Exchanges of Information in Competition Law: The Chilean (Incipient) Experience

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1. Introduction

This chapter describes exchanges of information between competitors in the Chilean case-law and practice. Its main aim is to describe the rules competition authorities have provided in the few cases that have dealt with this topic so far and sketch some possible conclusions for the future enforcement in the country and (possibly) other Latin American jurisdictions. Also, it gives a brief account on the relevance of different types of information and market structures for analysing a case.

Information exchanges are ubiquitous in oligopolistic markets. It is very common that firms exchange data on prices, quantities, capacities of production, demand, costs and others – albeit not necessarily directly. This situation presents a potential dilemma for competition systems and authorities. For the lawfulness of an exchange depends on its purpose. Therefore, the scrutiny of information exchanges depends on the eye of the beholder.

On the one hand, exchanges of commercially sensitive information (first and foremost prices or quantity) can be functionally equivalent to a cartel. They lie at its heart, being its "operative part", even if there is no "promise" to act in certain way (Wagner-Von Papp, 2013). For instance, the mere knowledge of current or future prices may be a very good substitute for cartel conduct, since it allows to monitor deviations and apply punishments. In practice, most cartels include this kind of exchanges between their members. Indeed, they are illegal (*per se* illegal in those jurisdictions that embrace such rule), because they are a mere support of illegal

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The views presented in this chapter are the authors' solely and do not necessarily represent those of the TDLC, the FNE or the persons that work in them.
All translations from Spanish texts, including official documents, has been done by the authors. In some cases, the actual text may have been slightly altered to keep its true meaning.

conduct.[7] On the other hand, "pure" exchanges of information about market conditions may even be beneficial if firms behave competitively. In fact, nearly every legitimate, pro-competitive cooperation agreement between competitors involves some level of sharing of key information. As Bennett & Collins (2010: 311) have stated, *"[m]any sectors of our economies now depend upon ready access to detailed information and some firms have made information their business"*. In these cases, the lawfulness of information exchanges should be out of question.

In the middle the outcome is not clear at all –not even for experts.[8] In this grey area, "residual" exchanges of (certain) information have the potential for harm market outcomes *by themselves*, and are potentially anticompetitive regardless whether the participants in the exchange are deemed guilty of cartelisation through direct means. The question is whether the fact that some information exchanges are a mere support of cartel conduct justifies a general hostile treatment towards most residual information exchanges –or the general perception of suspicion that seems to be common amongst authorities. The identification of licit and illicit exchanges of information is then crucial to combat collusion, but also essential to allow the normal functioning of business.

Competition authorities worldwide need to decide on the most suitable rules and guiding principles that allow discerning between lawful and unlawful conduct.[9] This objective is particularly relevant in Latin American, where exchanges of information between competitors are ubiquitous. This is due to several reasons. First, the degree of concentration in most industries remains high. Oligopolies are (or have been until fairly recently) largely dominant in many markets[10], as a result of a long tradition of state-controlled economies combined with social conflicts and resentments[11] and/or various concerns about 'too much competition'. Second, there are powerful interests that have strong political power. It is extremely difficult to go against these ruling elites. Threat of entry is fairly limited in both tradable and non-tradable

[7] In this sense, see the EU Commission decisions in *Fasteners and Attaching Machines* (2007) (upheld in *Prym*, 2009) and *Gas Insulated Switchgear* (2007) (partially upheld on appeal in *Areva*, 2014). In the literature, see Whish (2009) and Posner (2001).
[8] Quoting Bennett & Collins (2010: 312) again: *'Ask a consumer lawyer the main problem with information, and he or she might reply that firms do not disclose enough of it and there is often too little transparency in the market for consumers to make informed decisions. However, ask a competition lawyer the same question and he or she might reply that firms disclose too much of it, with too much transparency limiting competition and harming consumers. Then, of course, if you ask an economist, the answer is too often "it depends" –an answer that may be true, but not one that is particularly helpful for legal certainty of for business'.*
[9] Many competition authorities have issued guidelines on the topic, including some in Latin America. See, e.g, COFECE's "Guía para el intercambio de información entre agentes económicos" (Mexico).
[10] At least in principle, oligopolistic markets are more prone to cartelization. This insight began with Stigler (1964), but there is literature offering empirical support.
[11] Gerber (2010).

sectors.[12] Particularly in the latter, there is no credible threat, since financing is not readily available for new entrepreneurs outside these concentrated groups.[13] Third, with the exception of a few countries where competition policy has become an important part of the rules of the game, support for competition as a 'value' is weak – particularly amongst governments and political leaders, but also amongst business communities. Competition is seldom seen as the best path to enhance productivity and achieve prosperity and economic progress. Conversely, ideological reasons and historical anti-market traditions still play a role, making industrial policy and control over the wider economy a favourite amongst many governments.[14]

Despite important macro- and microeconomic advances, Chile is not entirely exempt from this reality. Oligopolies and market concentration are still a significant source of concern. So it is information sharing. Auspiciously, authorities have started providing rules and guidance on the topic and thus providing helpful clarification on how firms should address the effects of their information sharing. But there is still a long way to go. As we will show, most cases are clear-cut: the exchange of information allows to support straight cartel behaviour. Nonetheless, these type of cases have served for the purpose of drawing a line between lawful and unlawful conduct in a context of high scepticism of competition outcomes. At the same time, few cases and guidelines have allowed to sketch rules for dealing with residual exchanges of information. All in all, current Chilean stage of development seems appropriate to draw some lessons from this initial experience.

The remaining of the chapter is organised as follows. Part 2 describes the Chilean legal and institutional framework. Chile has a broad provision condemning anti-competitive conduct, with subsections giving some more detail as to the different types of conduct covered. Also, since the Chilean institutional structure is somewhat unusual within the international context (having a separate agency that investigates and prosecute, and a tribunal that makes actual decisions on cases), it is worth to give a quick reminder thereof before embarking in the analysis of the exchanges of information. Part 3 offers an account of the main cases where information exchanges have been a central part of cartels. Such exchanges have allowed to sustain collusive behaviour and, therefore, have been an important part of the evidence taken into account to condemn. Part 4 refers to residual exchanges. Despite the fact that these exchanges have been at the centre of only a handful of cases (mostly indirectly), both the tribunal and the agency

[12] Indeed, in some sectors the threat of entry may come from imports – especially in some countries with very open economies, such as Chile or Panama (on the latter, see OECD 2011, highlighting openness with respect to the Panamanian economy).
[13] Khemani & Carrasco-Martin (2008).
[14] Historically, import-substitution policies were common in Latin America between the 1950s and the1980s.

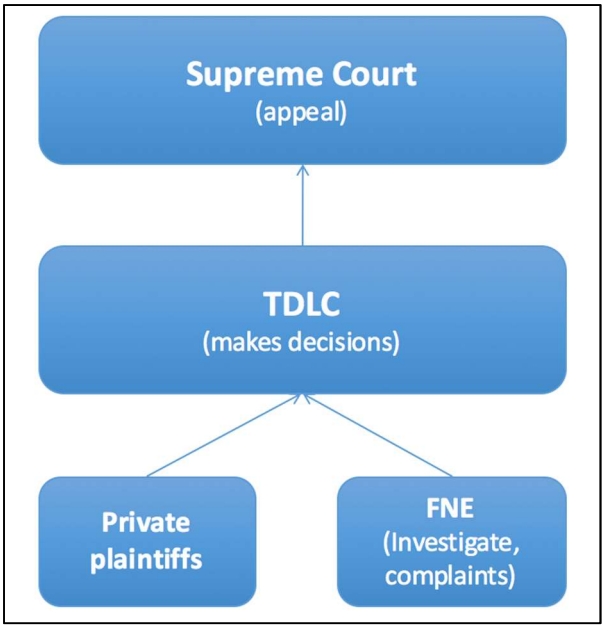
have developed important rules and principles that now generally frame them. Part 5 summarises the main ideas of the chapter.

2. The institutional and substantive framework

2.1 The institutional framework

In Chile, rules and principles governing exchanges of information are given in an institutional structure that is somewhat unusual within the international context. Its most prominent feature is the presence of two completely separate institutions in charge of enforcing competition laws: an administrative body (the FNE) that investigates and prosecutes, and a specialised judicial tribunal (the TDLC) that makes decisions. The structure is summarized in Figure 1. Since the main characteristics of the system have been described in full detail in other accessible documents[15], we only refer here to their most salient aspects.

Figure 1: *Chilean competition defence system*



Source: Authors' creation

Both the FNE and the TDLC are independent. On the one hand, the FNE is headed by

[15] See, e.g., OECD (2010) and Wise (2003).

the National Economic Prosecutor, who must be a lawyer by profession and is appointed by the President of Chile after a public contest handled by the special State agency in charge of recruiting high-level public officials. The Economic Prosecutor may only be removed by cause and subject to a prior motion at the Supreme Court.[16] On the other hand, the TDLC is headed by a President (a lawyer with experience in competition law) and has another four expert members (two economists and two lawyers, also experts on competition). The five members are appointed for fix six-year terms, renewable once. All the five members attend hearings and vote on decisions.

Investigations can begin either through receiving a complaint or through FNE's own initiation. After that, the FNE have extensive powers to investigate.[17] The FNE does not have a time limit to investigate, besides a somewhat similar rule stipulating a statute of limitations of five years for collusion cases and three years for other conducts. The results of an investigation may be an administrative decision closing the investigation; a report to the TDLC in a proceeding, in which the TDLC asks for the FNE's opinion; or an *ex-officio* complaint (*requerimiento*) seeking a fine or other remedy.

Besides investigations, the FNE fulfils an important advocacy role, stated in the Competition Act[18] laconically as "promoting competition". Although the Act does not specify how this task should be accomplished, the common understanding is that the FNE may, among others, issue non-binding guidelines highlighting the benefits of competition in a specific area or market. Some of these guidelines, such as the "Trade Association Guidelines" or the "Guidelines for Compliance" have played a crucial role in developing rules and principles for exchanges of information –particularly since the TDLC started embracing them in cases.

Before the TDLC, there are two main procedures, adversarial (which ends by "Judgements") and non-adversarial (which ends by "Decisions"), both initiated when the FNE or a private party files a complaint.[19] Only adversarial procedures may lead to sanctions. Conversely, non-adversarial procedures may only lead to recommendations and the setting of

[16] According to the Competition Act, the FNE is *'a decentralised public service, with legal status and own assets, independent from any other agency or service'* and the Economic Prosecutor is directed by law to *'discharge his duties independently'*, to *'defend the interests entrusted to him […] based on his own discretion'* and to represent *'the general economic interests of the community'*. Only for budget purposes, the FNE is part of the Ministry of the Economy.

[17] It can compel the production of documents and the co-operation of public agencies, state owned companies, firms and individuals. It can also summon anyone with potential knowledge of an infringement to testify as a witness (including the defendant's representatives, managers and advisors); to inspect the premises of the investigated entities on a voluntary basis; to conduct search and seizure of company premises (so-called dawn raids); and do wiretapping. Dawn raids and wiretapping require authorisation from the TDLC and the issuance of an order from a judge of the Court of Appeals.

[18] D.L. Nº 211/1973, as amended.

[19] On abuses of dominance cases, antitrust private litigation has generally been more active than public litigation.

some conditions for future acts or contracts. Regarding sanctions, the Competition Act allows the TDLC to impose fines and/or behavioural or structural remedies. Orders can amend or eliminate anticompetitive acts, contracts, agreements, schemes or arrangements in violation of the Act.[20] The TDLC can also order divestiture or dissolution of partnerships, corporations or business companies whose existence rests on anticompetitive arrangements. Administrative fines may be imposed upon the infringing legal entity and on its directors and managers and persons who participated in the infringement. According to the current version of the Competition Act[21], the amount depends on the financial benefit received from the infringement, the severity of the breach and the offenders' recidivism. The maximum fine is 30.000 "annual tax units" (approx. US$25 million) for cartel offenses and 20.000 annual tax units (approx. US$20 million) for other infringements.[22] The Act also gives the TDLC the faculty to propose Executive amendments to the legislation.[23]

On top of the system lies the Supreme Court of Justice (the highest court in Chile). Final decisions of the TDLC are subject to its judicial oversight under a special recourse called "complaint recourse" (*recurso de reclamación*). The scope of the review is not defined in the act, but the Supreme Court has interpreted it in the broadest possible terms, comprising questions of law, policy or fact[24], and, on occasions, even substituting its judgment for that of the TDLC.[25] That means the recourse has functioned in practice as an appellate review.

[20] For example, mandatory requests to modify internal procedures were made to private dominant firms in *GTD/EFE* (Decision 76/2008) and *Atrex/SCL* (Decision 75/2008).
[21] At the time of writing this chapter, the Act is about to be modified significantly. Among the main changes are the inclusion of incarceration for collusion and new fines. These will be either the double of the economic benefit of the offender, 30% of the sales, or up to 60,000 tax units when the previous two cannot be calculated.
[22] Tax units are a special monetary measure of value used by the legislation to keep the value of sanctions, exemptions, tax purposes and others, in line with inflation.
[23] Chilean Competition Act, article 18.3. The TDLC has used this faculty in several cases. For example, in both *Transbank I* (Judgement 29/2005) and *CCS I* (Judgement 56/2007), the Chilean TDLC recommended the sectoral regulator (in both cases the financial authority) to apply the corresponding norms and regulations (!). Likewise, in *Lan Airlines* (Judgement 55/2007), the TDLC proposed *'the regulatory changes that were necessary and suitable to favour competition'* to be introduced by the customs agency; instructed the FNE *'to keep watch the functioning of the airfreight transport market and the custom warehousing market'*; and ordered the dominant firm *'to restructure its tariffs for airfreight transport'* (it also imposed several other regulatory measures to the dominant firm).
[24] Commenting on the nature of the *reclamación*, the Supreme Court has stated that it has jurisdiction to 'fully' review all the grounds considered by the TDLC, *'including the legal and economic analysis that allowed it to reach the decision it took'* (Supreme Court, *Consulta de Subtel sobre participación de concesionarios de telefonía móvil en concurso público de telefonía móvil digital avanzada*, Rol 4797-2008, Decision of 27 January 2009, C. 6º).
[25] The most salient case on this is *Hardie*, where the Court sustain a textualist approach to article 3 "c" of the Chilean Competition Act (see Supreme Court, *Producción Química y Electrónica Quimel S.A. contra James Hardie Fibrocementos Limitada*, Rol 3449-2006, Decision of 22 January 2007).

2.2 The main substantive provisions

Besides the institutional structure, legislation governing competition has its own particulars. As in other legislations, the Competition Act does not refer specifically to exchanges of information. However, the Act is unusually broad – both in terms of objectives and substantive provision.[26] On the one hand, article 1 states that the purpose of the Act '[…] *is to advocate and defend free competition in the markets. Affronts to free competition in economic activities will be corrected, prohibited or repressed in the manner and with the sanctions provided in this law'.* This is supplemented in article 2 by the mandate to competition authorities to *'to enforce the present law to safeguard free competition in the markets'*. Beyond these general statements, no explicit objectives are stipulated.[27]

On the other hand, the substantive provisions are contained in Article 3, which indicates that

> Any person that enters into or executes, individually or collectively, any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effects, will be sanctioned with the measures mentioned in article 26 of the present law, notwithstanding preventive, corrective or prohibitive measures that may be applied to said actions, acts or conventions in each case.
>
> The following will be considered as, among others, actions, acts or conventions that impede, restrict or hinder competition or which set out to produce said effects:
>
> a) Express or tacit agreements among competitors, or concerted practices between them, that confer them market power and consist of fixing sale or purchase prices or other marketing conditions, limit production, allow them to assign market zones or quotas, exclude competitors or affect the result of bidding processes.
>
> b) The abusive exploitation on the part of an economic agent, or a group thereof, of a dominant position in the market, fixing sale or purchase prices, imposing on a sale of another product, assigning market zones or quotas or imposing other similar abuses.

[26] OECD (2010).

[27] As a consequence, for a number of years before the creation of the TDLC, freedom to compete was considered more important than efficiency (OECD, 2004). This may be explained by the wording of the law and a formal approach to the conducts. However, although some commentators still advocate this or other objectives, the most recent case-law has explicitly mentioned consumer welfare in a number of particular decisions. This has been reflected in more efficiency-oriented decisions.

c) Predatory practices, or unfair competition, carried out with the purpose of reaching, maintaining or increasing a dominant position.

As article 1, article 3 is general, broad and flexible. Its first paragraph generally provides that any deed, act or agreement (including a contract) that prevents, restricts or hinders free competition or tends to do so, is subject to sanctions under law. Although subsections in the second paragraph specifically refer to the traditional categories in competition law, they provide only illustrative detail.[28] For this reason, in practice many cases are brought by parties or the FNE under the first paragraph.[29] Indeed, direct ruling on information sharing may easily be framed within that paragraph.

2.3 The concept of agreement in Chilean competition law

An important substantive aspect for the analysis of exchanges of information is the concept of agreement adopted in each legislation and/or the case-law. For there must always be an agreement to sanction collusion or equate an exchange of information to a collusive conduct. It is not enough that a firm obtain information –let's say– from the press or direct discussions with consumers or purchasers. Consequently, the concept of agreement becomes crucial. That concept must be broad enough to include a broad range of practices that may not account for direct cartelisation.

Although to some extent the Competition Act facilitates a wide approach to cartels – given the broadness of article 3º and its reference to *"express or tacit agreements among competitors"*[30], until fairly recent the TDLC had not ratified the broad understanding of the provision. This was done in *Ginecologos*[31], in 2015. In that case, the Tribunal explicitly

[28] Note that the categories in the second paragraph are closer to the competition provisions of European Law than the Sherman Act. This fact, along with the existence of paragraph one, shows that despite its old American origins, Chilean competition law currently is far from being a mere 'transplantation of American antitrust and Chicago School of Economics' adapted to the local context, as some have mistakenly argued (e.g. Bauer, 2011). Moreover, most substantive standards are far away from those proponents of the Chicago School.

[29] This produces some important procedural differences (particularly in collusion cases) and, to some extent, has curbed more refined developments on the interpretation of the provision. These aspects, however, go beyond the scope of this work.

[30] For this reason, the well-known "Turner-Posner debate" in the US has not had echoes in Chile. See also Kaplow (2013)

[31] *Ginecologos* (Judgement 145/2015). In this case, the TDLC declared that a local Gynaecologists' Trade Association and several of its members engaged in price fixing infringing the Competition Act. The case started by a complaint filed by the FNE, which provided evidence of an agreement among the doctors, through their professional association, to steadily increase the price of the gynaecologists' medical consultations and surgeries in the local geographic market. The cartel worked at least during the period January 2012 to October 2013. The TDLC fined both the doctors and the association, and ordered the latter

embraced –for the first time– a concept of agreement, and did it in a manner that allows the sanctioning of unlawful exchanges of information that goes beyond formal "legal" agreements. Citing Areeda and Hovenkamp (2003), the tribunal stated that

> *"as it is known, in competition law the term 'agreement' is considered in a very wide manner, including a multiplicity of contractual forms, conventions, mere preliminary discussions, promises, collaboration agreements, gentlemen agreements, conduct guidelines, memos, among others […]. The agreement may be oral, or may manifest itself in one or more documents or even in a series of material acts. In general terms, the suppression of the individual will of two or more competitors and its change with a collective will that unifies their decisions is, in competition law, considered an 'agreement', whatever the form it may take".*[32]

3 Exchanges of information as support for cartel behaviour

In Chile, there have been three recent and important adversarial cases where information sharing played a relevant role in allowing competitors to engage in –and sustain– explicit coordinated behaviour. That is, information exchanges were part of hard-core cartels. In two cases the information was managed by a trade association, which was condemned along with the cartel members. Whereas the first case was based on information on quantities, the second one was centred on prices. In the third case, multimarket contacts between the firms facilitated the exchange of commercially sensitive information.

3.1 Exchanges of information on quantity

The first case was based upon information sharing of quantity. Information on quantity is highly sensitive for the competitiveness of the firms interacting in the market. For quantity may be indicative of a number of variables that, if known by competitors, may affect the commercial strategy of the firm. Among them are the rate of growth of the firm in the market (stagnation, moderate growth, rapid or aggressive growth, and so on); its targets of future growth; its capacity of production or storage; the amount of sales to third parties; and the product lines in which the firm may want to concentrate its production or sales (therefore its

to implement a compliance programme following the FNE Guidelines on the topic. The FNE had requested the dissolution of the association, but the TDLC dismissed the request. However, on appeal, the Supreme Court ordered the dissolution.

[32] *Ibíd*., para. 5º.

growth). Furthermore, depending on the amount information revealed, quantity may provide a fair account of the level of integration of the firm (therefore its level of production) or the actual purchases it makes to third parties (including imports). Likewise, information on quantity may be useful to infer or directly know the market share of the firm and possible that of its competitors –particularly if the estimated total sales in the market are also known.

In *Pollos*[33], three producers of poultry meat (*Agrosuper*, *Ariztía* and *Don Pollo*) agreed on the tons of poultry meat to be produced and sale in the local market, and assigned markets shares to each of them in the market of production and commercialization of poultry. The three firms produced more than 80% of the poultry meat in Chile. The agreement was implemented through the Poultry Producers' Trade Association (APA, for its Spanish acronym), who acted as monitor and coordinator of the cartel. Notably, the association was formed exclusively by the firms involved in the cartel. The TDLC condemned *Agrosuper* and *Ariztía* to pay the maximum fine, whereas *Don Pollo* was fined nearly US$10 millions. The TDLC also ruled the dissolution of the APA, among other measures. The Supreme Court upheld the judgment.

The TDLC established the agreement through emails and other evidence of explicit coordination seized by the FNE. There was enough evidence in the process to prove that the firms were acting jointly to define certain level of production and, consequently, keep the prices of poultry meet within certain range agreed. The sharing of sensible information was crucial to keep the internal stability of the cartel. One of the main roles of the APA was to forecast future poultry demand and disseminate the results among the members. During the whole period of cartelisation, the agreement was yearly controlled and adjusted by the APA, which "suggested" quantities, the killing of chickens, or other mechanisms to keep market shares within the commonly established levels. The TDLC recognised that all the process was done in an implicit and imperfect way, given the complexities for forecasting the demand function in the market. However, the cartel was successful for a long period of time – almost 15 years. The role of the association was not only make the information verifiable, but also increase the level of trust necessary to sustain the collusive behaviour.

3.2 Exchanges of information on prices

In another cartel case the agreement was mostly based upon the direct sharing of

[33] *Pollos* (Judgement 139/2014).

information on prices. Generally, these types of exchanges are treated harshly, because they tend to produce uniformity or high interdependency of prices in the market. Note that it is not necessary that two firms expressly agree on prices. The sole fact of giving or acquiring information on prices is enough to equate the exchange to price fixing. This is certainly the case under US antitrust laws. As the US Supreme Court said in *Gypsum* (1978), the direct exchange of price information between competitors has the highest potential to generate anticompetitive effects –particularly if there are other suspicious circumstances.[34] In EU law, the tenet is that positive steps must be adopted in order to avoid engaging in such exchanges. It is not enough not to act according to an agreement or remain silent in a concerted practice. A firm must show "public distance" of the meetings leading to the agreement. Otherwise, other members might understand that it agrees with them and will participate in the agreement.

Two caveats apply. First, the *per se* rule does not apply against exchanges of price information (unlike cartels in many jurisdictions).[35] Despite the fact such exchanges can be considered unlawful even when only one firm provides the information, there must always be an effect on prices. However, the effect is presumed. The sole ability to produce such an effect is enough to condemn, unless the defendant is capable to rebut the presumption of illegality.

The second caveat is that direct exchanges of information on prices may refer to different contents. The main reason is that, as Lafontaine & Slate (2013: 958) indicate, "many market transactions do not take place in arm's-length spot markets but instead are governed by long- or short-term contracts", which can take innumerable forms. The clearest case is the sharing of the level of actual prices – that is, prices actually used between a seller and its purchasers. Since these prices are a significant element of the costs structure of the buyer and hence may reveal important information on its margins and costs, this kind of sharing is a main source of concern for competition. Also, actual prices are a central part of the competitive advantage of any firm. For depending on the level of known information, actual prices may show a low-cost strategy, one based on product-differentiation, or any other one chosen by the firm.

Another subset of exchanges of information on prices is the sharing of (contractual) pricing or tariff structures. For instance, the actual price in a contract may not be established in first place, but be dependent on the costs of the product plus certain mark-up. A rather similar

[34] *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).
[35] In the US law, see *Citizens & Southern National Bank* (1975) and *Gypsum* (1978). In EU law, see *UK Agricultural Tractor* (1992), affirmed by the ECJ (*John Deere*, 1998).

structure may be based on margins or discounts. Conversely, the actual price in a contract may be based on a single, fix-price according to a pre-determined amount of product. In this case, the price is entirely independent of the cost. Other examples of pricing structures are the well-known contracts with two-part tariffs (generally, a fix amount plus an amount per unit) and the so-called shared-contracts. The specific structure varies on a case-by-case basis, depending on the level of risk each party must bear; the trust between the parties; asset-specificity; the level of the technology; and the incentives to control, among others. Pricing structure may be indicative of any of these variables.

3.3 Multimarket contacts

It may be the case that competitors have multimarket contacts, increasing the chances for sharing information and the possibilities of engage in anticompetitive coordination. In *Asfaltos*[36] the FNE filed a complaint against four firms accusing them of bid-rigging public tenders and private requests for bids. The firms assigned contracts among themselves for the provision of asphalt and other derivative products for road construction. The firms were found guilty in some of the accused cases, but there was no proof to condemn in all of them. The TDLC fined three of the competitors (*ACH*, *Dynal* and *QLA*), and the fourth (*ENEX*) benefited from the leniency programme. Also, the Tribunal imposed the obligation to each firm of implementing compliance programmes.[37]

In its judgement, the TDLC acknowledged the possibilities for multimarket contacts between the firms. In para. 19 it stated that

> *along with the reduced number of competitors in the industry, it is not controversial that they have a number of commercial and property relations, which can be summarised as follow: i) ACH and ENEX jointly own Conosur, firm through which they control the port located in Ventanas, where they import asphalt as raw material; ii) Dynal and QLA own approximately 49% of ACH; iii) the four accused firms are, jointly with Probisa, owners in equal parts of DASA, firm through which they managed the supply of asphalt they obtain from ENAP [a Chilean producer]; iv) there are production agreements for specific products between the firms; and v) there are sales of raw materials between them*.[38]

4. "Residual" exchanges of information

[36] *Asfaltos* (Judgement 148/2015).
[37] At the time of writing, an appeal was pending before the Supreme Court.
[38] Also, the TDLC acknowledged that the numerous meeting the competitors in hotels, restaurant and cafes was an abnormal business situation, regardless the multiple commercial relations the parties had.

As mentioned, residual exchanges of information –those that are not part of a cartel or price agreements in themselves– are more complex to qualify. It is important to remark, once again, that in many contexts such exchanges are part of normal business relations.[39] They include sharing of accounting information (e.g., accounting methods or ways to keep the accounts of a firm), exchanges of technology, research and development, contractual aspects (e.g., standardisation of contracting forms), credit information or historical information about consumers, among others. These exchanges may be beneficial for firms, particularly in markets where the nature and extension of publicly available information is limited.[40] Moreover, such exchanges may also be beneficial for consumers when they enhance transparency in the market. And they may even be positive for competition if they promote entrance of new firms to the market (Teece, 1993). However, residual information sharing does have a collusive potential. For it may act as platform for oligopolistic coordination.[41] Therefore, these exchanges must be judged in the context of a thorough market analysis, taking into account the specificities of the exchange and the type of information shared.[42]

All of the above necessarily implies a case-by-case analysis. In order to establish whether an exchange of information between competitors may affect competition, the sole analysis of the nature of the information is insufficient. For the information exchanged cannot be considered in vacuum. It is crucial to analyse it in a specific context – i.e., considering the structure and characteristics of the relevant market where the exchange takes place. Compare, for instance, the volume of information exchanged in stocks markets with the volume

[39] As Whish (2009: 525) indicates, benchmarking increases efficiency. Competitors cannot compete in a statistic vacuum. The more the information they have on market conditions, demand quantity, capacity levels and investments plans of rivals, the easier the taking of decisions on production and the adoption of rational and effective marketing strategies. This is particularly true in the case of firms producing homogeneous products.

[40] Between rivals, exchanges of information may, for instance, contribute to eliminate possible adverse selection and moral hazard concerns that may be present in some industries. Also, they may facilitate fast convergence to an equilibrium point in non-durable commodity markets.

[41] For instance, see the European cases of the EU Commission *Re Cimbel* (1972) (condemning the obligation of informing plans of capacity enlargements to competitors); *Zinc Producer Group* (1984) (condemning the obligation to inform investment plans); *Steel Beams* (1994) (objecting exchanges of information on request and purchases); y *EATA* (1999) (objecting exchanges of information on capacity and percentages of use, and capacity forecasted).

[42] As stated by the ECJ in *Asnef-Equifax* (2006): *"According to the case-law on agreements on the exchange of information, such agreements are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (John Deere v Commission, paragraph 90, and Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 81)"* (para. 51). *"[…] the compatibility of an information exchange system, such as the register, with the Community competition rules cannot be assessed in the abstract. It depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged — be that, for example, public or confidential, aggregated or detailed, historical or current — the periodicity of such information and its importance for the fixing of prices, volumes or conditions of service"* (para. 54). Although the judgement refers to two previous cases: *John Deere* (1998) and *Thyseen Stahl* (2003), the first precedent in the subject is *Suiker Unie* (1975).

exchanged in the market for artworks. Also, as the literature has pointed out, there are some market structures that make collusive behaviour and unlawful information sharing easier. The analysis therefore depends on a number of factors that interact with each other and vary on a case-by-case basis. For this reason, any general guidance is necessarily of limited value.

3.4 Market structures and characteristics of the information

The vast number of punishments as well as the variety of forms that cartel can take makes it easier for firms to collude in certain industries. The question is how easy collusion is. Unfortunately, there is scarce economic evidence (at least in our knowledge) clarifying the manner in which some industries will coordinate around a collusive equilibrium and which one this equilibrium shall be. The only aspects possible to analyse, as proxy, are the market characteristics that shall affect the probability of collusion in an industry. This one is associated to a relatively large number of factors affecting the sustainability of the coordination. Generally speaking, those factors may be structural, related to the demand, related to supply conditions, and other "unclassifiable".

Some structural features of market may facilitate anticompetitive coordination. First, *ceteris paribus*, the lesser the number of firms, the higher the probability of collusion – particularly tacit collusion.[43] This is not only due because it is easier for firms to coordinate behaviour, but also because potential punishments for deviations become more credible and effective.[44] Conversely, as the number of firms increases, gains from collusion (in the long-run) decrease and gains from deviations (in the short-run) increase. Second, entry barriers are another relevant factor.[45] Coordination is more likely to occur when there is no entry of firms whose behaviour is unknown by the incumbents (for instance, the risk of hit-and-run strategies is lower). However, entrance by itself is not a sufficient condition to break coordinated

[43] The idea is intuitive. However, some studies hold it. Huck *et al.* (2004) argue that anticompetitive effects are more likely in duopoly markets and less likely in oligopoly markets with more firms. In a study on the groceries market in the UK (CC, 2008), the former Competition Commission held that *"Increased concentration in the groceries supply chain may make collusion more likely. The exchange of information between retailers via their suppliers is simpler when there are fewer suppliers of a particular product or category* [...]*"* (¶8.10). Note that even though there is a legitimate objective in principle, the dangers for competition are still present: *"This consolidation has been encouraged by grocery retailers to some extent which have sought to reduce costs by reducing the number of suppliers that are used in each product category* […]. *If this continues, such consolidation may make collusion easier to undertake"* (¶8.12).

[44] Nonetheless, the number of participant in the market is not relevant. There are "benign" oligopolies for competition. The centre of the concern for competition remains market power. If *prima facie* few competitors facilitate coordination, the identification of such situation with market power is far from being a mere "accounting" exercise.

[45] There is a longstanding debate in competition law regarding entry barriers. The main antagonistic positions are those of Bain (1954, 1956 y 1968 [1959]) and Stigler (1968).

behaviour, because this depends largely on the credibility of the incumbents' reaction.[46]

A third structural factor is the degree and frequency of interactions between firms during a period of time.[47] Frequent interactions allow fast reactions to deviations. The same idea applies to the frequency of price adjustments: more frequent price adjustments allow a faster application of punishment. Hence no maverick firm can profit from deviations for a long time. Note that it is not relevant whether firms sell or produce the product in each period or in some of them, but the frequency of interactions and price adjustments. If firms do not interact or are not capable of adjusting their prices fast, collusion is improbable, because punishment is not credible.

Finally, transparency is another central structural feature that may facilitate anticompetitive coordination (Stigler, 1964; Green & Porter, 1984; Abreu *et al.*, 1986). Transparency allows to identify deviations easier. If prices are not observable or cannot be inferred from market data, sustainability of coordination becomes difficult.[48] Lack of transparency makes difficult to monitor a cartel. In case of tacit collusion, it makes more difficult to figure out whether price adjustments are due to new market conditions or deviations. Therefore, it is crucial to analyse all the features from information sharing: its nature[49], how easy is to obtain it, and so on.

A second group of factors that may facilitate coordination is related with demand conditions. Generally speaking, coordination is easier to hold if the market is growing –that is, if actual profits are lesser that future expected profits.[50] Conversely, in declining markets (or markets that are about to collapse) sustaining coordination is more difficult due to scarce expected profits. Indeed, this conclusion may sound counter-intuitive. Demand growing is commonly seen as a factor that makes collusion more difficult. However, this depends on entry barriers: if they are low, collusion is unlikely. But the isolated effect of the growth of the market is the aforesaid.

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[46] Note that it is not necessary for the entrant to enter the market on equal terms with the incumbent. The sole entrance is relevant. As the then Court of First Instance said in *Airtours* (2002: ¶213- 14), the issue is not whether a small player can reach the size necessary for it to compete effectively with an oligopoly by challenging the incumbent firms for their places as market leaders. Rather, it is a question of whether a number of small players already present on the market, taken as a whole, can respond effectively to a reduction in capacity put on to the market by the oligopoly to a level below estimated demand by increasing their capacity to take advantage of the opportunities inherent in a situation of overall under-supply.

[47] Interactions include minority shareholding between competitors and joint-ventures. They decrease gains from deviation (Martin, 1995).

[48] Notice that transparency does not prevent collusion, but makes it more difficult to sustain (and limits its reach). However, it is also possible that lack of transparency makes the formation of an agreement more difficult. That is, cartels might be hard to form, but once firms have reached an agreement, it might be hard to punish deviations. Unfortunately, the relation is not precise and there are no studies on the issue –at least in our knowledge.

[49] Less aggregated information facilitates collusion (Kuhn, 2001).

[50] As long as the number of players remains the same.

Secondly, demand fluctuations are also important. Generally speaking, a stable demand contributes to transparency, making deviations harder. Conversely, demand fluctuations make collusion more difficult, particularly if they are deterministic (for instance, because of stationary cycles) rather than random (Rotemberg & Saloner, 1986; Haltiwanger & Harrington, 1991). When markets are in their peak, gains from deviation are maximised and potential costs from punishments are minimised.[51] Hence if demand is unstable (in some period it is higher than average), incentives to deviate increase.

Finally, demand elasticity has no impact on coordination.[52] However, it does affect gains from coordination. If elasticity is low, firms may keep prices high without losing many consumers. In other words, the impact on welfare is bigger the more inelastic the demand is.

Other factors are related with the supply side. First, when firms are alike, collusion becomes easier. For instance, firms may be similar in cost structure (Bain, 1948). Conversely, a common price strategy may be difficult to adopt by firms with asymmetric costs. There are three main reasons. First, more efficient firms (with lower marginal costs) will prefer a price the others cannot, or does not, wish to hold. Secondly, it may become impossible to establish a focal point (Schelling, 1981 [1960]). Finally, technological reasons will push the transference of market shares to efficient firms, a situation that requires express agreements or monetary or non-monetary transferences (Schmalensee, 1987). But even if firms agree on a collusive price, those with lower costs have incentives to deviate, because threat of retaliation is less credible. Foreseeing this situation, firms may agree on sharing the benefits of collusion asymmetrically, with more benefits for firms with lower costs. They could also redistribute market shares asymmetrically (Harrington, 1989). However, since incentives of firms with higher costs are also affected, the outcome is unpredictable (Ivaldi *et al.*, 2003). As a result, the analysis must be cautious.

Symmetry can be analysed in term of capacity, plant size, market shares, range of production, and innovation[53], among others. Generally speaking, the more asymmetry there is in the market, stronger the incentives to deviate –particularly if aggregate capacity is limited (Compte *et al.*, 2002; Lambson, 1994). Conversely, the effects of symmetry are ambiguous

[51] Indeed, collusion is facilitated when demand is in the lowest part of the cycle. Nevertheless, collusion is harder to hold in absence of fluctuations.

[52] By contrast, Jones & Suffrin (2008) argue that firms would be capable to increase prices and profits only when demand is inelastic.

[53] A variant of cost asymmetry is the idea that coordination is more difficult when innovation in the market is high. For innovation allows advantages over rivals, especially when it is disruptive. Note that it is irrelevant if the innovator is the incumbent or the maverick: if the market is dynamic in this sense, competition authorities should sleep better.

(Abreu, 1986; Brock & Shainkman, 1985). If firms face capacity restrictions, gains from deviation decrease. At the same time, however, capacity to retaliate decreases.

The characteristics of the product is another factor to consider. The key here is "horizontal differentiation": different combinations of the same product, at comparable prices, being offered to different sets of consumers.[54] The objective of such an strategy is to create market segmentation, loyalty and increasing market power on a specific group of consumers. The effect on coordination is contradictory. On the one hand, horizontal differentiation limits gains from deviation, because it makes more difficult to attract new consumers. On the other hand, it limits price wars in case of deviations, making punishment less credible. The literature concludes that horizontal homogeneity or heterogeneity of the product has an ambiguous impact on collusive outcomes, depending on the nature of competition in the market (price competition *vis-a-vis* competition on quantity) (Ross, 1992; Martin, 1993).[55] Notwithstanding this result, competition authorities normally consider product homogeneity as a factor that facilitates collusion.[56] For differentiation increases informational concerns in less transparent markets (Raith, 1996), whereas homogeneity makes it easier for a firm to infer information from its own prices and quantities.

Another supply factor are multimarket contacts. There is evidence that coordination becomes easier in presence of such contacts (Berheim & Whinston, 1990).[57] There are at least three reasons for this. First, frequency of interactions increases. Second, asymmetries decrease. Finally, firms may collude even in markets with characteristics that make collusion more difficult in principle.[58]

Finally, there are a number of other "unclassifiable" factors that should also be taken into account in a structural analysis. For instance, purchasing market power may stimulate competition under some conditions (Snyder, 1996). Conversely, high frequency of purchase

[54] The opposite concept is "vertical differentiation", which refers to the development of better products –i.e., differences on quality. In this case, the situation is similar to cost asymmetry. Firms that can differentiate their products have more incentives to deviate. The magnitude of the incentives depends on the magnitude of the competitive advantage.

[55] The ambiguous effect is better illustrated with differentiated products. In principle these products do not facilitate collusion, due to the difficulties to apply punishments (demand will be positive even if rivals decrease prices). But they may also facilitate it for the same reason: deviation is less beneficial (price reductions must be considerable to gain a significant market share). Hence it is equally likely that collusion is produced between firms with homogeneous products –such as gasoline (e.g., as shown by Hosket *et al.*, 2008)– than between firms producing heterogeneous products.

[56] This seems to have been the implicit thinking of the TDLC in *D&S/Falabella* (Decision 24/2008). Applying a concept of "integrated retail", the TDLC expressly considered that the likelihood of collusion in the market was higher due to the homogeneity of products the only two integrated retailers produced (para. 225).

[57] As seen, they played a crucial role in the *Asfaltos* cartel case.

[58] At a first glance, it may seem that multimarket contacts decrease sustainability of collusion, since they allow firms to apply punishments in different markets. However, as Motta (2004) explains, a firm can deviate in all those markets at the same time. The crucial point is the relation with asymmetries.

orders may facilitate coordination because they help to impose credible punishments (Motta, 2004).

Once structural elements have been taken into account, the "inherent" characteristics of the information become relevant. By this we refer to a number of features such as the nature of the information exchanged (prices, quantities, sales, and so on); the time to which it refers (past, present or future information); its level of aggregation (disaggregated by players, aggregated anonymously, etc.); the form of delivery (directly between competitors, through third parties such as trade or professional associations, suppliers or others); and the frequency of the exchange (daily, weekly, monthly, etc.); among others. These features depend on market structure. For instance, what is "historic information" depends on interactions between competitors (including their contractual relations) and the nature of the market.

On this, despite the fact that, as mentioned, any general guidance is of limited value, it is still possible to sketch some general rules. First, as long as information is "farther" from prices, authorities should be reluctant to consider an exchange as anticompetitive.[59] This kind of information is normally expensive to produce, so they joint production may imply significant economies (Hovenkamp, 2005a). Second, the timing of the exchange should also be considered (Posner, 2001). Third, duration matters. It is likely that a systematic exchange is indicative or constitute a concerted practice (Monti, 2008). The underlying idea is always that, despite the exchanges, each competitor establishes its own market strategy independently.

Another relevant aspect is the way of disseminating information between competitors. First, information may be shared in an ample way within the industry –for example, throughout a commercial association or another organisation.[60] It is particularly relevant to consider the relationship between the domain in which the information is exchanged and the relevant market (Hovenkamp, 2005a).[61] As we have shown, in Chile trade associations have played a crucial role in sustaining cartels. Also, most cases condemned by the *Comisión Resolutiva* or the *Comisión Preventiva Central* (the TLDC predecessors) were against associations or their members.[62]

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[59] This was stated, for instance, by the US Court of Appeal of the 9º Circuit in *Zozlaw* (1982).

[60] The two seminal cases in US law are *Hardwood* (1921) and *Maple Flooring* (1925). A complete analysis of both cases can be found in Posner (2001: 159 *et seq*.). Fraas & Greer (1977) was one of the first empirical studies demonstrating the collusive potential of associations.

[61] For instance, Posner (2001) note that in *American Column* (1921), the association condemned had 365 members that collectively controlled only one third of the US market of hardwood. Therefore, even assuming express price fixing it would be hard to show how a cartel with so many members that control only a fraction of the market may have been affected prices substantially as the US Supreme Court concluded. Conversely, in the Chilean *Pollos* case, the association was formed solely by the three cartelised firms.

[62] E.g., see *Comisión Preventiva Central*, Ruling N° 1128/2002: "This Commission considers that announcements to increase

Secondly, firms may provide unilateral price announcements or unilateral production announcements that may also contribute to collusion.[63] There have been no cases of this kind in Chile. Generally, the focus of the analysis should be on transparency. If the announcements are public (for instance, through commercial advertisements), they should not be considered *prima facie* anticompetitive.[64] Conversely, private announcements, directed exclusively to rivals, should be banned. For the efficiency of that communication is practically inexistent (Kühn, 2001). They are normally direct to avoid costly periods of price wars and price instability (Motta, 2004) and may be a strong inductor of price fixing. Finally, firms may obtain or provide information by direct contact to one or more competitors.[65] In such a case, potential benefits of information sharing disappear completely, and it is highly likely that the exchange is part of a mere price fixing. Conversely, if the exchange is indirect, the situation is less clear. However, this does not imply less risk. Even though the form of the exchange is relevant for its qualification of lawfulness, it should not be too relevant for the analysis. For the election of certain form may depends on factors not related to the effects of the information exchange for competition (Posner, 2001).

3.5 General guidance by Chilean authorities

Considering all of the aforementioned, both the FNE and the TDLC have issued rules that aim to provide clearer guidance to parties that wish to exchange information.

In *Dentistas*[66], a non-adversarial case, a group of dentists part of a local Dentists' Trade Association requested the TDLC to clarify whether they could provide 'pricing guidelines' (*arancel de referencia*) for its associated members. The association requested the Tribunal to establish the conditions under which such references could be less risky for competition. Considering the market structure, the TDLC ruled that prices references cannot be established

prices […] [made by] leaders of the association are a wrongful intervention in the market […] and their statements may incite to price agreements", therefore "they should refrain from forecasting of price variations"; Ruling N° 589/1987: "It cannot be said that [the statements of the leaders of the association] in the press are anticompetitive. However, they have been inconvenient, considering a price increase is coming. Even though the object of such statement is to make users and authorities conscious of the need of price increases, due to the increase on supplies […] the sole fact of making the statement before the increase is materialised induce members to increase the price, either for mere parallelism or in a concerted manner"; and Ruling N° 365/1982: "associations cannot, in any event, suggest to their members nor to third parties, specific costs, prices or tariffs for goods and services, because it is anticompetitive".

[63] The seminal study is Farrel (1987), who analysed the influence of non-verifiable and non-compulsory communications (cheap talk) in agreements in a context of games with multiple equilibria. Later theoretical and empirical confirmed the collusive potential of unilateral announcements See, among others, Cooper *et al.* (1992), and Farrel & Rabin (1996).

[64] If there are positive and negative effects, the former tend to take precedence over the latter.

[65] The seminal case is *Container Corp*. (1969), ruled by the US Supreme Court.

[66] *Dentistas* (Decision 45/2014)

in case of services with a reduced number of suppliers in the market. Also, it said that price references must not be based on estimations of the dentists' future incomes. However, the TDLC did not completely restricted price references. It ruled that in circumstances different than the mentioned, prices references should comply with the following rules:

(i) They must be based on historical variables, including prices, costs or others;
(ii) They must be determined by a third party (not the trade or professional association);
(iii) References should provide aggregate information, that is, suppliers should not be identifiable from the information;
(iv) Following the reference should be voluntary for associated members, and sanctions cannot be adopted in case a member do not follow the reference; and
(v) References should be publicly available.

The Dentists' Trade Association also asked whether the estimation of costs or supplies the dentists would use, and the information on the criteria for adjustments of those costs, supplies or the valuation of the services related with the dentists' medical specialities, could be considered against the Competition Act. The TDLC stated that only the provision of information by the association to its members on the historical costs the treatments represent for the average of the members, based on surveys or studies, does not infringe the Act.

A slightly different case is *Lan/Tam*[67], a review of the merger between a Chilean and a Brazilian airlines (*LAN Airlines S.A.* and *TAM Linhas Aéreas S.A.*, respectively). The TDLC decided to approve the operation subject to a number of remedies, including limitations on information sharing. Among the remedies was the elimination and review of the code sharing agreements with airlines that were not part to the same alliance as LATAM (as the merged entity was called), within the routes and intermediate sections indicated in the decision[68] – which were those that affected the Chilean market more directly. Note that code sharing agreements are commonly accepted and of intense use in the airline industry. The TDLC stated that the characteristics of these agreements imply high levels of coordination, because they consider the mutual access to information on public and private tariffs and availability of seats on each flight (i.e., prices and quantities). Also, code sharing agreements are associated to the so-called *Special Prorate Agreements*, by which airlines directly agree on the price per seat for

[67] *Lan/Tam* (Decision 37/2011).
[68] The TDLC also recommended to review the interline agreements.

each section that the seller will pay to the operator, instead of distributing income proportionately. The Tribunal recognised that both in the literature and the case-law of other jurisdictions such level of coordination has been deemed as a mechanism with potentially anticompetitive effects.[69]

The TDLC acknowledged that the sharing-code agreements generated efficiencies and enhancement of quality of the supply[70], but also risks for competition. Both must be counterbalanced. Among the main risks was the reduction in the intensity of competition between the airlines that subscribe the agreement. Also, it would be more difficult for new firms to enter the market, because an entrant should offer at least the same number of daily flights as the airlines that operate jointly. That is, its minimum efficient scale increases. Considering that the residual demand makes difficult to increase passenger, this risk was considered particularly important.

In parallel to the case-law, the FNE has fulfil an important role advocating best practices. Due to the lack of specific legal regulation, the FNE has provided some guidance, although not directed to address specifically exchanges of information, but only as a subsequent topic. Guidance has been given mainly in the FNE Guidelines on Trade Association and Guidelines on Interlocking –being the first one the most relevant in practice so far. Regarding exchanges of information between associated members, the Trade Associations guidelines state that:

(i) Only historical information should be compiled;
(ii) Frequency of the exchanges should be reduced;
(iii) Information to be disseminated among members should only be aggregated and refer to general topics;
(iv) Any request for information should be voluntary; and
(v) The gathering and processing information should be externalised.

The Guidelines also refers to recommendations made by trade associations to their members. They indicate that such recommendations should not make references to prices, quantities or commercial strategies, and should always be voluntary (no disciplinary action can

[69] The TDLC expressly stated that the lawfulness of a specific agreement from the competition law standpoint depends on the clauses it contains, the routes it covers and the manner in which it is complemented with other agreements subscribed by the same airlines. As a general rule, the TDLC affirmed, the more the coordination and the more the number of routes that overlap with each other, the riskier the agreement for competition.
[70] The TDLC admitted the fragmentation in the aeronautic Latin-American market, which makes competition between airlines from different countries more difficult. Alliances and sharing-code agreement are hence useful to facilitate competition.

be taken against members that do not adopt a recommendation).

Another important area is participation in meetings. On this, the Guidelines suggest that meetings should be registered and documents saved; that minutes of every meeting should be saved, detailing every subject of the meeting; and that specialised legal training may be required.

Finally, there are also a number of other topics expressly referred to by the Guidelines. Among them, collaboration between competitors, boycotts, membership conditions, services to non-affiliated members, self-regulation and codes of conduct, technical standards-setting, and publicity.

5. Summing up

What is it possible to conclude from this short review? First, the analysis of market structure is crucial to assess exchanges. As seen, the lawfulness of an exchange depends in an important part on how easy collusion may arise from such structure. The different structural factors that may affect coordination and their effect on the sustainability thereof are summarised in Table 1.

Table 1: *Market structure and its potential influence on collusive behaviour*

Factors affecting anticompetitive coordination			**Effect on sustainability of coordination**		
			Positive	*Negative*	*Ambiguous*
Structural factors	*Number of participants in the market*	High		x	
		Low	x		
	Entry barriers	Many	x		
		Few		x	
	Frequency of interactions and price adjustments	High	x		
		Low		x	
	Market transparency	High (stable market)	x		
		Low (unstable market)		x	
Demand factors	*Growth*	Growing markets	x		
		Stable markets or shrinking		x	

	Fluctuations	High		x	
		Low	x		
	Elasticity	Elastic			x
		Inelastic			x
Supply factors	*Characteristics of the firms*	Cost symmetry	x		
		Cost asymmetry		x	
	Level of innovation	High		x	
		Low	x		
	Product differentiation	Vertical	(similar to cost asymmetry)		
		Horizontal			x
	Contacts between firms	Multi-market	x		
		Single market		x	
Other factors	*Purchasing power*	High		x	
		Low	x		
	Maverick firm	----			x
	Inventory and excesses of capacity	----			x

Source: Authors' elaboration

Second, aside the importance of market structures, it is possible to sketch a general view on the sharing of different types of information, "raking" it from exchanges that should in principle be banned (ranked number 1) to information that does not produce competition concerns (ranked 4). Most categories fall under number 3, which means that *prima facie* they should not produce competitive concerns, but they should be look with some care depending on the circumstances. This is summarised in Table 2 herein below.

Table 2: *Characteristics of the information*

	Type of information	**Characteristics / conditions**	**Information exchange**
Commercial information	(Actual) prices	Historic	3
		Present	1
		Future	1
		Aggregated	3
		Disaggregated	3
	Costs	Historic	3
		Present	3
		Future	3
		Aggregated	3
		Disaggregated	1
	Volume of production	Units	1

		Level of production (aggregated)	3
	Product quality	------	3
	Technology	------	3
	Security standards	------	3
	Other technical aspects	------	3
Strategic Information	Market studies	Positioning	2
		Market shares	2
	Pricing (models, strategies)	Prices (re)adjustments	2
		Prices by areas	2
		Minimum resale prices	2
		Discounts	2
	Commercialization strategies	Strategic stock	2
		Marketing strategies	2
		Commercialization plans	2
		Sales objectives	2
Non-strategic information	Regulations	-----	4
	Inflation	Publicly available	4
	Exchange rate	-----	4

Notation: 1 to 4: from prohibited to permitted under competition laws.
Source: Authors' elaboration

A mix of a thorough market structure analysis and the inherent characteristics of the information should allow competition authorities make robust inferences on the lawfulness of a practice that is common in business and may even be beneficial when firms behave competitively. The emerging Chilean experience is proof.