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I. INTRODUCTION

There is international consensus in regards to considering hard-core cartels as the most serious violation in competition law. There is also agreement on their basic definition: "[A] cartel is an agreement among competitors to restrict competition amongst themselves."

It seems close to impossible that a dispute can arise concerning the definition of cartels. Notwithstanding, problems can emerge when competition authorities make broad interpretations of cartel behavior that include activities that are not horizontal and, technically speaking, fall outside the definition of cartels.

II. CARTEL DEFINITION UNDER MEXICAN LAW

A problem with defining "cartels" had not arisen since the enactment of the Mexican Federal Law of Economic Competition ("FLEC") in 1992. Article 9 of the FLEC adopted the basic definition of cartel behavior (and a specific restrictive list) in the following terms:

> Absolute monopolistic practices are contracts, agreements, arrangements, or combinations among economic agents that are competitors among themselves, whose aim or effect are any of the following: I. To fix, raise, to agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with such purpose or effect; II. To establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services; III. To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or IV. To establish, agree upon or coordinate bids or to abstain from bids, tenders, public auctions or bidding.

Article 9 of the FLEC was quite clear about cartel definition. Only the four horizontal agreements listed in such article were considered hard-core cartels: (i) price-fixing and the exchange of sensitive information used for price-fixing; (ii) market division; (iii) output restriction; and (iv) bid-rigging.[2] The FLEC decided not to include vertical conduct in the category of hard-core cartel conduct by including the wording "among economic agents that are competitors amongst themselves" in the first paragraph of article 9. Thus, the FLEC clearly distinguished horizontal restrictions among competitors (FLEC §9) from vertical restraints (even with horizontal effects) among undertakings or economic agents at different levels of distribution (FLEC §10).

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[2] Since 1993 (the FLEC's inception), Resale Price Maintenance ("RPM") has been considered a vertical restraint and subject to a rule of reason approach and not a *per se* rule violation of competition law. Collusive boycotts are considered vertical restraints rather than cartels despite being horizontal agreements. *See* FLEC §10-VI.

For 20 years the competition authority, academics, practitioners, and economic agents have relied on such an interpretation since it was so obvious: one of the essential requirements of cartels under Mexican law is its horizontality. Horizontality means that a cartel behavior must be about those prices and products or services in which the cartel members compete. Such horizontality derives from the wording of FLEC §9 "agreements or combinations among economic agents competitors among themselves." If the products or services subject to the cartel agreement are not those sold or provided by the cartel members: (i) the agreement would be unenforceable because of the impossibility of the cartel members of fulfilling it; (ii) cartel members would not fail to compete within their products and prices; and (iii) the cartel members would not receive monopoly profits derived from the cartel agreement. In other words, there would not be an undue transfer of wealth or profits from the consumer to the cartelists.

The definition of "cartel" did not represent a problem under Mexican law until 2013 when the Mexican competition authority sanctioned as a hard-core cartel an alleged non-horizontal agreement in the poultry industry.

III. THE POULTRY PRICE-FIXING CASE

In 2013, the Mexican competition authority resolved in docket IO-005-2009-III[3] that a group of poultry producers committed a hard-core cartel by allegedly fixing the price of the products of their independent clients; specifically, chicken pieces sold to the final consumers in the public market channel[4] where the producers did not have a presence since they were not vertically integrated.

The subject matter of the investigation was four newspaper releases, addressed to final consumers in the public market channel in the years 2008-2009, that contained certain prices for some chicken pieces. The newspaper releases aimed to promote chicken consumption. The logos of some poultry producers appeared on the newspaper releases although the producers were not members of the poultry association, nor did they distribute or retail the chicken pieces on public markets. Further, wholesale distributors and retailers were not vertically integrated with producers but, rather, were totally independent from the poultry producers. However, the assumption was that behind the newspaper releases was an agreement between the poultry producers whose logos appeared on them. Therefore, there was a finding and subsequent sanction against the producers for committing a hard-core cartel disregarding that the alleged cartel behavior did not involve their products or their prices.

One of the main controversies was the interpretation of article 9-I of the FLEC (price-fixing definition) in order to conclude that (i) price-fixing cartel behavior does not require that the agreed upon price is the price of the accuseds' products, and (ii) it is enough that competitors

[3] Public version of the resolution is *available at*: http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V80/12/1775177.pdf.

[4] Poultry producers challenged the Commission's resolution before the new specialized competition courts. As of to December 10, 2013 the challenge is still in process.

in one level of distribution fix the price of the products of independent third parties in another distribution level (neither their prices nor their products).[5]

This wide interpretation of cartel behavior can occur in any case in which competitors for products X set the price of products Y (without being vertically integrated). For example: groups of steel producers fix the prices of screws for final consumers in hardware stores. The steel producers are economic agents and competitors of each other in the level of production of steel. But the steel producers neither convert the steel into screws nor sell screws to final consumers in hardware stores. Is the fact that they are competitors in the production of steel enough to consider that such conduct falls within the scope of article 9-I of the FLEC and should be sanctioned as a hard-core cartel?

The answer must be no. Even though it may sound like a cartel, and may look like a cartel, it is not a cartel! Under Mexican law federal precedents, antitrust offenses that are to be interpreted as criminal provisions require a strict interpretation of the law and clear violation of the subject matter of the law. For cartel effects, it is not sufficient that the cartel participants be competitors within any product or service but, rather, they need to compete among themselves with the products or services subject to the cartel agreement. The behavior could be something different, but the competitors would not be direct participants in a cartel behavior.

Under the terms of article 9-I of the FLEC, and given the relevant facts of the case, the only cartel behavior that might have occurred was at the level of the wholesale distributors. Wholesale distributors that followed a recommendation of the newspaper releases, and sold the chicken pieces at the recommended price, could have been sanctioned for cartel behavior.

We consider that cartel behavior must be analyzed under the strictest standard of interpretation and proof since such behavior will bring not only administrative, but also criminal liability. A rigorous analysis is needed, especially when a newspaper release is open, public and transparent—very different from the secret pacts that are common in horizontal agreements or cartel behavior.

IV. CONCLUSIONS

The main feature of a cartel agreement is that it is indeed horizontal—this is a natural and essential condition of hard-core cartels under Mexican legislation. Article 9 of the FLEC did not include vertical conducts in the category of horizontal hard-core cartels. In addition, Resale Price Maintenance must be analyzed under a rule of reason approach as ordered by article 10-II of the FLEC. Article 9 of the FLEC only bans horizontal restrictions among competitors related to those products or services for which the cartel members are considered competitors of each other.

Under Mexican law, cartels are sanctioned with administrative fines up to 10 percent of the annual tax income of the offender and criminal consequences of up to 10-year imprisonment terms. Therefore, an offense of such gravity must be perfectly defined in competition law in order to guarantee legal certainty to the economic agents by enabling them to know exactly what

[5] "…it is enough that economic agents competitors of each other have agreed to fix, arrange or manipulate the price of any product offered in the market…" *See* page 720 of the resolution.

conducts are prohibited. Broad interpretations of the legal definition of cartel in order to include other types of behavior that do not fall within the definition of a cartel must be excluded.

In the next months, the specialized competition courts or the Supreme Court of Justice will have the last word in defining whether horizontality is one of the essential requirements of cartels under Mexican law.