

APEC-OECD INTEGRATED CHECKLIST AND THE COMPETITION LAW AND POLICY IN CHILE

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An Outline....

- An overview of the chilean competition system
 - The statute and its substantive provisions
 - The institutions (authorities)
 - Its powers
 - The outputs
- The APEC-OECD Integrated Checklist and the chilean competition system
- Some final remarks

AN OVERVIEW OF THE CHILEAN COMPETITION SYSTEM

The Statute of Competition (CHILE)

- Decree Law N° 211/1973, as amended, by Law N° 19.911/2003:
The Free Competition Statute.
- Goal: To promote and defend the markets' free competition(2003).

The Statute of Competition (CHILE)

Substantive provisions:

- **General Provision:**

...any deed, act or contract that prevents, restricts or hinders free competition or tends to produce such effects...

- **Exemplary Provisions:**

-agreements...abusing the power conferred upon them by such agreements

-abusive exploitation of market dominance...and other similar abuses

-predatory and unfair competition practices...with an objective related to market dominance

- **Special Provision to public authorities**

The Statute of Competition (CHILE)

- Persons targeted by law: private and public
- No statutory, no judicial exemptions
- Coordination with sector regulators and some links with trade policy
- Standing: private and public persons

The authorities of competition

- The Agency (“FNE”)
(just investigative, without remedial powers)
- The Competition Court (“TDLC”)
(assesses the claims and the non-controversial presentations from the competition agency, private and public persons; has remedial powers in case of findings)
- The Supreme Court
(reviews not just the due process but also the merits of the decisions of the competition court)

The authorities of competition

- **The Chief of the Agency:**
“National Economic Prosecutor”, who remains in his duties during the confidence of the President of the Republic
- **The Competition Court:**
5 members: 3 lawyers, 2 economists
They’re appointed for 6 years in non-exclusive terms, following a public selection process where the Central Bank, the Supreme Court and the President of the Republic participate

The powers of the competition authorities

- The agency:

Limited investigative powers (evidence based mainly in documents voluntary presented and testimonies, expert reports; days in prison just in case of proved obstruction to the investigation procedure; searches, raids and inspections are not common at all because of the lack of direct compulsory powers in case of opposition)

2006: A bill for enhancing investigative and detection powers, currently discussed in Congress (leniency program, wiretapping, compulsory inspections)

The powers of the competition authorities

- The competition court:
 - 1) Decision and remedial powers in cases of violation of free competition statute (non ex – officio powers) / Controversial procedure
 - 2) Decision and remedial powers in non contentious matters that might imply an actual or potential violation of the law / Non-controversial procedure
 - 3) To give general instructions (exceptionally used power)
 - 4) To propose to the President of the Republic, amendments or abrogation of laws and regulations, and the enactment of regulations, in all cases, on grounds of competition issues

The powers of the competition authorities

- The competition court:
REMEDIAL POWERS
 - a) In adversarial procedures:
 - To fine undertakings and managers up to 15 millions USD
 - To amend or terminate acts, contracts, agreements, systems or arrangements against the competition law
 - To order the amendment or dissolution of partnerships, corporations or other private law entities that committed those acts
 - Other corrective or restrictive measures that may be decreed
 - b) In non adversarial procedures:
 - To set the conditions to be met by the facts, acts or contracts considered by the procedure
 - Other corrective or restrictive measures that may be decreed

The Outputs of the Competition System

- 2003: OECD Peer review and a big reform
- 2004-2006:
 - 50 decisions in adversarial issues
 - 19 decisions in non-adversarial issues

The Outputs of the Competition System

10 of 50 Decisions in Adversarial Procedures

DECISION	AKA	FINDINGS	REMEDIES	S.Court
S. 9/2004	Supermercados (SM)	Abuses of buying power of big supermarkets	Obligations for the SM in commercial relations with their suppliers	C/R
S. 12/2004	Nestlé/Masterfoods	Unfair Competition in advertising without market power is not a violation of the free competition law	Claim rejected	-
S. 24/2005	Paltomiel	Confusion against consumer by a big retailer who imitates a supplier's product	40.000 USD f	C
S. 26/2005	Phillip Morris - Chiletobacos	Exclusionary Unilateral Abuses	600.000 USD f and Order to modify exclusionary contracts	C
S. 29/2005	Transbank (credit and debit cards administrator)	Unilateral Abuses	ADR 60.000 USD f Prices selfregulation plan others	-

The Outputs.....

10 of 50 Decisions in Adversarial Procedures (from previous slide)

DECISION	AKA	FINDINGS	REMEDIES	S.Court
S. 38/2006	Maritime Agencies	Colective Abuses in the maritime transport of exports	Different fines up to 400.000 USD	R
S. 39/2006	Fibrocement building materials	Predatory Pricing	Claim rejected	R and fined up to 700.000USD
S. 43/2006	Oxygene in public hospital tenders	Bid rigging	Different fines up to 2.3 millions USD	R
S. 45/2006	Telefónica and VoIP	Exclusionary Unilateral Abuses in contracts	1.1 million USD f modified contracts, others	pending
S. 47/2006	Ports for Salt Transportation	Unilateral Abuses by misuse of administrative and judicial procedures	360.000 USD f order of pre-merger notification	-

The Outputs of the Competition System

3 of 19 Decisions in Non-Adversarial Procedures

DECISION	AKA	FINDINGS	REMEDIES	S.Court
R. 1/2004	TVP Merger, VTR-Metrópolis	Analysis on TVP, mobile and fixed telecommunication markets	Conditionated in many terms, divestiture included.	C
R. 2/2005	Telefónica-BellSouth Latin America Merger	Analysis on mobile telecommunication markets	Conditionated in many terms, divestiture included.	C
R. 5/2005	Chevron Texaco	Paralel Imports/Unfair competition of acts that impede import doesn't necessarily harms free competition	Just a declaration of the difference between unfair competition and free competition issues	-

The APEC-OECD Integrated Checklist and the Chilean competition system

The APEC-OECD Integrated Checklist Competition Law and Policy, CHILE

C1

To what extent has a policy been embraced in the jurisdiction that is directed towards promoting efficiency and eliminating or minimising the material competition distorting aspects of all existing and future laws, regulations, administrative practices and other institutional measures (collectively “regulations”) that have an impact upon markets?

Chile has a competition framework in force for more than 30 years and a lot of anticompetitive regulation has been removed by the institutional mechanisms of DL 211.

Future regulations are subject of a constant assessment by the competition agency and, in some cases, the agency sends a report to Congress or makes a presentation during the legislative procedure.

It might be necessary to implement a broad program with the focus on existing regulations in sectors or areas to better accomplish the point.

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C2

To what extent do the objectives of the competition law and policy include, and only include, promoting and protecting the competitive process and enhancing economic efficiency including consumer surplus?

The objective of competition law and policy is clearer today than before 2003, because of the explicit mention of the objective in the statute.

Unfair competition issues have been removed from free competition jurisdiction.

Economic efficiency of markets has become the main concern of competition authorities. Maybe some ancillary legislation (such as the media) requires a reassessment of its treatment in the view of competition policy.

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C3

To what extent does the Competition Authority or another body have (i) a clear mandate to advocate actively in order to promote competition and efficiency throughout the economy and raise general awareness of the benefits of competition, and (ii) sufficient resources to carry out any advocacy functions included in its mandate?

The mandate of promotion of competition is clear in the statute.

Chilean competition authorities have played an important role in the creation of a competition culture within the country. And recently, there are some good advocating experiences that reach procompetitive results, avoiding the costs of litigating between government agencies.

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C4

To what extent are measures taken to neutralise the advantages accruing to government business activities as a consequence of their public ownership?

Making subject of anticompetitive liability to both, private and public sector, is a good incentive for public owned businesses, to refrain from violate the neutrality principle. Even though, chilean legislation provides other judicial mechanisms at administrative and constitutional level that could be more appropriate instruments to prevent that government failure.

The APEC-OECD Integrated Checklist Competition Law and Policy, CHILE

C5

To what extent does the agency responsible for the administration and enforcement of competition law (the “Competition Authority”) operate autonomously, and to what extent are its human and financial resources sufficient to enable it to do its job?

In Chile, with its dual system of competition, the autonomy is stronger in the decisional body than in the investigative agency. However, this lack of absolutely independency from government that affects the investigative agency is compensated by a broad access to competition authorities by both, public and private persons.

Financial resources seem sufficient but the investigative agency lacks of strong investigative powers.

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C6

To what extent is the role of enforcement decision makers transparent, especially when there are multiple government bodies involved in decision making, for example, regarding who the decision maker was, factors taken into account by such a decision maker, and their relative weighting?

The decisional body and the investigative agency, both have done important steps forward transparency of their decisions and activities, using the technology of 21st century for communicating them to the public.

With no doubt, predictability has augmented in the community regarding competition matters. Another factor that favors it is the relative few authorities that take part in the decision making processes on competition issues.

The APEC-OECD Integrated Checklist Competition Law and Policy, CHILE

C7

To what extent is there a transparent policy and practice that addresses the relationship between the Competition Authority and sectoral regulatory authorities?

In some cases, the dispositions of the sectoral law specifically regulates the respective duties and coordinations.

But a framework to enhance this relationship outside the statutes (protocols between authorities) needs to be done to a greater extent to better accomplish with the point.

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C8

To what extent does the competition law contain provision to deter effectively and prevent anti-competitive conducts and anti-competitive mergers? To what extent does the competition policy ensure that the above conduct is not facilitated by government regulation?

About the provisions: slide N° 5

Application of competition policy to government regulations.

¿Are naked agreements per-se violations? Not clear, it seems no, rule of reason.

Not mandatory pre-merger notifications but important incentives for doing it.

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C9

To what extent does the competition law apply broadly to all activities in the economy, including both goods and services, as well as to both public and private activities, except for those excluded?

Broadly application of competition law: goods, services, public, private, professional associations, government branches, etc.

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C10

To what extent does the competition law provide for effective investigative powers and sanctions to detect, investigate, punish and deter anti-competitive behaviour?

The investigative agency lacks of strong investigative powers. Bill in discussion in Congress since 2006.
The appropriate remedies: difficult issue.

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C11

To what extent do firms and individuals have access to (i) the Competition Authority to become apprised of the case against them and to make their views known and (ii) to the relevant court(s) or tribunal(s) to appeal decisions of the Competition Authority or seek compensation for damages suffered as a result of conduct contrary to the domestic competition law?.

The respect of the rule of law is the very core of the Chilean legal system.

Reform of 2003 made this principle stronger in competition issues: no findings and no remedies can be imposed but after a judiciary process at the Competition Court.

Its decisions are generally reviewable by the Supreme Court, that has broad jurisdiction on the review.

Regarding to damages compensation the 2003 introduced a provision that is expected to facilitate the exercise of compensation claims.

SOME FINAL REMARKS

Chilean Competition System:
Important steps forward reaching the checklist standards
But still a work in progress

- For further information:

www.tdlc.cl

Web Site of the Chilean Competition Court (Tribunal de Defensa de la Libre Competencia)

www.fne.cl

Web Site of the Economic Prosecutor Office (Fiscalía Nacional Económica)

THANK YOU

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