Chile's contribution:
Competition Policy and Consumer Protection Policy
When, how and why they interact

Ms. Marcia Pardo [1]
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Introduction

In Chile, as in many other countries, there is an increasing awareness on the complementarities between Competition and Consumer Protection policies and authorities, due to the notion that competitive markets are the best way to achieve consumer welfare.[2] [3]

Based on that notion, the perception of poor competitive conditions in a given market or economic sector, or the evidence of market failures such as information asymmetries, transaction costs and externalities- trigger actions of both Competition and Consumer Protection authorities. The rationale behind these parallel actions is that, such market failures or anticompetitive conditions may, under some circumstances, not only be issues for the enforcement of competition law but could also harm consumers' rights, which enforcement is guaranteed by the consumer protection policy.

Furthermore, there are several areas in which Competition and Consumer Protection policies may interact. For instance, freedom of choice, adequateness of information, advertising regulation (misleading advertising does not only affect consumers, but also competition since it detours people's choice; comparative advertising can also affect competition) are essentials for both policies. In other words, it can be said that right functioning of markets is paramount in both Competition and Consumer Protection policies, given their common public interest goal.

This presentation is organized in three sections. The first one is a brief review of the Chilean legal framework for both Competition Policy and Consumer Protection Policy. The second focuses on areas for the relation of both policies, distinguishing at least three levels of interaction. The third section presents an empirical example on a merger case in the retail industry, where both agencies gave their (complementary) position to the TDLC. Finally, the last section presents some closing remarks and conclusions.

1. Chilean legal framework and institutional arrangements

In some countries, the same legal body governs both competition and protection of consumer rights. In other countries, a single body is responsible for the promotion, protection and respect

[1] Economist, National Economic Prosecutor's Bureau, Chilean competition agency. Email: mpardo@fne.gob.cl. This document is part of the material contributed by the FNE to be presented on August 17, 2009, at the Fifth APEC Training Course on Competition Policy, working group 2, "*Interrelations between Competition Policy and Consumer Protection Policy*", organised by Chinese Taipei Fair Trade Commission and Japan Fair Trade Commission. The author must acknowledge comments and guidance given by Ms. Ximena Rojas, attorney of the Research Division at FNE. The usual disclaimer applies.

[2] *Ceteris paribus*, competitive markets allow economies to achieve efficient allocations, i.e., satisfying both economic efficiency (good and services supplied at minimum average cost) and allocative efficiency (the value consumers place on a good or service reflected in the price they are willing to pay- equals the cost of the resources used up in production). When a competitive equilibrium is reached, the price equals the marginal cost, which is also the minimum feasible cost. When this condition is satisfied, both consumers and firms' surplus are maximised, i.e., total economic welfare is maximum.

[3] In spite of the abovementioned notion, it must be noted that consumer welfare is not expressly declared as aim of Chilean competition policy.

of both rights.[4] In our case, there are two separate legal bodies and two different agencies within the Chilean government: the National Economic Prosecutor's Bureau (FNE), responsible for enforcing the Competition Law, and the Consumer National Service (SERNAC), in charge of enforcing the Consumer Protection Law.

a. Competition Policy: Defending and promoting competition

Chile has a long tradition in competition enforcement. The first statute on Competition and market access was enacted in 1959, with the enactment of the first competition provisions.[5] These provisions were part of a miscellaneous economic and industrial statute. In one of its chapters, the statute created the "Antimonopoly Commission," empowered to punish harmful conducts and to control industrial and commercial activities. Later on, the position of *Fiscal Nacional Económico* (National Economic Prosecutor) and the *Fiscalía Nacional Económica* (National Economic Prosecutor's Bureau, hereinafter, FNE) were created,[6] with the objective to provide technical support to the abovementioned Commission and to carry out investigations procedures aimed at the improving of the law's effectiveness. These entities, however, investigated few cases because of the planned economy model place on those years, and therefore, there was not significant competition law enforcement between 1959 and 1973. At a time when many products and services were subject to government price fixing, and several markets were heavily influenced by state-owned enterprises or managed firms, competition policy or law played no major role.

In 1973, Chile adopted a market economy including *inter alia* privatization, price liberalization and openness to foreign trade. Coupled with this policy initiative, the Military Government improved competition enforcement, by way of enacting Decree Law No. 211/1973, known as the Competition Act. This was the first piece of legislation exclusively related to competition in Chile.

Between 1973 and 2003, competition law was enforced with several different purposes — striking down privileges granted to or by the State, ensuring freedom to economic agents, encouraging fair competition, particularly in the industrial privatization and liberalization processes that took place during that period.

Over the years, both the FNE and the Antitrust Commissions were developed and became better established. The Decree Law No. 211 was amended several times, but it was not until 2004[7] that the major amendments were defined and the current decisional structure set up:[8]

- **A dual competition system**

- First, the FNE, or competition agency, in charge of keeping economic competition in domestic markets. The FNE is part of the Executive and its main function is to investigate any deeds, conducts or contracts which tend to restrict or hinder competition, and when necessary, bring the case to the specialized court. The FNE is essentially an investigative agency and as such it does not have adjudicative functions.
- According to the Competition Act, the FNE also deals with the promotion of competition.
- Second, a Competition Tribunal (*Tribunal de Defensa de la Libre Competencia*, or TDLC by its Spanish acronym), which is an independent judicial body, subject to the Supreme Court of Justice. Its function is to hear adversarial and non-adversarial competition cases and consultations presented by the FNE or by any private or public entity. The decisions of the TDLC may be punitive, restrictive or corrective.

[4] For instance, some institutions in charge of competition and consumer protection are the Federal *Trade Commission* (FTC, USA); *Direction Générale de la Concurrence, de la Consommation et la Répression des Fraudes* (France); the *Office of Fair Trading* (OFT, UK); and, the *Australian Competition & Consumer Commission* (ACCC, Australia).
[5] Law No. 13305/ 1959.
[6] Law No. 15142/ 1963.
[7] Law No. 19911 / 2004.
[8] The last amendments were enacted by Law No. 20361/2009, which increases FNE's powers to deal with cartels and collusive agreements, among others.

- Finally, the Supreme Court of Justice reviews not merely the observance of the due process but also the merits of the Competition Tribunal's rulings.

- **Scope of the law**
- The aim of the law is to promote and defend competition in domestic markets
- The Competition Act defines expressly the scope of the anti-competitive illicit in its general provision as "*…any deed, act or contract that prevents, restricts or hinders free competition or that tends to produce such effects*" (Art. 3rd)

The Chilean legal system does not consider market share presumptions, nor does it establish *per se* treatments for any conducts. In any case, the actual or potential effects on competition in the relevant market must be proved following the rule of reason. Market efficiency has become the main concern of competition authorities.

It must be noticed that our Competition Act considers no exemptions, i.e. the law is applicable to any private or public person. Finally, the FNE's investigations may be initiated ex-officio or upon complaints. However the law allows any person to directly bring a case to, or consult, the Competition Tribunal which will initiate a judicial –contentious or not contentious process, i.e., there is private enforcement of the competition law.

b. Consumer Protection Policy: Defending and promoting consumer's rights

In Chile, the consumer protection issue finds its origins in the year of the Great Depression when, in order to solve the crisis, the Government decided to participate more on the economy, creating the *General Commission for Prices and Supplies* (SAP).[9] Its functions were to ensure provisions and reasonable prices. Later on, its functions were limited to the monitoring and protection of consumers against commercial malpractices.

In 1960, the "Directorate of Industry and Trade, DIRINCO" was created, replacing the old SAP.[10] DIRINCO was part of the Executive, under the Ministry of Economic Affairs. Its tasks were to monitor, receive complaints, investigate and sanction consumer rights violations. It creation was consistent with the existing economic and political context, in which the State had a large influence on the market. Later, under the Military Government (1973-1989), DIRINCO's punitive and monitoring functions ceased due to the establishment of a market economy system.

In 1990, the *National Consumer Service* (SERNAC), the institution in charge of defending and promoting consumer's right was created.[11] SERNAC is a de-centralised public service, subject to the supervision of the President of the Republic through the Ministry of Economy. The objectives of the SERNAC, established by law are to inform, educate and defend Chilean consumers. Its main functions are: to check compliance of the legal regulations related to the protection of consumers' rights; formulate, carry out and encourage information and education programs for the consumer; compile, carry out, process, divulge and publish information to provide the consumer with a better knowledge of the characteristics of the goods and services commercialised in the market; and execute and promote research on consumptions issue. Therefore, its faculties are mainly of an enforcing nature, although, it also has education and research functions.

Nowadays, even though the SERNAC cannot sanction malpractices, it has several tools to enforce consumer rights taking actions in Courts under the 1997 Consumer Protection Act (CPA).[12] Moreover, in 2004, this act was complemented introducing, among others, the sanction of spam and abusive clauses in adhesive contracts.[13]

[9] DL 520
[10] DL 242/1960
[11] Law No. 18959/1990
[12] Law No. 19496/1997. Full text for download here (available only in Spanish).
[13] Law No. 19995/2004

2. Competition and Consumer Protection: Interactions in practice

a. A first level, the logistic interaction

A first level of interaction between both agencies is of a logistic kind. Unlike other agencies of the Executive Branch, the FNE is centralized, and has no branches in other regions, excepting for the one located in Chile's capital. To enhance regional community awareness, the FNE's structure includes a Regional Coordinator office, which receives and responds to queries that arise in the regions, establishing information and contact networks with public authorities, academia, as well as business and private parties.

Trying to improve the regional communication, the FNE has signed an Agreement for Inter-institutional Cooperation with the SERNAC which oversees consumer protection nationally through its the regional offices, which according to the cooperation scheme, may also receive submissions addressed to the FNE.

For implementing this agreement, the FNE has delivered training workshops on competition policy to SERNAC's regional officers to enable them to adequately inform the consulting community.

b. A second level, interaction on substantive matters. When does it apply?

Even when there are anticompetitive acts and conducts that may affect or impact end consumers, the fact remains that although free competition and consumer protection are (sometimes) complementary, they are different matters.

The real scope on interaction between consumer protection and competition can be inferred from their respective legislations. In fact, Law No. 19496 (CPA) establishes that its aim is to "*regulate the relations between suppliers and consumers*" (Article I). It defines "*consumer*" as the "*ultimate consumer*" of goods and services purchased, used or enjoyed (first article, first paragraph). In contrast, the DL No. 211, which sets standards for the protection of competition, states its aims as being to "*promote and defend the free market competition*" (Article I), at all stages of the economic activity not only in transactions between suppliers and consumers.

Thus, some conducts may lead to an infringement of the Competition Act while simultaneously being a violation of consumer protection rules. However, this does not imply the existence of an identity between the legally protected interests, nor does it mean that in the analysis of anticompetitive conducts the consumer interests should not be considered, or that the effect of such conducts on those interests should be neglected. In simple terms, this means that these acts or behaviours may be punished to the extent that there is an effect on competition.

We can provide some examples to illustrate:

The first case was related to advertisement accused of being "misleading".[14] Obviously, it would be misleading or not, depending on the likely effect or impact that it may have on consumers, and whether such advertisement it is actually able to mislead the consumer. On the other hand, consumer confidence on the supplier could be affected by that fact that what is offered is found to be false, thus affecting the honesty, transparency and balance that should exist in all consumer-provider relations. However, even when we are in the presence of a false or misleading advertisement, the undertaking should not be punished under the Competition Act unless the following conditions are met:[15]

[14] This misleading advertisement could be considered as an unfair trading practice. Since February, 2007, when the Unfair Competition Act was enacted –Law No. 20.169 / 2007- unfair competition matters are enforced by civil judges, protecting fair competition mostly with private remedies.

[15] According to the Unfair Competition Act, the possibility to impose fines against unfair competition conducts remains under the jurisdiction of the TDLC, but only a after formal claim by the FNE,

(i) The publicity has affected consumer choices to the detriment of the undertaking's competitors and therefore an act of unfair competition has taken place, and
(ii) The advertiser has a dominant position in the relevant market, and
(iii) The publicity had intended to achieve, maintain or increase the dominance of the advertiser in the market.

Otherwise, at best, this advertisement could be punished from an ethic point of view,[16] or by the standards of protection of consumer rights that expressly sanction the misleading conduct, but not from the perspective of competition.[17]

Another example could suggest that lower prices are not always good prices for the economy based on competition criteria. For instance, lower prices are always beneficial to consumers, and indeed, no provision of the CPA punishes the offering of certain products at low prices (it is worth mentioning that the CPA does not penalise the high-pricing of either). However, behind these low prices practices there may be a conduct contrary to free competition, such as predatory pricing, a form of abuse of dominant position, expressly defined by DL 211.[18] Following this criteria, unfair competition issues frequently associated with dominance have been among the grounds of several of the TDLC condemnatory decisions.[19]

c. A third level, interaction on advocacy issues: When interaction always applies

Competition promotion and advocacy is a big challenge for the FNE. Currently, the FNE is working on a cooperation basis with all the regulatory agencies to promote free competition in the markets. One of these advocacy activities relates to private health providers market which has been a matter of common interest for the FNE, the SERNAC and a third agency, the Health Superintendency (sectoral regulator for both providers and health insurance companies).

A few months ago, the FNE presented the results of a qualitative research on the insights behind consumers' choices in the private health providers market. Although this research was developed in order to define relevant markets for health services and procedures, its findings were also useful to other public services –i.e., the Health Superintendency, the National Institute of Statistics (INE) and the SERNAC-, that are concerned about the high variance of prices between different private health providers (mainly clinics and private hospitals) and the lack of transparency, all of which makes difficult the choice process for consumers.
Future initiatives resulting from this research involve the SERNAC and the Health Superintendency project, regarding the generation of an *on line* search engine for health plans and health services prices, which will deliver information in advance to consumers (affiliated to private health insurance companies), that will increase levels of transparency and information

following the termination of the civil procedures, and provided they constitute very serious offences under an unfair competition criteria.

[16] In Chile there is a code of practice for ethical advertisement implemented by the Chilean Advertisement Association.

[17] Ruling No. 12/20 12 2004 (*Nestlé vs. Masterfood Chile*, full text available here (only Spanish). TDLC expressed that a violation against art. 3 c) of antimonopoly law required both, an unfair competition practice and that this practice be conducted in order to attain, keep or increase a dominant position.

[18] Art. 3 c) of the current Competition Act

[19] For instance:
(i) TDLC, 22.09.2004, Ruling N° 8/2004, fining (12.000 USD approx) a laboratory in a concentrated market with only three laboratories producing pharmaceuticals with oxcarbazepine, for comparative and denigrating advertising;
(ii) TDLC, 28.07.2005, Ruling N° 24/2005, fining (30.000 USD approx) an integrated drugstore retail chain-laboratory in a concentrated market, for imitating a supplier's product and risking confusion; affirmed by Supreme Court, 22.12.2005;
(iii) TDLC, 21.09.2005, Ruling N° 30/2005, fining (6.000 USD approx) a fishing corporation for creating a barrier to entry by means of obtaining the registration as a trademark of the generic name of a product and preventing its use by other industry actors, thus abusing its IPRs;
(iv) TDLC, 27.12.2005, Ruling N° 35/2005, fining (1.200 USD approx.) a kinesiologists professional association for several boycotts, denigrating and exclusionary practices against an educational institution of kinesiology.

for consumers to make choices in this complex market. This will also improve the market performance from the FNE's point of view, as it will diminish both searching and switching costs and the risks of abuse of dominant position of the incumbent health providers.

3. Case Study: Both policies acting in a complementary fashion in a merger case

This is an example of the type of cooperation which can be accomplished between FNE and SERNAC. Both agencies submitted presentations before the TDLC with the occasion of a merger consultation between Falabella and D&S, two of the major retail chains and retail credit companies in Chile.[20] The following is a brief of the case and a summary of those presentations:

- **Facts**

One of the main Chilean retail companies, Falabella, and the most important supermarket chain, D&S, agreed in May 2007 on a merger. A new entity would be formed, in which Falabella would own 77% of the shares and D&S would own 23%. The combination would become the second largest firm traded on the local stock market. With annual sales of approximately US$ 8 billion, it would be the second largest retailer in Latin America, after Wal-Mart in Mexico.
In order to perform the concentration operation, the undertakings requested of the TDLC,[21] which in turn asked the FNE's opinion, among others. During the process, the SERNAC also submitted its own report.

- **FNE's presentation**

The FNE focused its presentation on the definition of the relevant markets, its characteristics and the risks for free competition that the eventual merge would entail, concluding with a suggestion of remedies to decrease such risks, in case the operation were to be approved .

Consequently, the FNE stated that the operation tended to restrain competition in the supermarkets and the retail credit cards markets, also affecting the markets of shopping centres and electric home appliances. It was considered that the operation as presented would increase the risks of unilateral abuse and coordination in each of these relevant markets. Such risks were mainly revealed by the specific characteristics of each of the affected markets.

In the supermarkets market, the FNE pointed out that there were a high market concentration and barriers to entry (sunk costs, scale economies, know-how, and strategic behaviour, among others) which forced potential competitors to use specific vehicles of entry –buying little incumbents- rather than to enter as a new competitor. This view was supported by evidence on entry, changes in market shares over time, and importantly, on econometric evidence showing that higher concentration would lead to higher prices for consumers.

The FNE claimed that the main risk associated to the merger was that it would increase market power, with an upstream effect, since the greater buying power would allow the payment of lower prices or the imposition of worse trading conditions to providers, thus affecting the investment and output levels. On the other hand, it would allow abuses against consumers

[20] Falabella is the leader chain in department store retail, is the third player in the domestic supermarket industry (operating the brand Tottus) and was the pioneer introducing CMR as a retail credit card. Recently, it had started participating in banking (Falabella Bank), among other branches of the investment holding. On the other hand, at the time D&S was the leader in the supermarket industry (operating 'Líder', 'Ekono' and recently adding the wholesaling by means of 'Bodega A Cuenta'), participating also in credit retail with Presto.

[21] Chilean Competition System has no mandatory merger notification. Accordingly, mergers cases may be heard by the TDLC in a non-adversarial procedure when the parties to the operation voluntarily seek the Tribunal's approval or when the FNE or any interested party requires the TDLC to examine the operation. Also a merger or acquisition can be considered an infringement of the Competition Act if it prevents, restricts or hinders free competition or tends to produce such effects, in which case the parties could be penalized after the merger. This adversarial proceeding against a merger may be initiated upon request by the FNE or any interested party.

through the increase of final prices of products or the decrease of quality, services or innovation.

In order to countervail these risks, the FNE proposed –among other remedial measures- conditioning the approval of the merger upon the sale of Falabella' supermarkets to a third party, which would likely become a third strong competitor.

In the market of retail-credit cards, the FNE asserted that there were serious problems of transparency and exclusion that could be augmented with the merger and result in abuses against card holders. In order to diminish the risks in this market, the agency suggested prohibiting the performance of some conducts by the proposed merger, such as forbidding the unilateral refusal of third party credit cards or alternative means of payment, or the marketing of certain products or services in more favourable terms because of the use of related credit cards. All of these measures aimed to protect free competition as well as consumers.

- **SERNAC's presentation**

SERNAC's presentation began with an overview of consumer opinions on the retail market, based on surveys prepared by the agency on a regular basis and internal statistics on the number and characteristics of complaints. They reflected that, for instance:

- *Only a 25% of the surveyed people believed that companies were interested in solving their problems;*
- *1 out of 5 consumers claimed that Department Stores had made charges to their bills without their consent*
- *90% of consumers argued that Department Stores' bills could not be understood;*
- *23% of the complaints submitted to the SERNAC were related to Department Stores and supermarkets,* and that in the case the merger were approved SERNAC estimated that the new Company would be the second most claimed-against company in Chile

The SERNAC explained that the information given by retail companies (department stores and supermarkets) about the credit conditions offered by their own credit cards was scarce, vague and extremely complicated. For instance, charges were divided into different items (i.e. interest rate, commissions, etc) and these items were expressed in different measurement units (for instance, percentages, indexed units, lump sum charges, etc).

Regarding advertising, there were cases in which companies claimed that costumers could use theirs credit cards without paying interests while in fact the companies were charging high commissions for the use of their credit cards. Furthermore, even though they offered discounts if costumers made their purchases using their store cards, the overall prices paid were much higher than the prices paid in cash, once interests and commissions were actually charged.

Moreover, SERNAC described several safety infringements and abusive clauses incurred by both companies in their contracts, which had been penalized by Chilean Courts. For instance, the Chilean Supreme Court declared void a contract clause established by Falabella in which consumers were made responsible for transactions made with their stolen credit cards, and condemned the company to compensate the consumers with US$ 50,000. SERNAC also brought a case against D&S for several abusive clauses included in its credit card contracts. For example, consumers were forced to contract three different types of insurance, and the company established that it could unilaterally change the conditions of the contract. Both types of clauses were prohibited by the Chilean Consumer Protection Act.

In SERNAC's opinion, all of the abovementioned facts could have an impact on the performance of this market. If there is not enough competition, if concentration continues to grow, and the number of rival players in the retail markets continues to fall, not only will this lead to higher prices as stated by the FNE, but also to consumer harm in a broader sense. Hence, all of the evidence added by the SERNAC constituted an example of the symptoms and problems faced by consumers in the retail and credit card markets, which were expected to grow if the operation were to go on.

- **The Decision**

The final decision was issued in January 2008. The Competition Tribunal prohibited the merger between these two leading retail groups. This was the first time that the TDLC had refused to approve a transaction submitted for consultation.

The TDLC found that the proposed merger would lead to a huge change in market structure, by creating a company that would be the dominant player in retailing, involved in virtually all segments and functions: department stores, home improvement stores, supermarkets, real estate and financing. It could have extended that power into other retail areas in the future, while the effects of integration could create barriers to entry by others. Tracing the history of retailing, the TDLC noted the advantages of an "integrated retail" operation, in functions such as inventory management, transport, refrigeration and others. The new entity would have greater access to capital and a larger base to cover fixed costs. It would have greater power to negotiate better terms from suppliers. It would have advantages in compiling information about consumers' consumption and credit. It could retain and expand its consumer client base through fidelity programs and non-bank consumption cards.

The TDLC devoted particular attention to the issuing of credit cards by retailing firms. It rejected evidence of increasing use of similar non-bank credit cards by other retailers. Rather, it contended that the brand value of the card issued by a dominant retailer would create a barrier to entry to the market.

The TDLC regarded as sources of market power the same commercial advantages that the merging parties regarded as sources of long run efficiencies. It rejected the parties' claim of pro-competitive efficiencies because they did not show how they would be passed on to consumers.

Finally in its Res. No. 24/2008,[22] the TDLC concluded that there was insufficient evidence to support the parties' efficiencies claims and that it would be impossible to mitigate the anticompetitive effects of the merger by imposing conditions.

4. Concluding remarks

The first point I would like to highlight as concluding remark is that although Competition and Consumer Protection policies are different –such a biunivocal relation between them is a fallacy easy to show-, there is always a strong relationship between them: ,

- In a non competitive market, consumers are not only going to be affected by higher prices, but also by the potential harm in several of their rights;
- Violations of consumers' rights are many times (not always!) indicative of behavioural or structural problems in competition;
- On the other hand we note that the proper functioning of markets benefits the society as a whole, including consumers. More competition will lead to more innovation, more supply, a wider spectrum of consumer choices, better products and a decrease in prices. The effects and benefits to the consumer may then be one –among others- of the objectives of free competition.

Finally, both the competition advocacy experience in the health sector and the presentations submitted by FNE and SERNAC in the merger case exposed today are good examples of how the coexistence of different agencies for Competition and Consumer Protection is not an obstacle for cooperation. By developing good communication practices, agencies can take advantage of their individual strengths and synergies.

[22] Res. No. 24/31 01 2008 on S.A.C.I Falabella and Distribuición y Servicio D&S S.A. Voluntary Consultation is available at www.tdlc.cl (only Spanish).