

Chile: Updates and Developments of Competition Policy and Law in 2010

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Outline

1. Chilean Competition System: A brief overview

- Updates in Chilean Competition Law in 2010

2. Developments in Enforcement of Chilean Law in 2010

- Important cases reviewed by the agency:
 - * Cases where the FNE pressed charges before the TDLC
 - * Non-contentious cases reviewed by the FNE
 - * Non-contentious cases initiated and still under revision by the FNE
- Summary of TDLC's main rulings in 2010

3. Some statistics

Chilean Competition System: A brief overview

Chilean Competition System

DL No 211 Competition Act

From 1973.

Mayor amendments 2003 (creating a dual system) and 2009 (regarding leniency provisions)

Aimed to “*promote and defend the **free competition***”. Protect competition at all stages of the economic activity

Entities targeted by law: Any private or public entity could be targeted by law, without exemptions or exclusions.

Scope “... any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects...” (Art.3)

Adversarial procedures: Cartels and unilateral abusive conducts
Non-adversarial procedures: Mergers

Dual system: Enforced by the **FNE**, an independent agency. Also **private enforcement**
 Decisions are made by the **TDLC**, a separated judicial body.

Decisions can be punitive (fines), restrictive or corrective.

TDLC’s decisions can be appealed to the **Supreme Court** by the parties.

- **Criminal sanction for cartel activities**

→ **Bill under discussion at the Legislative**

After the amendment of the D.L.N°211 in 2009 (that introduced a leniency program and gave stronger investigative powers to the FNE among other tools for combating cartels), the Chilean Congress started discussing a new bill that would establish criminal penalties, including imprisonment from 541 days to five years, against individuals involved in **collusive behaviour** (described in article 3(a) of DL 211) affecting essential economic activities.

Developments in Enforcement of Chilean Law in 2010

Important cases reviewed by the agency:

Cases where the FNE pressed charges before the TDLC

- ***FNE vs. Tecumseh do Brazil Ltda. and Whirpool S.A.***

In July 2010, charges were laid against an international cartel in the market for refrigerator compressors. According to the FNE's claim, both companies participated in the cartel since 2004. Being the whistleblower, Tecumseh was the first company to benefit from full immunity from fines under the Chilean leniency program.

This case constitutes therefore a milestone in Chile's cartel prosecution history and is still pending before the TDLC.

Important cases reviewed by the agency:

Cases where the FNE pressed charges before the TDLC

- **FNE vs. Santiago Chamber of Commerce (CCS)**

In June 2009 the FNE filed suit against the CCS* (a trade association), a privilege monopoly in the market of financial information on debtors, which had abused its dominant position against SIISA by means of imposing abusive conditions for renewal the contract of financial information provision, an essential input in the downstream market where SIISA participates. The CCS' abusive requirement to SIISA was imposed removing of all arbitration clauses among the parties as a condition for the contract renewal. It is worth mentioning that under the FNE request, in past May the TDLC imposed a preliminary injunction against the CCS.

The case is still pending before the TDLC

* The CCS undertakes the task of compiling information on unfunded checks, protested letters of exchange and promissory notes, and preparing and publishing the Commercial Information Bulletin or Commercial Bulletin (BIC) under a legal mandate established in 1928 by Supreme Decree 950 of the Ministry of Finance. The provision of loan data services is made by private firms which compile and warehouse the information obtained from the BIC and other public or private sources for offering different services to the public. These firms are: DATABUSINESS, SINACOFI, SIISA y DICOM-EQUIFAX.

Important cases reviewed by the agency:

Non-contentious cases reviewed by the FNE

- **ALVI's acquisition by D&S in the supermarket industry**

In September 2010, the FNE used a new power introduced by the 2009 amendments to D.L. N°211, initiating a non-adversarial proceeding before the TDLC for reviewing this prospective acquisition. This action aimed at reviewing the takeover of a wholesaling distributor in the supermarket industry (ALVI S.A.), which is currently expanding its activities in the retail segment, by one of the two leading supermarket chains (D&S, controlled by Walmart).

By means of this enforcement action, the FNE clearly signaled that merger control by the TDLC, although a notification process is not legally mandatory, can also be triggered by the FNE when necessary.

Important cases reviewed by the agency:

Non-contentious cases reviewed by the FNE in 2010

- **Chilevisión's acquisition by Time Warner**

In August 2010, Time Warner announced its acquisition agreement with Chilevisión, one of the leader broadcasters in the free-to-air television in Chile. According to Law No 19,733, on Freedom of Speech and Information Disclosure (Media Act), the FNE reviewed the case, assessing the effects of this acquisition in the contents broadcast distributing.

Following that, the FNE issued its opinion approving the transaction grounded in its technical report launched in September.

Important cases reviewed by the agency:

Non-contentious cases reviewed by the FNE in 2010

- **Terpel's acquisition by Copec in the gas-oil market**

In June 2010, this acquisition was submitted to the TDLC by Copec.

The operation is referred to the acquisition of the entire operations of the company Terpel in Chile and elsewhere in Latin America in the framework of the internationalization of Copec. In Chile, Copec acquires all of Terpel's operations; both the industrial ones and the 200 service stations, while stating that it would liquidate these. The effects on competition are that one market agent, the fourth largest, gets out, which strengthens the dominant agent's position in the distribution and sale of liquid fuels. This in turn raises the risk of collusive behaviour of the three remaining firms in the market.

The FNE is currently, assessing the acquisitions effects, prior to launching its technical report.

Important cases reviewed by the agency:

Non-contentious cases reviewed by the FNE in 2010

- **Allocation system of fishing rights**

In February 2010, a market player in the fishery industry submitted a non-adversarial procedure before the TDLC regarding, among others, the modification of the allocation system of fishing rights based on historical catch criteria, claiming market foreclosure effects. This consultation about allocation of fishing rights and fishery resources highlighted a sensitive issue for competition advocacy, due to the fact that the regulatory scheme based on “Maximum Catch Limit per Boat Owner” defined by law, will expire in 2012.*

* Extractive fishery is highly regulated in Chile, by the “General Act on Fisheries and Aquaculture” (Act 18.892 of 1989 and its amendments). From 2002 onwards a Maximum Catch Limit per Boat Owner system (LMCA) was introduced under Act 19.713 for industrial fishing only. This new system allocated individual fishing quotas based on a historical catch and investment allocation criterion. LMCA will expire in December 2012.

- *Allocation system of fishing rights (cont.)*

The FNE launched its technical report in June 2010, focusing in productive efficiency rather than on allocative efficiency. The grounds for this approach were that in this particular case, in the downstream market, the product was considered a commodity (fish flour) and thus no serious potential risks towards final consumers were identified. On the other hand, the FNE identified that the potential competition problems in the market for fishing quotas should be addressed with an efficient transferability system for the individual transferable quotas, rather than amending the initial allocation provisions

In its report to the TDLC the FNE recommended that *"in the context of a new fishing regulation, a proper secondary market for extractive fishing rights should be promoted, leading to an efficient allocation of extraction rights"*, provided that *"two essential assumptions come together to make this happen: that property rights are well defined and that transaction costs are not too high"*.

This case is still pending before the TDLC.

Important cases in 2010

Non-contentious cases initiated in 2010 but still under revision by the TDLC

- **LAN – TAM Merger (airline industry)**

In August 2010, LAN and TAM publically announced their intentions to combine their holdings under a single parent entity.

The combination would create a new Latin American airline group that would offer passenger and cargo service across the continent and around the world. In spite of the fact that the airlines had signed a non-binding memorandum of understanding regarding this operation, they have not yet brought a non-adversarial proceeding before the TDLC.

This year, the FNE submitted its technical report and started an engagement process to LAN, but currently, a third party, representing the interest of consumers submitted a consultation to the TDLC regarding this operation, which was admitted by the tribunal.

- **Nestlé – Soprole Merger (dairy industry)**

Submitted before the TDLC by the parties (both of them relevant players in the Chilean dairy industry) in November 2010.

Last March 4th, the FNE submitted to the TDLC its technical report assessing the acquisitions effects. In this report, the FNE's opinion was that the proposed joint-venture operation should create a huge risk for competition in several final markets (liquid milk, yogurth, chilled desserts, cream and '*manjar*' ('dulce de leche' or soft milk caramel) but also could affect the raw milk providers by creating the hugest buyer power in the country. According to the FNE position, there is no possible remedy to compensate such risks.

The TLDC should now assess not just the evidence of efficiencies provided by the consultants and the FNE' report but all the documents submitted by third parties prior to decide.

Some Statistics

Some 2010 Statistics

- 33 new investigations in different markets were initiated (44,2% of them by *ex officio* actuations)
- Total investigations carried out by the FNE: 104 investigations
- The FNE pressed charges before the TDLC in two cases
- Also, submitted 10 technical reports on competition issues to the TDLC,
 - 5 in consultations (non-contentious proceedings)
 - 5 in adversarial proceedings carried out by private enforcers before the TDLC
- Two non judicial settlements were reached by the FNE with the respective investigated parties, using new powers introduced by the last amendment of the DL211
- Two legal proceedings initiated by the FNE in previous years finalized with judicial settlements
- The TDLC ruled in 5 cases brought by the FNE, accepting the FNE's position in 2 cases, both in cartel in land transport sector)
- The Supreme Court accepted the FNE appeals in 3 cases, increasing fines ruled by the TDLC (and dismissed 1 appeal resource)

Creating a Competition Culture

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