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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Chile

-- Session I --

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-- Chile --

1. Chile's merger control regime

1.1 Legal framework

1. Chilean Competition Act ("the Act")[1] does not address mergers or acquisitions directly. However, several sections of the Act provide the substantive basis for merger control by both the Fiscalía Nacional Económica ("FNE" [2]) and the Competition Tribunal ("TDLC" [3]) under two alternative procedures.

2. The first procedure is voluntary and non-adversarial[4]. There is no general pre-merger notification of the proposed merger to the FNE[5]. But either the merging parties or the FNE may request the TDLC to review the transaction. Mergers that may raise antitrust concerns are increasingly being voluntarily submitted to the TDLC by the parties involved[6]. In this case, the FNE's role is to submit a report with its opinion. The report is not binding for the TDLC, but is considered an important antecedent. The transaction can be cleared, blocked or subject to conditions for approval. The merger cannot be completed before the approval. The TDLC's final decision may be challenged before the Supreme Court. The Court generally acts with deference, mainly reviewing the measures and conditions imposed by the TDLC.

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1 Decree Law N° 211/1973.

2 FNE stands for *Fiscalía Nacional Económica* (Competition Agency), an administrative and autonomous body in charge of competition law enforcement (investigation, and litigation) and competition advocacy. The FNE also acts as an independent technical body on competition law issues (drafting technical reports).

3 TDLC stands for *Tribunal de Defensa de la Libre Competencia*. TDLC is a judicial body with specific jurisdiction on competition law issues.

4 DL 211, articles 3, 18 N°2 and 31. The TDLC has issued instructions aimed at regulating the procedure in case of conflicting proceedings (adversarial and non-adversarial) regarding the same issue (*Auto Acordado N° 5/2004*) and about the information that parties must provided in these proceedings (*Auto Acordado N° 12/2009*).

5 Mandatory pre-merger notification to the competition institutions is required only for transactions involving television and radio. Banks and some other financial institutions must notify the Bank Superintendency before merging, and the Superintendency could ask the competition institutions to review a matter. Transactions in certain industries, such as media, banking, and electricity require approval by other governmental agencies. The TDLC has ordered mandatory pre-merger consultation for certain firms and markets, as remedies following its decisions about anticompetitive restraints (e.g. in the supermarket industry).

6 The voluntary procedure do not consider submission fee. Since 2004, the TDLC has decided 7 transactions voluntary submitted.

3. The preliminary review procedure has several advantages. If the transaction is approved or the merging parties comply with the conditions, there is no further liability with respect to the specific transaction. Also, after a non-adversarial proceeding has begun, the FNE or other third parties with legal standing to act in the case cannot initiate an adversarial procedure (e.g. seeking an injunction to suspend the transaction).

4. The second procedure is adversarial: under Art. 3 of the Act, a merger or acquisition (pending or completed) may be considered an infringement if it prevents, restricts or hinders "free competition" [7] or tends to produce such effects[8].

5. Arguably, the adversarial procedure is less likely to be used in the future, after an amendment to the Act allowed the FNE to request the TDLC the review of future mergers[9]. This faculty, however, largely depends on the FNE's available resources.

1.2 FNE's Guidelines for Horizontal Merger Review

6. The FNE has provided guidance on merger analysis by issuing its *Internal Guidelines for the Analysis of Horizontal Concentration Operations* (2006) ("Merger Guidelines")[10]. Although the Merger Guidelines is a non-binding document, the FNE conducts its analysis following the procedure established in them as much as possible.

7. The Merger Guidelines state that merger analysis aims at preventing increased concentration in the relevant market as result of the merger[11]. Among the anticompetitive risks identified in the guidelines are unilateral behaviour by the merging company and post-merger coordination in the market. The Merger Guidelines balance these and other risks against pro-competitive efficiencies. In this sense, the substantive test is shaped as a risk-effect test similar to the Substantial Lessing of Competition (SLC) test rather than a structural test such as the dominance test.

8. The Merger Guidelines presume that if the market after the merger has an HHI lower than 1000 points, the merger is unlikely to entail potential anticompetitive effects. Markets with HHI between 1000 and 1800 points are considered moderately concentrated. Finally, post-merger HHI higher than 1800 points are regarded as potentially harmful and require further review. In this case, the FNE opens a formal investigation and may decide to initiate a review process before the TDLC if the parties to the transaction do not bring the operation to the TDLC for review[12].

9. Entry barriers and entry conditions receive an in-depth treatment in the Guidelines. Entry barriers are defined as "*an impediment to competitor's entry or cost advantages that an incumbent has over a firm*

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7 "Free competition" is the wording used by Chilean law when referring to competition law.

8 Art. 3 of the Act: "*Whoever executes or enters into any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalized with the measures indicated in Article 26 hereof, notwithstanding any preventive, corrective or restrictive measures that could be ordered in each case, with regard to said acts, agreements or conventions".*

9 Before Act N° 20.361/2009, only the parties were able to request the review of future transactions. The FNE had only the power to request the review of completed transactions. The amendment aimed at broadening the FNE's powers.

10 Available at http://www.fne.gob.cl/?content=guia_concentracion

11 Merger Guidelines, p. 5.

12 Merger Guidelines, pp. 14-15

wishing to entry"[13]. Legal barriers and sunk costs are addressed in detail. The analysis of entry conditions aims to assess the actual likelihood, timeliness and sufficiency of entry. This means that not only entry barriers are assessed, but also any circumstance affecting entry conditions. For instance, the guidelines deal specifically with strategic behaviour[14].

10. The Merger Guidelines also deal with failing firm situations and the analysis of overseas mergers with impact on the Chilean market. Regarding the latter, the Merger Guidelines give *prima facie* lenient treatment to mergers between undertakings located abroad that affect the ownership structure of subsidiary companies in Chile. However, the FNE considers the potential risks for competition arising from such transaction. This provision is the only specific reference to cross-border effects of mergers[15] in Chilean legislation.

11. The Merger Guidelines represented an important first step in the standardization of competition rules for merger control to increase certainty and transparency. In the coming months the FNE aims to issue a new version, after a period of review initiated in 2009. The new draft may incorporate developments on cross-border mergers.

2. Merger cases with cross-border elements in Chile

12. The selection criterion of the following cases has been broad: all merger cases reviewed by the TDLC since 2004 where a relevant "cross-border element" is present have been included.

2.1 Cases reviewed by the TDLC

2.1.1 Telefónica Móviles takeover on BellSouth

13. In 2005, the TDLC reviewed a takeover by the Spanish company *Telefónica Móviles S.A.* ("TM") of the Chilean companies *BellSouth Comunicaciones S.A.* and *BellSouth Inversiones S.A.* (the latter, the parent and controller company of *BellSouth Chile S.A.*, an actor in the international and domestic long-distance telecommunications industry). The acquisition was part of a broader purchase agreement between TM and the U.S. company *BellSouth Corporation* ("BS") dated March 2004. Pursuant the agreement, BS agreed to sell to TM a number of business units operating in the telecommunication industry in several countries of Central and South America[16].

14. The transnational dimension of the transaction was not considered in the market definition. The market was locally defined as *the analogue and digital mobile services supplied under radio electric spectrum concessions within Chilean geographic borders*[17]. International interconnection or roaming services, as a broader element for market definition, was discarded in the TDLC's decision and considered not significant the calls traffic taken into account in the analysis

15. During the preparation of its report, the FNE requested the merging parties to inform on the stage of the merger control proceedings carried out in other jurisdictions, with the aim to avoid potential

13 Merger Guidelines p. 15.

14 Merger Guidelines p. 18

15 A cross-border merger is "a merger between organizations in different countries" (Longman Business English Dictionary: http://lexicon.ft.com/Term?term=cross_border-merger)

16 By the transaction TM agreed to acquire from BS directly or indirectly 100% of BS subsidiaries in Argentina, Chile, Peru, Venezuela, Colombia, Ecuador, Uruguay, Guatemala, Nicaragua and Panama.

17 TDLC, Decision N° 2/2005, p.59

conflicts. Merging parties reported that in Chile the proceedings were more advanced and formal. In the TDLC's decision none of the remedies imposed to the transaction was determined taking into account the eventual transnational dimension.

2.1.2 Acquisition of Iberoamerican Radio Chile by a Spanish media group

16. In 2007, the TDLC reviewed the acquisition of *Iberoamerican Radio Chile S.A.* by the Spanish media group Prisa (through its Chilean subsidiary *GLR Chile Ltda*). Prisa was also acquiring shares in several other radio broadcasting companies. The seller was *Claxson Chile S.A.*

17. Competition authorities were involved in the case because a specific legal provision[18] requires that changes in ownership or control of media businesses must be communicated to the TDLC within 30 days after agreement. In cases of media needing a "concession" to operate (i.e. a special permission from the authority), the legal provision ordered the parties to pre-notify the merger to the competition authorities and the TDLC to issue a report.[19]

18. The TDLC's review and report was aimed at assessing the impact of the transaction in the "media" market (*mercado informativo*).[20] In the actual case, the discussion was centred on whether the provision mandated the TDLC to protect the "public interest" (i.e. pluralism in the media) as well as competition, or whether the test was based purely on competitive risk or effects. In this regard, the TDLC held:

> *"...[C]onsidering the aims of the law, the interest at stake is that the social, cultural and political content communicated through a mass media firm could be verified, compared or contrasted with other media. In this sense, the provision does not require to vary the analysis from the one performed regarding any other merger under the competition law provisions, however, it orders for the analysis to take into account the additional consideration of the effects a merger in the media industry can have with respect to pluralism in the media and freedom of speech" (Gr. 8°).*

19. According to the TDLC, the legislator considered competition as merely *one* of the appropriate means to reach, indirectly, a reasonable degree of pluralism and information diversity (Gr. 9°, 80°).

20. The relevant product market was defined as "spaces in AM and FM radio stations for publicity dissemination" (Gr. 29°), and the relevant geographical market was defined as "all the national territory with some particular local considerations for certain zones" (Gr. 37°). The TDLC imposed remedies based on both competitive analysis (e.g., it reduced the length of non-compete covenants in order to increase market contestability (Gr. 66°)) and the protection of pluralism in media content (e.g., it ordered the divestiture of radio spectrum concessions in certain areas (Gr. 87°)).

21. An additional extra-competition argument was raised against the merger. According to independent radio broadcasters, the transaction violated a legal provision in media regulations[21] that ordered the verification of "conditions of reciprocity" before the approval of acquisitions of radio-spectrum

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18 Art. 38 Act. N° 19.733 ("media law").

19 This scheme was subsequently changed. Following a 2009 amendment to the media law, the FNE is the issuer of the report. If the report is not favorable, both the FNE's report and the investigation files are referred to the TDLC for merger review.

20 Following the 2009 amendment to the media law, the FNE's assessment only concerns the effects on competition.

21 Art. 9 Act N° 19.733.

concessions by legal entities with more than 10% of foreign capital – i.e., the provision ordered to check whether in the country where the investor is based, Chilean investors have the same rights and duties as foreign persons have in Chile. The TDLC dismissed the argument on the grounds of lack of competence, and referred the point to the telecommunications regulator (the competent body on this issue) (Grs. 88° - 91°).

22. The TDLC's approved the merger with mitigating remedies. The dissenting vote used mainly "non-competition" arguments (i.e. pluralism and ownership reciprocity) to block the merger. The Supreme Court upheld the TDLC's decision, indicating:

> *"[T]he imposed remedies seem appropriate and sufficient in order to protect competition hence ensuring media pluralism and by this mean freedom of speech and information diversity" (Gr. 6°).*

2.1.3 ING AFP Santa María and Bansander Merger

23. The merger between *ING AFP Santa María S.A.* and *Bansander AFP S.A.*, in 2007, was a consequence of a transnational agreement between the foreign companies *ING Insurance B.V.* ("ING"), from The Netherlands, and *Banco Santander Central Hispano S.A.* ("Santander"), from Spain. The parties agreed that Santander would sell to ING the entire capital of legal entities ING held in pension funds in Colombia, Uruguay, Mexico and Chile.

24. When the TDLC reviewed the transaction in 2008, regulations and the particularities of the private pension funds industry justified a very narrow and domestic definition of the market. Also, the frame agreement between the parent companies was only submitted to the TDLC a few days before the final hearing. Arguably for these reasons, no transnational consideration was part of the TDLC's reasoning.

2.2 Pending cases

25. The FNE is currently preparing reports on three mergers with significant cross-border elements. In two of them, the merging parties submitted a consultation to the TDLC for merger analysis under a non-adversarial procedure. Since the three cases have not yet been decided, only a general outline and some potential cross-border elements are described.

2.2.1 Chilean Copec's acquisition of Colombian Terpel

26. In June 2010, *Compañía de Petróleos de Chile Copec S.A.* ("Copec"), a leading Chilean gas distributor, notified the TDLC the acquisition of significant capital interests in the Colombian gas group *Organización Terpel S.A.* ("Terpel"). The transaction aimed at expanding the participation of the Chilean group in the Colombian market. According to Copec's submission, its rival in the Chilean gas distribution industry, Terpel Chile, subsidiary of Terpel, was not an essential part of the transaction.

27. From a structural point of view, the merger may be considered a cross-border merger. The merger would generate risks in the Chilean market. During certain period of time (i.e. the period in which Copec will indirectly have an interest in its rival in Chile) the transaction may be framed as a horizontal merger, which consequence would be to reduce the market structure from four to three players.

28. Copec proposed a structural remedy: the complete divestiture of assets in Terpel Chile. However, since the divestiture could take about two years, Copec also proposed a number of behavioural remedies ("Chinese walls") to regulate Terpel's corporate governance, prevent any influence of the Colombian parent company in Terpel Chile, and avoid any exchange of sensitive information between both firms.

29. If the remedies are accepted, monitoring them will represent a significant challenge for Chilean competition authorities, since most of the behavioural remedies must be abided by a Colombian legal

entity. It is likely there will be a need for cooperation with the Colombian competition authorities for the implementation and monitoring of such remedies.

2.2.2 Integration of Lan and Tam airlines

30. In August 2010, the FNE launched an investigation on the merger between two airlines: the Chilean Lan and the Brazilian Tam. Pursuant the agreement, Lan acquires 100% of Tam's shares, whose shareholders receive shares in Lan in exchange. In order to comply with Brazilian regulations regarding caps to foreign capital in airlines ownership, Lan acquire only a 20% of voting rights in Tam, leaving the remaining 80% in hands of current Tam's controllers. Once the merger is completed Lan will become "Latam". Both Lan and Tam's controllers will have sits in Latam's board. A shareholder agreement between Latam and Tam's controllers will regulate the corporate governance of the merging entity.

31. Being both public companies, the parties had already reported the planned transaction to the securities regulators in Chile, Brazil and U.S. before the FNE launched its investigation. The parties also submitted the transaction for merger review to the Brazilian competition authorities in October 2010.

32. In its public statement for opening the investigation[22], the FNE identified very high concentration levels in three air flight frequencies (which are the relevant market to consider in this industry): Santiago-Sao Paulo, Santiago-Rio de Janeiro and Santiago-Asunción. In the first two frequencies, Lan and Tam jointly serve over 90% of the traffic in passengers and freight.

33. This merger case is certainly a good case-study. Chilean and Brazilian authorities are facing a cross-border merger and undertaking parallel reviews regarding a unique transaction. In order to explore the possibility of coordination with the aim of implementing and monitoring potential remedies, the competition authorities of both countries have had informal exchanges under the frame of a bilateral cooperation agreement in force since 2008.

2.2.3 Nestlé and Fonterra Joint Venture

34. In November 2010 foreign groups Nestlé and Fonterra submitted to the TDLC a transaction aimed at implementing in Chile their 2002 "Alliance Agreement" (also known as "Dairy Partner America"), aimed at developing in America (excluding U.S. and Canada) an alliance for joint production and marketing of certain dairy products. The transaction consists of a Joint Venture implemented by the acquisition by Nestlé group of the 50% of one of Fonterra's subsidiaries, Soprole S.A., changing the name of the latter to Dairy Partner America Chile S.A.

35. According to the own submission of the merging entities, different markets in Chile may be affected by the transaction. Downstream, different dairy products were identified as separate markets. Parties argued that potential price increases on dairy products could be disciplined by imports. National industry exports (around 20% of the total product in the last 3 years) are also mentioned in the submission. However, so far competition authorities have not inquired into the potential risks for foreign markets. Improvements in consumer's health and increases in sales of dairy products of better quality are some of the benefits of the transaction claimed by the parties in addition to the synergies on productive efficiency.

36. Politicians and agricultural interest groups have raised concerns about the transaction's possible effects on the upstream market of primary product (particularly milk). The concerns include topics such as jobs cuts and sunk investments made by milk producers. In 2004 the TDLC issued a ruling in the milk market which the merging parties are now citing as an important protection of fair market conditions that

22 Available at: http://www.fne.gob.cl/?content=notes&db=jurispru&view=9a004077ac7ed70c8425733e005df334

complements the mitigation commitments they propose. The parties also suggest commitments regarding corporate governance and ring-fence conditions aimed at reducing the risks of coordination between parent companies in the markets involved. However, there are no explicit references to potential risks for competition in the foreign markets of Chilean exports, nor to the risks of coordination of the foreign parent companies abroad that might influence the behaviour of the Alliance Agreement in Chile.

37. The parties highlighted the Alliance Agreement has already been implemented in several jurisdictions such as Argentina, Brazil, Colombia, Venezuela and Ecuador. They also adjoined to their submission the approvals by the European Union's and Brazil's competition authorities. The FNE may request information from these and other competition authorities.

3. Cooperation among competition authorities, jurisdictional issues and remedies

3.1 Cooperation

38. Chile has signed several free trade agreements (FTAs) as part of its general trade policy. However, the country is not part of any regional organization with jurisdiction on competition matters. FTAs contain provisions regarding competition laws and policy of each party and a general frame for cooperation between national authorities. Chile is associated to the regional organization Mercosur[23] under an Economic Complementation Agreement which also contains provisions aimed at developing cooperation between national competition authorities. The competition provisions of the FTAs are not subject to the dispute resolution mechanisms of the treaties.

39. The FNE has signed several cooperation agreements and memorandums of understanding with foreign competition authorities[24]. The content of these documents reveal part of the efforts aimed at implementing the OECD and ICN recommendations for cooperation and coordination between authorities from different jurisdictions specially in merger review. These instruments have not been used in its whole dimension in merger analysis and it is hard to conclude that they have been used as an instrument to address cross-border issues that a merger under review may involve.

40. The FNE cannot report so far cases of conflict with foreign competition authorities regarding a merger review. Such a conflict would be solved by direct consultations between authorities. The fact that our legal framework and the assessments of the Chilean competition authorities do not consider other public interests different than competition in the markets -whether it comes from a domestic or foreign undertaking or interested party- should be considered by other jurisdictions to prevent any such conflict.

3.2 Jurisdictional issues

41. Chilean competition authorities may request information from outside their jurisdiction either through the merging parties or through cooperation with foreign competition authorities.

42. Actions or decisions of foreign competition authorities regarding cross-border mergers are certainly taken into account. However, their influence in national decisions may be limited, depending on the structure of the relevant market.

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23 Integrated by Argentina, Brazil, Paraguay and Uruguay.

24 These agreements are available at:http://www.fne.gob.cl/?content=notes&db=actualidad&view=2c41b664d320a0eb8425733f0054c768

43. Institutional arrangements ensure very high degrees of autonomy and independency of both the FNE and the TDLC. Competition authorities focus their actions and decisions on concerns about competition in markets and try to avoid integrating in their assessment other public interest considerations.

3.3 Remedies

44. The FNE cannot yet report examples of merger remedies with transnational dimensions or aimed at mitigating cross-border issues. Considering the reported cases, however, the FNE needs to take into account international recommended practices. They suggest working closely with the corresponding foreign authority from an early stage of the case, in order to exchange preliminary opinions (especially when the insights of the foreign competition authority may be relevant in the implementation and monitoring of the remedies).

4. Concluding remarks

45. Chilean competition authorities have increased their involvement in reviewing transactions with cross-border elements in the last few years. It is likely that this trend will continue in the next years. The roundtable presents a great opportunity for the FNE to analyse the topic ahead of the next review of its Merger Guidelines.