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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Contribution de Chile --

4-5 April 2017, Managua, Nicaragua

The attached document from Chile (FNE) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
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Session II: Merger Control in Latin America and the Caribbean – Recent Developments and Trends

-- CONTRIBUTION OF CHILE (FNE) --

1. Introduction: current legal framework

1. The legislation governing free competition makes no express reference to controlling transactions that result in concentrations. The FNE [*Fiscalía Nacional Económico*, Office of the National Economic Prosecutor, the competition authority] and the Tribunal for the Defence of Free Competition (TDLC) have pursued control over mergers by using nonbinding standards or "soft law", following the general provisions of the decree law that sets rules for the defence of free competition (DL 211). As the notification of concentration transactions to the competition authorities is optional, the merger control system in Chile can thereby be characterised as semi-voluntary.

2. The TDLC takes decisions on concentration transactions. This is an independent tribunal, separate from the FNE, which is specialised in free competition matters. It consists of five members: three lawyers and two economists. The decisions of the Tribunal may be appealed to the Supreme Court.

3. The parties to a merger, or third parties, may put the transaction directly to the TDLC for consultation. In these cases, the FNE must issue a formal, non-binding opinion on the transaction.

4. Alternatively, the FNE may launch an investigation at its own initiative, or after having been notified by the parties. The FNE's investigation may end with a (i) consultation before the TDLC, (ii) an out-of-court agreement between the FNE and the parties, which must then be approved by the TDLC, or (iii) authorisation to proceed with the transaction. If the parties decide to notify the transaction to the FNE voluntarily, that agency is required to issue an opinion within 60 days. This provision has been welcomed by private parties.

2. Merger control in practice

5. In the current legal context, the FNE has taken a proactive stance in detecting and analysing transactions that could potentially have adverse effects in Chile. The parties to mergers, and their legal advisors, have been paying increasing attention to the practices followed by the FNE, and as a result a growing number of transactions have been notified over the course of the years.

6. This practice has also been motivated by the use of a more efficient system of conciliation for the adoption of remedies, the purpose of which is to discourage anticompetitive conduct and avoid costly and time-consuming litigation. Under this alternative, the parties negotiate mitigation measures with the FNE and the resulting settlement is submitted to the TDLC for approval. Parties have tended to opt for this alternative, recognising that standard proceedings before the TDLC can run on for more than a year, on average, while it typically takes between four and six months to reach an out-of-court agreement with the FNE and have it approved by the TDLC.

7. Although the competition authorities in Chile have overcome many of the obstacles posed by the current legal framework, the high levels of market concentration in all productive sectors of the economy, together with the growing number of cases involving abuse and cartels, has shown the need for a comprehensive legal reform that will address a number of matters, including the introduction of a compulsory notification system. Thus, there is now a consensus on the need to reform our merger control system. The coexistence of different general procedures leads to inefficiencies and lack of certainty. In this context, the OECD report on merger control in Chile, published in 2014,¹ recommended among other things that legislation should include a special two-stage procedure for mergers that would involve a substantive test for merger review, and ensure that the process is effective.

8. The government took these recommendations on board and set out to replace the existing voluntary system by a compulsory system for concentration transactions in excess of certain thresholds. In 2015, a reform bill was presented to Congress. After lengthy negotiations in the Senate and the Chamber of Deputies, the bill was finally approved in July 2016. The FNE was present at the discussion of each article, requiring 23 visits to Congress devoted exclusively to discussion of the law. This commitment was rewarded with the granting of various powers and responsibilities, including measures to increase fines (so as to make them effectively dissuasive), to criminalise hard-core cartels, to authorise market studies, and to prohibit interlocking.

3. The new merger control law

9. In the area of merger control specifically, the legal reform establishes a system of compulsory notification for transactions that exceed the thresholds defined by the FNE. Once the transaction has been notified to the FNE, the agency will have 10 working days to review the background that has been provided and, if appropriate, to declare the notification complete. If this is the case, the investigation is formally triggered. The reform also provides for the possibility of a simplified notification mechanism, when certain criteria are met. The Ministry of Economy, Development and Tourism has regulated the said mechanism, making it applicable to transactions that present no overlap in any relevant market, or to those cases in which the overlap does not exceed certain market share thresholds².

¹ Available at: <http://www.oecd.org/daf/competition/chile-merger-control-2014.htm>.

² Available at: <http://www.participacionciudadana.economia.gob.cl/consultas-ciudadanas-virtuales/reglamento-que-detalla-los-antecedentes-que-deben-acompa%C3%B1arse-al>.

10. The new notification system consists of two phases. During Phase 1, the FNE has 30 days to approve the transaction, to approve it with conditions, or to decide to extend the investigation for 90 additional days, in which case Phase 2 begins. At the end of 90 days, the FNE may approve the transaction, approve it with conditions, or prohibit it. In this last case, the parties may appeal the decision to the TDLC.

11. The reform establishes, for the first time, a legal standard for objecting to mergers. Specifically, under the new law the FNE may approve the merger with remedies in Phase 1 or Phase II, or it may prohibit the transaction in Phase II if it finds that the transaction, were it to be conducted in the form proposed, could substantially reduce competition.

12. In addition, the new law establishes administrative penalties for breach of the duty to cooperate with the FNE during the investigation. In particular, it sets criminal penalties for concealing information or providing false information, and opens the door to imposing fines on persons who do not respond, or respond only partially, to requests for information, and on those who fail to appear before the FNE to give evidence.

13. The new system will be implemented as of the second half of 2017. The transition from a voluntary to a compulsory system has required a series of preparatory stages. The first was to define the thresholds, responsibility for which, according to DL 2011, falls to the FNE. In November 2016, the FNE published a report proposing the pertinent thresholds, based on quantitative exercises that relate levels of GDP to the notification thresholds applied by a number of countries with similar systems. This report was reviewed and commented on by various academic experts in industrial organisation.³

14. The FNE has also cooperated closely with the Ministry of Economy, Development and Tourism, which is responsible for issuing the regulation specifying the information that the FNE may request in the context of a notification. A draft of the regulation has also been submitted to public consultation.

15. Another preparatory step in this context includes amending the guidelines for analysing concentrations, publishing the jurisdictional guidelines, and publishing the guidelines for remedies, which will be submitted to public consultation in the coming months. In addition, internal structures and processes have been amended, and additional staff have been hired to reflect the increased workload.

³ The report and the comments are available at: <http://www.fne.gob.cl/2016/11/26/umbrales-operaciones-de-concentracion/>.