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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from Chile

-- Session IV --

This contribution is submitted jointly by the Fiscalía Nacional Económica (FNE) and the Servicio Nacional del Consumidor (SERNAC) under session IV of the Global Forum on Competition to be held on 21 and 22 February 2008.

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--Chile--

1. Introduction

1. In Chile there is increasing awareness on the complementarity between Competition and Consumer Protection policies and authorities. The notion that competitive markets are the best way to achieve consumer welfare impinges political discourses and policy proposals in the entire political spectrum, and the perception of poor competitive conditions in a particular market rapidly triggers actions and the mobilization of consumer associations and representatives, as well as both Competition and Consumer Protection authorities. But this is a prerequisite, since on the other hand, there are several market failures which go beyond market power or, more practically, beyond the usual reach of competition authorities. Those market failures, such as information asymmetries, transaction costs and externalities, may under some circumstances threaten consumers' rights, which enforcement is guaranteed by the consumer protection policy.

2. There are also several areas in which Competition and Consumer Protection 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) is essential for both areas at the same time. Moreover, the right working of the markets is paramount in both Competition and Consumer Protection policies, and for their common search of the public interest.

3. There are two separate agencies within the Chilean government one for each area: the FNE (Fiscalía Nacional Económica) enforcing Competition Law, and the SERNAC (Servicio Nacional del Consumidor) in charge of Consumer Protection.

2. Competition authorities

4. Besides the FNE, the Chilean System for the Defence of Free Competition currently operates on the basis of the decisions of a Competition Tribunal,¹ created in April 2004.

5. The system started in 1959, with the enactment of the Law Nr. 13.305. This miscellaneous statute, in one of its chapters, created the "Antimonopoly Commission", entitled with the powers to punish conducts and to control industrial and commercial activities. Later on, the FNE was created as a prosecution office, for the technical support of the mentioned Commission and for the investigations procedures aimed at the improving of the effectiveness of the law.

6. In 1973, the Decree Law Nr. 211 was enacted. This was the first regulating body exclusively related to competition law in Chile. Over the years, both the FNE and the Commissions (the decisions were divided into several commissions) developed and became well established. The Decree Law Nr. 211 was amended several times, but it was not until 2004 that the current decisional structure was set, with all of the decisions being concentrated into a single body, the already mentioned Competition Tribunal, which was placed as part of the judiciary system. According to this statute, the FNE deals with the promotion and defence of the free competition in the markets, by investigating, submitting complaints if necessary, providing with the asked reports to the Competition Tribunal and proposing the right amending or punishing measures for antitrust conducts.

¹ Its Spanish acronym is TDLC, which stands for "Tribunal de Defensa de la Libre Competencia" (Free Competition Defence Tribunal).

3. Consumer protection authorities

7. On the other hand, the SERNAC finds its origins in the years of the Great Depression, when, in order to solve the crisis, the Government decided to participate more on the economy and created the “General Commission for Prices and Supplies.” Its functions were to ensure provisions and reasonable prices. Later, its functions were limited to the monitoring and protection of consumers against commercial malpractices.

8. In year 1960, the DIRINCO was created. Its tasks were to monitor, receive complaints, investigate and sanction consumer rights violations. Its creation was consistent with the economical and political context existing at the time, in which the State had a large influence in the market.

9. Under the Dictatorship, its sanctioning and monitoring functions ceased due to the establishment of a liberal economical system.

10. The institution known as SERNAC was created by the Act Nr. 18.959, in 1990.

11. 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. Moreover, in the year 2004 this act was completed by act 19.995 by the sanction of spam, abusive clauses in adhesive contracts and the establishment of several rights.

4. Competition and Consumer protection interactions; a merger case example.

12. The FNE and the SERNAC are aware of the synergies that they can generate, and carry out in consequence several joint initiatives. In this written contribution we will give an example of the type of cooperation which can be carried out between both agencies, by presenting a briefing on the presentations made by both agencies before the Competition Tribunal, for the occasion of the consultation on the merger between Falabella and D&S, two of the mayor retail/credit companies in Chile.

13. On May 17th, 2007, the alliance between the retail firms Falabella and D&S was agreed as a share exchange, granting the first a 77% of the new society’s property and a 23% to the latter. Thus, it was created a firm which joint sales amounted for approximately US\$ 8,000,000,000 per year, which sets it in the second place among the Chilean firms which shares are traded in the local stock-market. At regional level, the merged retailer becomes the second largest of Latin America, only after Wal-Mart in Mexico.

14. In order to be executed, this merge needs the approval of the Chilean Competition Tribunal, which asked for the FNE’s opinion. During the process, the SERNAC also submitted its own. The contents and purposes of both presentations are briefed next.²

4.1 *The FNE presentation*

15. The FNE focused its presentation on the definition of the relevant markets, its characteristics and the risks for free competition introduced by the eventual merge, concluding with the suggestion of remedies for decreasing such risks in case of an approval of the operation.

² Although the final decision is not yet issued at the time of the elaboration of this document, we shall describe the participation and approaches of the competition and consumer protection agencies, and the coordination which took place between them, towards the submission of their opinions and independently from what could be the final unknown decision of the Tribunal.

16. Consequently, the competition agency stated that the operation was tending to restrain competition in supermarkets and retail credit cards, 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 characteristics of each of the affected markets.

17. In the case of supermarkets, the FNE pointed out that there exist high market concentration and barriers to entry (sunk costs, scale economies, know-how, strategic behaviour, among others) which forces potential competitors to use specific vehicles of entry -the buying of 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, econometric evidence on showing that higher concentration would lead to higher prices for consumers.

18. 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 minor prices or the imposition of worse trading conditions to providers, affecting the investment and output levels. On the other hand, it would allow abuses against consumers through the increase of final prices of products or the decrease of quality, services or innovation.

19. In the market of retail-credit cards, the FNE asserted that there are serious problems of transparency and exclusion that could be augmented with the merger and result in abuses against card holders.

20. In order to contend these risks, the FNE proposed, among other measures, the conditioning of the merger to the sale of Falabella's supermarkets to a third party likely to become a third strong competitor.

21. It also suggested the prohibition of several conducts, such as the unilateral refusal, without a justified reason, of third party credit cards or alternative means of payment to be used in the stores of the new society, or the marketing of certain products or services in more favourable terms because of the use of related credit cards. All of these measures aim to protect free competition as well as consumers.

4.2 The SERNAC presentation

22. The presentation of the Chilean Consumer Protection Agency, the SERNAC, was focused on the effects that the merge would have on consumers, should the operation be approved by the Tribunal. It presented an analysis of consumer's opinion on the retail and credit markets, while quoting evidence on the infringements on both markets that are reported to them, and predicting an increase in the number of complaints if the scenario turns to be of even higher concentration. This section summarises the main ideas presented by this agency in this case.

23. The presentation began with an overview of *consumer opinions* on the retail market, based on surveys prepared by them on a regular basis and on internal statistics on the number and characteristics of complaints. They reflected that, for instance, (1) only a 25% of the surveyed people believed that companies were interested in solving their problems; (2) 1 out of 5 consumers claimed that Departmental Stores had made charges to their bills without their consent; (3) 90% of consumers argued that Department Stores' bills could not be understood; (4) 23% of the complaints submitted to the SERNAC were related to Department Stores and supermarkets, and that in case the merger was approved, they estimated that the new Company would be the second most claimed company in Chile; (5) that the information given by retail companies about the credit conditions offered by their own cards is scarce and vague; (6) that there are also huge differences between the interests charged by different competitors. Furthermore, there are major differences between the interest rates charged by the same department stores to different customers.

24. SERNAC explained that the information given by Department Stores and Supermarkets about their credit conditions was extremely complicated. For instance, charges are divided into different items (i.e. interest rate, commissions, etc) and these items are expressed in different formats (for instance percentages, indexed units, etc).

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

26. 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.

27. SERNAC also claimed against several abusive clauses included in the credit card contracts of D&S. For instance, 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 clauses were ruled out by the Chilean Consumer Protection Act.

28. In SERNAC's opinion, all of these consumer claims and statistics could have an impact on Competition in 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 this will 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 a sample and example of the symptoms and current problems faced by consumers in the retail and credit card markets, which are projected to grow if the operation goes on.

5. Conclusion

29. The presentations submitted by the FNE and the SERNAC in a merger case are good examples of how the existence 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 yet develop synergies.

30. This experience is also an example of the strong relationship between Competition and Consumer Protection. In a non competitive market, consumers are not only going to be affected by higher prices, but also because of potential harms in several of their rights that may be affected. As we suggested while introducing this document, violations of consumers' rights are many times indicative of behavioural or structural problems in competition.

APPENDIX: QUESTIONS AND ANSWERS

1. How does Consumer Policy interact with Competition Policy in your Country, if at all? Can you give examples where they have conflicted? Where have they been complementary?

There are separate agencies in Chile for Consumer Protection and Competition policy. However, both agencies are aware of the synergies that they can generate when they act together. For instance, they have both recently participated in the Competition Tribunal consultation on the merger operation between D&S and Falabella (the example given above) and in the legal actions established recently against a credit bureau.

2. What do you feel are the benefits and drawbacks to your own country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?

The main benefit is the institutional autonomy. In Chile, the choice of "separate agencies" allows each agency to define their own strategy, based on their own strengths and faculties. No decision is subordinated to the interest or priority of the other agency. Importantly, as each institution develops its own reputation, in which their autonomy plays a role, coordination proves to have an additional impact. The drawback is the natural difficulty and cost of coordination, and to identify areas of synergies on a regular basis.

3. Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was the supply enforced? What was the effect in competition, if any?

There are minimum information requirements in products and services such as credit, safety instructions, among others. The Consumer Protection Act mandates that all information and advertising must be clear and understandable and has to be provided before the transaction

4. Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

Areas in which a better convergence between competition and consumer policies would be beneficial are: credit, retail, basic services (natural monopolies) and telecommunications.

5. Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring and adequate protection of consumers around the globe?

Although no decision has been made by the Chilean authorities on this matter, at this stage, it is considerable that in areas within the software industry, when highly concentrated (if not monopolistic), several consumer protection issues arise (for instance security breaches). The fact that this is an extremely technical product also raises several information issues linked to both competition and consumer protection matters.

Another instance of cooperation could be ICPEN (International Consumer Protection and Enforcement Network). This International Organization carries out several actions against frauds on the internet that might be useful in order to maintain a healthy environment for Competition.