



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ROUNDTABLE ON MONOPSONY AND BUYER POWER

-- Note by Chile --

This contribution is submitted by Chile to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 21-23 October 2008.

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1. Competition law in Chile underwent a major modification during 2004 as its Competition Act (DL 211) was subject to one of its most important amendments.¹ Until then the decisional powers to enforce the Competition Act fell upon different administrative² and quasi-judicial³ bodies. The amendments established a sole competition tribunal, the *Tribunal de Defensa de la Libre Competencia* (TDLC), a highly specialised body, judiciary in nature, and integrated by five expert judges -competition lawyers and economists-, totally independent from the executive. The work of the new tribunal has featured high technical standards, while shortening the length of procedures, also enhancing transparency and independency.

2. It is worth mentioning that before the 2004 amendments of the DL 211, unfair competition cases belonged to the jurisdiction of the competition authorities. After the 2004 reforms, unfair competition cases are no longer under the TDLC's jurisdiction,⁴ unless the FNE decides to bring a claim, after private redress procedures before civil courts are terminated, and previous consideration to the seriousness of the conduct is given by the agency.⁵

3. The abovementioned reforms on unfair competition may help to understand the transition in the competition authorities' approach to buying market power, from a more legal and pro-competitor view (economic dependence) towards an economic oriented and pro-competition conception, based on monopsony theory and welfare effects.

4. Indeed, different forms of exercising buyer power have been assessed in a number of decisions by the competition tribunal. The main decisions thoroughly addressing buying power have referred to supermarkets chains or large retailers, and are related either to abuse of dominance or mergers which could create the risk of abuse. These cases will be analysed below.⁶

1. Supermarket abuse of dominant position case I (2004)⁷

5. In mid 2003 *Cencosud*, the second largest supermarket chain, acquired Santa Isabel, another relevant agent in the supermarket business. After the acquisition, *Cencosud* confirmed that Santa Isabel had a large debt with most of its suppliers, and sent a letter to all of them requesting a financial contribution. Upon receiving the contribution Santa Isabel would pay off its debt and begin in a financially sound position its market performance as part of the *Cencosud* group.

¹ Law 19.911 of 2004.

² The "*Comisiones Preventivas*" were administrative bodies –a central commission and several regional commissions- in charge of the issuance of preventive injunctions and recommendations.

³ The "*Comisión Resolutiva*" was a quasi-judicial body that decided on antitrust matters with adjudicative powers.

⁴ Since Law 20.069 on Unfair Competition Practices was enacted on February 2007 unfair competition is under civil jurisdiction for private parties seeking damage compensation.

⁵ In the wording of art. 3 c) of DL 211, *competition practices aimed at attaining, increasing or maintaining a dominant position*.

⁶ There have been other cases, which in theory involved more pure forms of monopsonies or oligopsonies, but were dismissed on considerations that did not include a thorough analysis of buying power: Decision N°7/2004 of May,8, 2004 involved an alleged buying cartel in an oligopsonic milk market which was accused of geographic market allocation and price collusion in several regions of the country. The accusations were dismissed; and Decision N° 27/2005 of August 23, 2005, in which IANSA, Chile's biggest buyer of sugar beet and largest sugar producer, was accused by a suppliers' association of abuse in order to maintain its dominance over the sugar market.

⁷ Resolution N° 720 of the *Comisión Resolutiva* of January 23, 2004.

6. This financial contribution was established as a discount of 5% on the outstanding debt of Santa Isabel with each of the involved suppliers. The letter was signed by the company's CEO, emphasising that after the acquisition *Cencosud* would control 20% of the supermarket business in the country, thus highlighting its share and market power.

7. The National Economic Prosecutor pressed charges against Santa Isabel -now controlled by *Cencosud*- for abusing its dominant position in regard to its suppliers based upon its request to fulfil the debt discount.

8. Although accounting for *Cencosud's* market share (20%), the *Comisión Resolutiva* (the predecessor of the TDLC) held that such market participation was not enough to release *Cencosud* of its responsibility. Considering the particularity and importance of supermarket distribution for suppliers, the Commission stated that Santa Isabel indeed held and could exercise market power. Proof of this was the fact that Santa Isabel was bold enough to make its request, quite certain that the suppliers would bend to it, regardless that its market share (considering *Cencosud's* overall participation as a holding) was not the highest one. In so doing the firm was abusing its market power as the second most important supermarket group. The Commission found Santa Isabel guilty of abuse and was fined.

9. In this case the buying power was defined on the grounds of the suppliers' economic dependence on the supermarket distribution channel, and not upon the effective existence of monopsony, oligopsony, or bargaining power.

2. Supermarket abuse of dominant position case II (2004)⁸

10. The association of large suppliers (AGIP) requested the TDLC to sanction the two largest domestic supermarket chains (*Cencosud* and D&S) for abusing their dominant position through a series of conducts, such as charging suppliers the costs of retail sales discounts or unilaterally changing contract terms.

11. The TDLC's analysis of buying power stated that in this case the strong dependence that a large number of suppliers had upon the distribution channel of supermarkets could constitute market power. As such, the TDLC considered that buying power was determined by the economic dependence of suppliers *vis-à-vis* the distribution channels controlled by the leading supermarkets, and ordered some injunctive measures.

12. In the same decision the TDLC dismissed the supermarkets' allegations that they were exercising their market power only to countervail the dominant position held by big suppliers, many of which were large transnational companies.

13. The TDLC also stated that using market power to reduce payments to suppliers has the same effects as using a dominant position to increase sale prices. As such, the abusive use of a dominant position (on the buying side) can result in the variation of prices, reducing quantity produced and society's welfare as a whole.

14. Given that a more economic approach was followed in this case, economic dependence was a determinant factor.

⁸ Decision N°9 issued by the TDLC in October 5, 2004,.

3. Supermarket concentration case (2008)⁹

15. By mid 2006 the FNE requested the TDLC an injunction to freeze the buying spree in which the two main supermarkets chains had engaged. According to the FNE, by means of organic growth but mainly through an aggressive strategy of acquiring its competitors, D&S and *Cencosud* were reducing the number of players in the market, eliminating competition and trying to generate barriers to entry in the supermarket downstream relevant markets. All this affected the relationships between supermarkets and their trading partners, both 'up-stream' (with suppliers) as well as 'down-stream' (with customers), generating the risk of abuse of their dominant position in both of them.

16. The FNE position highlighted that the assessment of supermarkets' upstream market power depends critically on the definition of downstream relevant markets, showing empirically this intrinsic relationship between downstream dominance over a well-defined relevant market and the risks of abuse of buying power. The FNE also emphasised that these firms had been involved in former abuses of dominance and had been sanctioned for it. Not just suppliers but consumers and competitors would also be at risk.

17. The TDLC analysed the relationship between the supermarkets and the suppliers for a proper assessment of the risk of possible abusive behaviours by the supermarkets.

18. In this case the TDCL analysis of the buying power steers slightly away from the economic dependence analysis which had predominated so far. Here, the buying power is associated with the creation of entry barriers, the increased integration of the retail sector and the importance of the supermarkets as a distribution channel. According to the TDLC, as long as supermarkets buy their competitors, the importance of the distribution channel increases and so do entry barriers to the market. But the decision also states that this conduct (acquiring competitors) may have negative effects for competition only in situations where such strategy has a non-transitory effect on the aggregate supply, be it through the reduction of total output, the increase in prices or the reduction of investments in innovation and development of new products.

19. This last condition is new in the analysis of buying power performed by the TDLC and sets a stricter economic approach to that conduct.

20. Before the matter was resolved by the TDLC, the FNE reached a settlement with D&S, one of the two defendants. The final TDLC's decision ordered the other defendant, *Cencosud*, to consult the TDLC further supermarket acquisitions and did not approve the agency's request to establish certain rules for the relations between supermarkets and its suppliers. *Cencosud* appealed the decision, but the Supreme Court, acting *ex officio*, called upon the parties to reach a settlement in the same direction as was signed with D&S. An agreement was reached before the matter was finally decided.

21. The settlements were similar in nature and, as explained, had the main purpose of establishing standardised supply conditions governing the relationship between leading supermarket chains and suppliers and, ultimately, to prevent any possible abuse of the dominant position the supermarkets held. One aspect worth noting is that in both settlements the suppliers were categorised as large scale suppliers and small scale suppliers (SMEs). Small scale suppliers have a series of additional safeguards vis-à-vis regular suppliers, since it was considered as unlikely that negotiations between supermarkets and regular suppliers would lead to abusive or inefficient outcomes.

⁹ Decision N°65/2008 issued by the TDLC (May 8, 2008).

4. Joint Abuse of Market Power and Collusion Case (2008)¹⁰

22. This is a case which was recently reviewed by the Supreme Court and is one of the most important competition cases in the last years. On April 2006 *Banco de Chile*, one of Chile's largest banks, was ready to hold a "technological fair" for its accountholders in which electronic and TV devices would be sold with the option of acquiring them with the Bank's credit cards and special credit conditions. Given that one of the main goods for sale were plasma TV sets, the case came to be informally known as "The Plasma War". For those purposes the bank invited the most important suppliers of electric, electronic and computer devices to offer their products and signed a contract with most of them. Since *Banco de Chile* was a leading Bank this occasion was also favourable for different brands to show their best products.

23. *Falabella* and *Paris*, two of the largest retailers in the country, considered that the offer by different suppliers in this technological fair was a menace to their own business and demanded them not to participate threatening to boycott their products in the retailing business should they not comply.

24. As a result of the serious pressures from the two retail companies, the technological fair, which had already been publicised in newspapers and among the accountholders of the bank, suddenly failed. Most of the suppliers called the bank withdrawing their attendance. The FNE and consecutively the bank filed charges against *Falabella* and *Paris* for abusing their dominant position and colluding.

25. In analysing *Falabella* and *Paris*' market power, the TDLC concluded that the sole fact of these two companies achieving their goal (the cancellation of the technological fair) was sufficient proof that, at least at that time and jointly, both firms had market power which they could abuse of. It held, too, that market power was precisely related to the capacity of the market agent to influence the prices or decisions of another agent, which, had it not been for that market power, would have acted independently.

26. The Supreme Court upheld the TDLC's decision and supported the arguments stated when determining buying power. The approval of the decision was historical because until then the highest Court had overturned a number of TDLC' decisions regarding collusion.

5. Retail Merger Case (2008)¹¹

27. In mid 2007 one of the largest supermarket chains (D&S) and one of the leading retailers (*Falabella*) disclosed their intention of engaging in a merger and initiated a requested approval before the TDLC.¹² The TDLC issued its decision early this year, which has come to be the most important antitrust case since the creation of the competition tribunal. Considering that both companies participated in different markets, such as supermarkets, large retail distribution, credit cards, real estate and insurance, the case was decided upon the concept of 'integrated retail'. After a long and thorough analysis the TDLC did not approve the merger, arguing mainly that it would mean a significant risk of future abusive conducts.

28. The analysis of market power and specifically both companies' buying power confirmed past decisions of the TDLC. Even though both firms' market shares in supermarkets and large retail distribution was not significantly high, the TDLC confirmed its position that these distribution channels

¹⁰ Decision N° 63/2008 issued by the TDLC (April 10, 2008).

¹¹ Decision N°24/2008, issued by the TDLC on January 31, 2008.

¹² The Competition Act does not make pre-merger notifications mandatory, and so mergers may be reviewed by the TDLC on the grounds that mergers may prevent, restrain or obstruct free competition as established in article 3 of DL 211. Private parties may also initiate a non-adversarial procedure as regulated in articles 18 N°2 and 31 of the DL 211, in order to obtain a decision of the TDLC for the approval a merger.

had very special characteristics which could not be replicated, and barriers to entry as well. These characteristics made them irreplaceable and very important for suppliers.¹³

29. The decision also confirms TDLC's former considerations, in the sense that large retailers have enough market power to negotiate in equal conditions with these companies, while acknowledging that medium and small suppliers do not. The TDLC concludes that this operation would inevitably mean that, since the merged company would increase its market power, more and more suppliers would not have enough power to negotiate in equal conditions, and that would allow the merged company to abuse its new dominant position.

6. Final remarks

30. It can be noted from cases above that most often the analysis of buying power has not focused in the concepts of monopsony, oligopsony, countervailing power or bargaining power, but rather on economic dependence.

31. Nevertheless, in the last few years the TDLC seems to be foregoing the bare economic dependence analysis on behalf of a more complex one, including the careful examination of relevant markets involved and of entry barriers and circumstances both up and down stream.

32. The abuse of dominant position underlying buying power is reflected in asymmetrical marketing and commercial uses which, by instance, introduce exclusion clauses, unilateral changes to contracts or charges (or discounts to agreed-upon prices) for nonexistent services. Because of this, every asymmetrical bargain following a buying power abuse brings in inefficiencies and harms social welfare.

33. In order to preclude these inefficiencies the FNE has performed not only judiciary actions before the TDLC but also has encouraged good practices in the relationship between the large purchasing powers and their providers.

¹³ The same considerations had founded the TDLC's analysis regarding another retailer: big-retail-pharmaceutical chains in an abuse of dominance case in which the retailer had replicated a supplier's product, inducing consumers to confusion. TDLC's Decision N°24/2005 of July 28, 2005