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Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN MERGER CASES

-- Chile --

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The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on the 28 June 2011.

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1. Chile's Merger Control Regime: The Legal framework

1. Chilean Competition Act[1] ("the Act") does not address mergers or acquisitions directly. However, several sections of the Act provide the substantive basis for merger control by the Competition Tribunal ("TDLC")[2].

2. The procedure for merger review is voluntary and non-adversarial, most of the times[3]. Merging parties or the FNE may request the review by the TDLC. There is no general pre-merger notification and review requirement[4]. However, mergers that may raise antitrust concerns are increasingly being voluntarily submitted to the TDLC by the parties involved[5]. In this case, the Competition Agency ("FNE"[6]) submits a report with its opinion after analysing the operation at issue. The report is not binding for the TDLC. The TDLC may decide to clear the transaction, block it or imposing conditions for the approval. The merger cannot be completed until the TDLC completely clears the merger. The TDLC's final decision issued in a non-adversarial proceeding may be challenged before the Supreme Court. The Court mainly reviews the measures and conditions imposed by the TDLC, generally acting with deference.

3. This review procedure has several advantages. If the transaction is approved and the merging parties comply with the conditions the TDLC sets, there is no further liability in respect to the specific transaction. Also, after a non-adversarial proceeding begins, an adversarial procedure (e.g. seeking an injunction to suspend the transaction) may not be initiated by the FNE, or third legitimated parties.

4. Due to an amendment to the Competition Act in 2009 the FNE is allowed to request the TDLC the review future mergers[7].

5. What follows elaborates on the described non-adversarial procedure only.

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1 Decree Law N° 211/1973.

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

3 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*).

4 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 for regulatory purposes. 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).

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

6 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).

7 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.

2. Remedies Design

6. As was said above, non-adversarial procedure for merger review is a voluntary process before the TDLC, and it is a 1-phase process. Very often, in their submission, interested parties themselves include a proposal of mitigation remedies. Alternatively, the FNE when issuing its report proposes remedies. Whether proposed by the FNE, the interested parties or even by a third party, the TDLC has the power to impose the remedies it deem appropriate.

7. According to the TDLC's Internal Regulation N°12, which regulates the information required in order to initiate a merger review proceeding, if merging parties propose remedies, their sufficiency and opportunity should be justified and the way the remedies will be implemented should be clearly specified.

8. During the non-adversarial proceeding for merger review, third parties, government agencies, and anybody who has interest on the subject can comment on the proposed merger itself, as well as on proposed remedies –and they can even propose new remedies. However, once the TDLC has issued its decision, challenging it before the Supreme Court is the only way of changing remedies.

9. So far, the TDLC has used both structural and behavioral remedies in horizontal mergers. No vertical mergers have been submitted to review since the establishment of the TDLC.

10. If merger's effects on competition can be adjusted via structural remedies, in a way that facilitates competition in the relevant market, then structural remedies will be considered –and eventually used– as well as behavioral remedies.

11. For the TDLC, there are two kind of structural remedies:

1. Forward-looking structural remedies: such as a prohibition to participate in a related market, which potentially could compete with the market in which the merger takes place –e.g., prohibition to a cable TV merged company to participate in the property of satellite TV companies.

2. Divestitures: this remedy has been used in three cases so far; the first time, it was imposed in the merger of 2 (out of 4) mobile telecommunications companies, where they were forced to sell part of the electromagnetic spectrum that had been assigned to them separately; the second time, it was imposed in the context of a takeover of a radio broadcasting chain, ordering divestiture of broadcasting licenses in several cities; the third time it was imposed in the context of the stocks acquisition of a foreign parent company of a competitor by a gas stations chain in Chile, where a divestiture of all businesses in Chile of the target company was ordered.

12. The TDLC has never required divestiture of a stand-alone business, but only of specific assets. This took place in the three cases mentioned above.

13. Similarly, for the TDLC, there are two kind of behavioral remedies:

1. General remedies: such as prohibition of bundling products and prohibition of price discrimination.

2. Specific remedies: such as a prohibition to increase prices and/or decrease quality of products for a certain period of time.

14. The TDLC does not always rely on behavioral remedies, since it considers that monitoring compliance with behavioral remedies is much harder than monitoring compliance with structural remedies.

Behavioral remedies have been used only when the TDLC has expected that potential anticompetitive effects will be overcome in a short term.

15. For instance, when the merger between two cable TV, telephonic service and internet providers was analyzed, the TDLC imposed a behavioral remedy, consisting in a prohibition to increase prices and/or reduce quality, for 3 years. This was done because the TDLC expected new competition in these markets, coming from new ways of providing these services –such as satellite TV, IP telephony, among others.

16. Behavioral remedies used by the TDLC have included transparency requirements, uniform prices, prohibition of bundling, and other non-discrimination requirements, limitations to further concentration of assets, obligation to notify new mergers before the TDLC for review, and facilitating switch for consumers who wish to stop contracting with the merged company (particularly, in a merger of two cell phone companies, the merger company had to implement an automatic message informing the new phone number of users who wished to change companies). Usually, whenever a merger has potential anticompetitive risks, behavioral measures are used in order to mitigate them.

3. Monitoring and enforcement

17. In the above mentioned cases where divestiture was ordered, in order to ensure expeditious and successful divestiture, the TDLC gave merging parties a timeframe of 18 months for performing it in the first and third cases, and 6 months for the second. For the first and second cases, the assets were sold within that timeframe. In the other case we are still within the timeframe. If parties do not perform the divestiture within the timeframe and merger closes, parties would commit an infringement that may be punished by the TDLC.

18. The FNE is the body in charge of monitoring compliance of ordered remedies and may initiate proceedings in case of infringement.