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ROUNDTABLE ON IMPACT EVALUATION OF MERGER DECISIONS

-- Note by the Delegation of Chile --

This note is submitted by the delegation of Chile to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 June 2011.

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-- Note by Chile --

1. Introduction

1. Evaluation of how competition authorities' decisions impact on welfare is a relatively new issue for competition authorities in Chile. The topic is neither in the agenda of relevant stakeholders nor of think tanks on competition policy and law in the country.

2. The FNE¹ is a relatively small competition agency, with budgetary restrictions which have to be solved by strict prioritization. However, it understands that evaluating competition authorities' interventions is an increasingly important task, particularly so in a society claiming for the legitimacy of their governmental bodies.

3. With this in mind, two years ago, the Research Division at the FNE participated in a draft project with the support of the IDRC² aiming to develop a case-study model in order to identify whether competition authorities' interventions represent an effective contribution to the total welfare and whether society's gains from these interventions are greater than their costs.

4. The purpose of this contribution is to share with the rest of the delegations the experience of choosing a methodology and designing the aforementioned research. Unfortunately, due to FNE's priorities we have not been able to implement and conduct the study so far, so what follows is just limited to methodological and design aspects of the project.

2. Choosing an industry to consider for the study: Methodological aspects

2.1 *The industry*

5. For the draft project, in the design of which the FNE participated, the Supermarket Industry and Competition Authorities' intervention therein was selected as a case study. The chosen industry seemed relevant considering the industry's evolution towards concentration and consolidation in the last years, the availability of information –in part, precisely because of these interventions– and the potential impacts on consumers and on industry suppliers as relevant stakeholders³.

¹ FNE stands for Fiscalía Nacional Económica, the Chilean Competition Agency.

² IDRC stands for International Development Research Center.

³ In fact, several additional changes took place in the industry in the following years including the consolidation of a third actor by means of acquisitions of regional chains, the entry of a fourth actor into relevant segments, and a major change in the ownership and control of the principal actor due to an acquisition by Wal-Mart. Furthermore, a merger between the larger actors in the retail industry and supermarkets had been blocked by the TDLC (TDLC, Decision N° 24, January 31st, 2008).

6. One concern these interventions had in mind was the consolidation of purchasing power that had translated into abusive relations against supermarkets' suppliers, in particular, small and medium-sized ones, which were part of the supply chain. Given the competition risks associated with these actions and their potential negative consequences on consumers' and relevant suppliers' welfare, in 2006 the FNE initiated a legal action against the industry's leading actors who had initiated a serial acquisitions of regional supermarket chains. Shortly after initiation, the case was settled with one of the defendants. A settlement with the other one took place much later, after hearings before the Supreme Court. The settlement set up a self-regulation structure (mainly general and fair contractual terms for small and medium sized suppliers) for each of the defendant companies. The self-regulation framework aimed at preventing purchasing power abuses⁴.

2.2 Competition authorities' intervention to be evaluated

7. The concrete interventions of competition authorities had led to the following outcomes: (i) Further acquisitions by the defendants should be submitted to notification and review before competition authorities. The hypothesis was that this scheme would turn further acquisitions more costly and hence would reduced incentives for further acquisitions. (ii) A contractual frame with general terms for exchanges between small and medium-sized suppliers and big retailers should be put in place. The hypothesis here was that such a frame would introduce fairness in the exchanges between big retailers and their small and medium-sized suppliers, which expose the latter to less risks of abuse.

2.3 Methodological aspects

8. Once those outcomes were identified (reduced incentives for further acquisitions and fairness in exchanges between parties), the challenge was to construct reliable indicators using data already available or data not difficult to access.

9. At the time of the draft, there was not enough data for evaluating the impact on retail prices downstream. This was a significant downside of the project. Industry members have claimed reduction in retail prices in time. However, an interesting hypothesis to test would have been whether these retail prices were actual efficiency gains or there were just a small proportion of surpluses taken from suppliers transferred to consumers, and hence an increase in supermarket's margin.

10. Thus, quantitative as well as qualitative instruments would be required in order to test the hypotheses. Some of the indicators considered were: the number of new acquisitions in the following months by the same defendants; the number of acquisitions by other actors, not subject to these regulations⁵; satisfaction tests and interviews to relevant stakeholders such as small and medium-sized suppliers as well as consumers –if the project extended downstream.

3. Design considerations

11. Developing an evaluation process is a very time and resource-consuming endeavor. Such an initiative cannot be undertaken by agencies if budgetary constraints or other reasons produce uncertainty about completion.

⁴ Settlement between the FNE and D&S, approved by the TDLC on December 15th, 2006. TDLC, Ruling N° 65, May 8th, 2008. Settlement between the FNE and Cencosud, approved by the Supreme Court on July 24th, 2008.

⁵ At the time of the draft, the successful entry of a third actor was already known. Whether this entry was or not facilitated by the regulatory burden faced by the incumbents is something not easy to define but it was an actual outcome in the industry at the time of drafting the project.

12. Once the decision is taken, the composition of the research team should be carefully defined. The work could be performed in whole or in part externally. However, we believe that involving agency members in the exercise of evaluating agency's interventions can be much richer as a learning process. In this sense, it seems that a team composed by members of the agency as well as by external consultants could represent an appropriate equilibrium, as long as external consultants are appropriately selected.

13. Indeed, one of the first issues that may arise from this exercise is the weakness of data management within agencies. It is not infrequent that data obtained during investigation cases are known and managed only by case-handlers members of the investigation teams. The lack of a centralized system for data management will be perceived at the beginning of the evaluation process, particularly when a baseline should be defined.

14. Thus, a priority task -once the decision to develop evaluation activities has been made- is to build baselines for relevant investigated industries that have been translated into competition authorities' interventions. In order to build these baselines, a centralized administration of data can be a helpful institutional arrangement within agencies.

4. Final remarks: Lessons learned

15. The decision of evaluating competition authorities' intervention implies the selection of appropriate cases. This selection process rests on the data available, which in turn depends on institutional arrangements for knowledge management within agencies. Thus, these considerations should be taken into account and actions should be considered long before the evaluation project design and conduction of the process are initiated.

16. Evaluation activities, particularly in small agencies facing budgetary constraints are submitted to an internal competition for resources in the prioritization game. Resources to evaluation activities should be committed for the entire project in order to avoid a project failure due to the lack of resources.

17. An appropriate selection of the members of the team for the evaluation process is crucial. We believe that a team composed by members of the agency and external consultants able to perform quantitative and qualitative analysis is the appropriate body for performing the task.