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COMPETITION COMMITTEE****Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note
from Chile****5 December 2017**

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More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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Chile – FNE

1. Mergers

1. Mergers analysis has gone through substantive changes in the past year in Chile. A large reform was approved in 2016 (Law 20.945) which included, amongst other topics, the introduction of a new mandatory merger notification system in charge of the Fiscalía Nacional Económica (or “FNE”).
2. Considering the above, the new law on merger analysis relies on certain safe harbors and presumptions, which vary from substantial to procedural. In line with the development of the subject in other countries¹, most of these are rebuttable and allow the enforcement authority to analyze the transaction or gather more information when needed, even if the conditions for the presumptions apply.
3. The following are the hypothesis that Chilean law includes regarding safe harbors and presumptions.

1.1. Thresholds for merger analysis

4. Merger control in Chile is mandatory only for transactions that overcome the thresholds established in Resolution N°667 (06.24.2016), as stated by the Competition Law (or “DL 211”)². According to it, prospective merging firms must notify the authority only if:
 - Their summed sales are equal or higher to USD 77.7 million approximately during the last commercial exercise.
 - Sales of at least two of the prospecting merger agents separately have reached amounts equal or higher than USD 12 million approximately, in the last commercial exercise in Chile.
5. Considering the above, it could be argued that the law presumes that smaller transactions will not arise any competition concerns and hence, frees agents from notifying. Nevertheless, it should be noted that such presumption may be rebutted and the FNE may open ex-officio an investigation even when the thresholds are not met.
6. The FNE has published a soft law guide (“Practical Guide Towards the Application of Thresholds to Merger Notifications”) that is aimed to help agents calculate and determine if they have to notify or not. Prospective merging agents also have the pre-notification stage to discuss the issue.

¹ Lindsey M. Edwards; Joshua D. Wright, The death of antitrust safe harbors: causes and consequences, 23 Geo. Mason L. Rev. 1205-1250 (2016).

² Article 48.

1.2. Substantial presumption

7. Once parties or the authority establishes that the transaction does overcome the thresholds, firms have two procedural options to notify: general or simplified form (this is an equivalent, for example, to a “short form” of the European Union).

8. Simplified form applies when transactions meet the following criteria:

- There is an overlap between parties or their business group in relevant markets;
- The limited market share is unlikely to raise competition concerns
- In some merger hypothesis³, the increment (‘delta’) of the Herfindahl-Hirschman Index (‘HHI’) resulting from the concentration is below 150 and the parties or their business group combined market share is below 50%.

9. Given and proven these assumptions, prospective notifying agents are obliged only to a reduced amount of information regarding the transaction in comparison to the general form.

10. In other words, the law presumes that when these criteria are met, a merger has less potential to raise competition concerns, thus allowing parties to present less information to the authority.

11. The burden of proof lies on the parties. They have to present sufficient information so that the authority is convinced the transaction meets the criteria for the simplified procedure to apply.

12. Nevertheless, the FNE is empowered to request parties to notify using the general form when:

- The relevant market is difficult to define.
- A party is a new or potential competitor or owns an invention patent.
- A proper calculation of market share is not possible.
- Markets involved have high entry barriers, are highly concentrated or have known competition problems.
- At least two agents taking part of the operation have presence in narrowly linked markets.
- The transaction may raise coordination risks.
- The notification presented under simplified procedure had false, incorrect or hidden information.

13. In these cases, the FNE can rebut the presumption, and parties have to present all information required under the general form procedure.

14. A recent notification presented before the FNE exemplifies one of the criteria mentioned above.

³Those contemplated in article 47 letters a), b) and d).

Box 1

In merger notification Rol FNE F-94-1, “Acquisition of Enjoy S.A. by Entretenciones Consolidadas SpA”⁴, parties presented a simplified notification due the lack of overlaps between them. The FNE sustained the same reason to authorize the transaction, without needing an in depth analysis arguing that: “(...) *it is not possible to identify any relevant horizontal overlaps and vertical or conglomerate links concerning competition analysis (...). EC, as mentioned, is an investment vehicle with no activities in Chile, and (...) The Operation does not yield any integration or concentration relevant concerning competition. Thus this Division has achieved the conviction that the Operation is not suitable to substantially reduce competition*”.

1.3. Procedural presumptions

15. Article 54 and 57 of the DL 211 states that if the time limit the Fiscal Nacional Económico has to take a decision regarding a merger (approval, prohibition or approval with remedies) elapses, it is understood that the transaction is approved, in the terms the notifying parties have presented it, including remedies.

16. The law presumes the authorization if authority is silent, meaning the transaction does not raise competition concerns and, when appropriate, remedies are sufficient.

1.4. Substantial presumptions: “Merger Analysis Guide”

17. The “merger analysis guide” was a guideline issued by the FNE before the mandatory merger notification regime existed. Even though this Guide is now not completely valid because of the new merger control process (i.e., the procedures are now in the law), it contains substantive criterions that the FNE can still use to decide whether to perform an in depth analysis or not.

18. The FNE presumes that transactions not overcoming certain HHI thresholds do not have an anticompetitive potential. Thus, the FNE dismisses an in depth analysis when:

- The HHI after the transaction is inferior to 1500;
- The HHI is between 1500 and 2500 (moderately concentrated market) and the delta between the HHI before and after the transaction is less than 200.
- The HHI is higher than 2500 (highly concentrated market) and the delta between before and after HHIs is less than 100.

19. Notwithstanding the above, if the thresholds are not surpassed, the FNE will analyze in depth a transaction when:

- A party involved in the transaction is a potential or new competitor, with a small market share that does not necessarily reflect his future market share.
- A party involved in the transaction is a “maverick” not reflected in market share.
- There are actual or recent coordination indicators.

⁴ Final Report available in www.fne.gob.cl

Box 2

Merger Investigation Rol FNE F-66-2016, “Acquisition of Danone Chile S.A.”⁵, exemplifies the application of this of law criterion by the FNE.

The investigation showed that the fluid milk market, after the acquisition, had HHIs of 1359 and 1678 in both geographic relevant markets identified respectively. On the other hand, the HHIs deltas were 325 and 55, respectively. In other products and geographic markets, the situation was very much alike.

As such, the FNE reached the conclusion that, because of the HHIs and their irrelevant variation, the transaction would not contravene DL 211, even though there were overlaps between products.

The same criteria applied in merger investigation Rol F61-2015, “Acquisition of SABMiller plc by Anheuser-Busch InBev SA NV”. Here even though HHIs were high (5,680 and 5,724 in different transaction hypothesis), the FNE authorized the transaction because the deltas were 36 and 81, respectively.

1.5. Thresholds for the notification of minority interests.

20. Law No. 20,945 also added article 4 bis to DL 211, which refers to the duty to inform the FNE of the acquisition, by a company or an entity that is part of its business group, of a direct or indirect participation, in more than 10% of the capital of a competing company, at the latest 60 days after its completion.

21. The above applies when the acquiring company, or its business group, as appropriate, and the company whose share is acquired, each separately, has annual revenues from sales, services and other activities of the line that exceed 100,000 UF (approximately USD 4.2 million) in the last year calendar.

22. Regarding the notified acquisitions, the National Economic Prosecutor may instruct an investigation into such acts in order to check possible infractions of article 3 of DL 211, according to the general rules of anticompetitive illicit acts. It also has the power to supervise and request sanctions with respect to those acquisitions that were not duly notified or fall below the 10% threshold.

2. Substantive illegality presumptions

2.1. Cartels

23. Recent modifications on cartel regulation established a *per se* rule for hard-core cartels (letter a) of article 3 of the DL 211). This means that, only an anti-competitive agreement among competitors - involving sell or purchase price fixing, limiting production, market share assignments or bid ringing- should be demonstrated before the Tribunal. Thus, in these cases, there is no need to demonstrate that the cartel confers a dominant position or the negative effects produced in the market. In this sense, it could be

⁵ Final report available in www.fne.gob.cl. The case was analyzed according to the old non-mandatory merger control system.

inferred that the law presumes them [a non-rebuttable presumption]. Accordingly, efficiency arguments are not pertinent, being that, for the Chilean legislator, hard-core cartels do not have any.

24. The per se rule only applies to limited conducts mentioned in article 3, that is, agreements between competitors.

2.2. Interlocking

25. Prohibition of interlocking was also introduced by recent legal modifications (article 3, letter d), taking the form of a legal presumption, which cannot be rebutted.

26. Our jurisdiction prohibits the participation of a person in relevant executive positions or as a director, in two or more undertakings that compete with each other, if the business group to which the undertakings belongs, has annual incomes for sales, services or other activities, over USD 4,3 million⁶ approximated.

27. The legislator assumed that a dual presence in relevant positions might conduce to anticompetitive conducts, such as sensitive commercial information exchange, but limited the prohibition to larger firms due the effects they could have in the market, in comparison to smaller firms.

2.3. Substantive legality presumptions

28. The legal treatment given to vertical restrictions does not contemplate any presumptions. Nevertheless, the FNE has recognized through soft law, a presumption of legality. The “Vertical Restriction Guideline” establishes that the FNE acknowledges a vertical restriction as legal when the seller’s market share and the buyer’s market share in the market where the goods are traded, are less than 35% respectively.

29. Notwithstanding the above, the mentioned presumption may be rebutted if parallel vertical restrictions affecting suppliers or distributors are detected and, both (or more) added, raise an accumulative effect on competition. The presumption will also not apply in extraordinary cases determined and justified by the FNE.

2.4. Evidential presumptions

30. Our competition court has considered certain type of evidential presumption, regarding the influence of a parent company towards its subsidiaries or related companies.

31. Apart from the objective criteria established by the Chilean financial market law, the Competition Court has held that a parent company has control or influence in its related companies⁷ if the core of the business group takes decisions in order to act in a certain anticompetitive way regarding its related companies. Thus, the responsibility for those actions has to be ascribed to the parent company⁸.

⁶The Guide establishes a unit of measure that avoids inflation.

⁷ Law N°18.045 contains an open criterion (“decisive influence over the company”), fulfilled by the court.

⁸ Consideration No. 294 of Judgment N° 139/2014 of the TDLC.