CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

July 2014 (1)

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I. INTRODUCTION

In the nineteenth century, John Stuart Mill stated that societies are economically successful when they have good economic institutions, and that it is these institutions that lead to prosperity. History has proved him right as both theory and the empirical evidence show that differences in economic institutions strongly explain the differences in growth and prosperity among countries.

While it is not easy to define economic institutions, there is consensus on the aspects primarily concerned with the ground rules and, in particular, with the structure of property rights and the existence of competitive markets. These latter definitions, which are more specific, make it possible to better understand the importance of economic institutions. On the one hand, property rights play the role of generating incentives to invest in both physical capital and technology, as well as in human capital. On the other hand, and complementarily, truly competitive markets allow for an efficient allocation of resources. Thus, the existence of a strong competition policy has positive effects on the economic growth of a country and helps its development.[2]

Along these lines and considering evidence for different countries, Edward Prescott & Stephen Parente argue—in the book *Barriers to Riches*[3]—that large income differences among countries are mainly due to the lack of free competition in the poorest countries. In many poor and developing countries, this lack of competition is linked to anticompetitive behaviors that go unpunished due to: (i) the nonexistence of an appropriate institutional framework, (ii) corruption, (iii) nontransparent practices that favor certain groups, and (iv) privileges that various lobbyists have obtained for many years.

In the case of Chile, antitrust legislation begins in 1959 when the first Act that punishes—with imprisonment—price-fixing, production quota agreements, and geographic market sharing is approved. At the same time, the Antimonopoly Commission, which aims to investigate and punish anticompetitive practices, is created.[4] The Commission consists of a Justice of the

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[2] J. Baker, *The Case for Antitrust Enforcement*, 17(4) J. ECON. PERSPECTIVES (2003).

[3] S. L. PARENTE & E.C. PRESCOTT, BARRIERS TO RICHES, (2000).

[4] To address a major inflationary crisis in the late 50s, the Chilean government hired U.S. consultant Klein-Saks, who made the recommendation, among other measures, to have antimonopoly legislation guaranteeing market competition.

Supreme Court, the Superintendent of Securities, and the Superintendent of Banks. Subsequently, in 1963 the Prosecutor position is created to act as public defender.

In the period 1959-1972, the antimonopoly commission had little work and persecuted only 120 cases. New legislation that increased the penalties and range of anticompetitive conduct that could be sanctioned was created in order to strengthen the free competition policy. New institutions created include the Consultative Commission, which was responsible for responding to queries and for trying to prevent anticompetitive practices, and the Competition Commission, which had the role of a court. Furthermore, the position of the National Economic Prosecutor ("FNE") was created to investigate and pursue cases on behalf of the public.

One of the main weaknesses of this institutional design was that the members of the Consultative and the Competition Commissions were appointed by the government or elected by lot (between the Deans of Economics and Law Faculties), worked pro bono, and dedicated only a few hours per week to the tasks related to the Commissions.

II. A DECADE OF SIGNIFICANT CHANGES

While in Chile the institutional framework against anticompetitive practices formally began in 1959 and gradually improved in some dimensions in subsequent decades, in recent years there have been significant changes. These changes have placed Chile at an institutional level equivalent to that of many developed countries.

A. Institutional Framework

The first significant change occurs in 2003 with an amendment to the Competition Act that creates the Free Competition Tribunal ("TDLC"). This entity consists of five specialized judges (three lawyers and two economists)—chosen by public tender and based on merit—who are paid and initially worked on a part-time basis. In terms of the sanctions levied, imprisonment—which previously existed for more serious cases such as collusion—was eliminated.

Later, a new reform in 2009 improved the operation of the TDLC. It perfected the listing of situations in which judges are disqualified to participate in certain cases and the listing of incompatibilities to become members of the court, all of which ensures greater independence. Additionally, in an effort to encourage the best lawyers and economists countrywide to apply for the posts of judges of the court, the salaries of the members of the court were significantly increased. The number of times that the court meets on a monthly basis also increased.

The 2009 amendment to the Competition Act introduced several highly relevant changes in terms of improving the enforcement of competition policies. First, it created a leniency program that allows for fine reductions or full immunity from antitrust prosecution to the first firm that offers collaboration on cartel cases. The leniency program has already been utilized in two cases: the international case of the refrigerant compressors (in Chile, Tecumseh benefited from the leniency program while Whirlpool faced a fine of approximately U.S. $4.5 million), and a local case of collusion among three firms to increase the bus fares on the Santiago-Curacaví route.

Second, with the reform, the FNE has also gained powerful tools to assist them in their investigations. They are now able to—with the authorization of the TDLC and a judge of the

Court of Appeals—conduct dawn raids on firms' premises to obtain physical evidence and wiretap suspected firms' managers (the aforementioned case of the Santiago-Curacaví buses was also the first case in which the FNE made use of this faculty).

Third, maximum fines that can be imposed by the TDLC in cartel cases were increased by 50 percent (from approximately U.S. $18 million to U.S. $27 million). However, the reform insisted on a cap on fines unrelated to the profits or sales of the infringing firm(s).

Finally, the reform also introduced the possibility that the FNE may "challenge" a merger through a non-adversarial procedure.[5]

On a last note, it is important to highlight that these policy changes have also been accompanied by the strengthening of the main institutions that defend free competition. In the last decade, the TDLC has increased its budget by 200 percent and the FNE by 260 percent (both in real terms).

B. Regulatory Certainty and Competition Advocacy

The FNE has been particularly active in recent years. They have generated guidelines that provide more information on the various analyses carried out internally and on the possible risks that different conducts can pose for free competition.

1. Horizontal Merger Guidelines

As is well known, it is generally not easy to determine the potential effects of a merger on the degree of market competition, since the difference in the degree of future market competition must be evaluated in circumstances both with and without a merger. Therefore, the decision to reject or approve a merger is a difficult one and it certainly creates uncertainty to the companies that are considering the possibility of merging.

One way to systematize the analysis required to try to answer these questions is to establish an explicit policy for evaluating mergers. This policy consists of an analytical framework used to determine the probability that a merger will reduce the degree of market competition.

The main objective of a merger policy is to design a methodology to be followed by institutions that promote and guarantee free competition. This methodology not only allows for a systemized analysis to assess whether there should be an objection to the merger, but it also allows involved private agents to anticipate the actions of these institutions. Accordingly, one of the advantages of having an explicit policy is that companies considering a merger face a more certain regulatory environment.[6]

To this end, first in 2006 and then in 2012, the FNE established an explicit policy to evaluate horizontal mergers, consisting of a four-dimensional analytical framework. First, the relevant market to be affected by the merger (it may be more than one market) is determined.

[5] *See* OECD, *Chile – Accession Report on Competition Law and Policy*, COUNTRY STUDIES (2010) for a detailed description of adversarial and non-adversarial procedures presented before the TDLC.

[6] For these reasons, there are several developed countries that have explicitly implemented a policy to assess mergers. Saliently, the United States had its first merger guidelines in 1968 (revised and amended in 1984, 1992, 1997, and more recently in 2010).

Second, the degree and the increase in the post-merger relevant market concentration are evaluated to establish whether the merger can generate anticompetitive effects on the relevant market (unilateral effects and coordinated effects). Then there is an assessment of the possibility of a likely, timely, and sufficient entry into the market to offset potential anticompetitive effects of the merger. Fourth, the efficiency gains produced by the merger are evaluated in terms of whether they can or cannot be achieved through means other than those of the merger and whether these gains more than offset the potential anticompetitive effects of the merger (in the case where they exist).

The first guidelines of 2006, as well as the 2012 version, have contributed to providing certainty to companies considering possible horizontal mergers since they describe the procedures and the different analyses that the FNE follows in the evaluation of the merger. At the same time, these guidelines have expedited the merger process.[7]

2. Vertical Restraints Guidelines

In June 2014, the FNE published a new guide, this time to describe the general guidelines used in analyzing vertical restraints and their potential anticompetitive and efficiency effects. In particular, it details the procedures used to analyze the anticompetitive risks associated with facilitating collusion at the supplier or distributor levels, and with blocking or delaying the entry or expansion of competitors. In addition, it describes the guidelines followed in analyzing the efficiency gains obtained with enhanced vertical coordination (avoiding double marginalization, removing hold-up, and optimally providing complementary services) and with greater competition between rival vertical structures.

To this end, the FNE establishes a categorization of vertical restrictions separating them by intra-brand restraints (minimum or maximum resale prices, exclusive territories, exclusive distribution, service requirements, and preferred customer clauses) and by inter-brand restraints (exclusive contracts, nonlinear pricing, tied sales, marketing access payments, and minimum purchase requirements). In the analysis of each vertical restraint, the FNE considers three stages: (i) market share of the economic operators subject to the restriction, (ii) actual or potential anticompetitive effects arising from the vertical restriction, and (iii) efficiencies that arise from the use of the restriction and are not possible to obtain with less restrictive measures for competition.

The vertical restraints guidelines provide a good guidance for companies, describing the risks of using certain types of restrictions in the different markets and providing more certainty on which practices will effectively be considered as anticompetitive by the FNE.

3. Professional Associations Guidelines

In developing countries such as Chile, it is common to see various professional and business associations strongly defending the interests of its members. This raises questions regarding the role they play in a market economy and its effects on market competition.

[7] However, it is important to note that the Free Competition Tribunal ("TDLC") is not bound by these guidelines. Moreover, not only the FNE but also any affected private party can challenge the merger before the TDLC.

On the one hand, the associations play an important role in collecting and diffusing market information that is difficult to obtain for each member, facilitating the adjustment to different shocks facing the industry. Additionally, they can facilitate the establishment of quality and safety standards as well as the comparison of products and services provided by the different companies.

On the other hand, associations facilitate collusion and price-fixing by bringing together a group of competitors. This risk is almost certain if the information shared is specific to each company and not aggregated for the entire market.

In August 2011, the FNE published the *Professional Associations and Free Competition Guidelines*. The main objective of these guidelines is to make clear the prosecution's views regarding the actions of various professional associations in the country and the possible risks that different conducts can create for free competition.[8] These guidelines describe and specify the practices associated with the risk of coordination among competitors as well as with other anticompetitive risks related to information sharing, establishment of common standards, professional associations membership conditions, provision of services to companies not affiliated to the association, and advertising and standard contracts. In addition, these guidelines provide a list of recommendations regarding the participation and record of association meetings and the hiring of specialized consultants by the association.

Although the *Guidelines* is mainly informative and has the goal of promoting fair competition among members of various professional associations, it has had an important impact in describing risky behaviors. It has also promoted the implementation of explicit policies to prevent those risks within companies.

III. THE ROAD AHEAD

Despite all the progress made in the last ten years, there are several aspects of antitrust enforcement in which Chile significantly lags behind more developed countries. The most important ones are highlighted in this article; most of them have been on the public agenda for the last few years.

Two issues regarding institutional aspects are on the public agenda. First, the judges of the TDLC are committed to their duties for a minimum of three days a week and it is currently being analyzed whether they should provide exclusive dedication, with a consequent increase in their salaries. This could help reduce the length of the trials that are presented before the TDLC. Today the trials last 630 consecutive days, on average, for contentious cases with a statement of evidence that end with a sentence.[9]

As it relates to the FNE, the appointment and, particularly, the removal or confirmation of the Prosecutor has been the subject of debate since it has not been possible to guarantee independence from political power. According to current regulations, the Prosecutor is chosen

[8] These guidelines are in line with similar documents produced by antitrust organizations in other countries: Australia (2010), New Zealand (2010), European Union (2010 and 2004), Spain (2009), Ireland (2009), Canada (2008), Holland (2008), United Kingdom (2004), and Japan (2001).

[9] TDLC (2014) webpage: http://www.tdlc.cl/DocumentosMultiples/Contenciosas%20-%20Duraci%C3%B3n.pdf.

by the President of the Republic from a shortlist defined through a selection process and is appointed for a four-year term, which is renewable for another four years.[10] At the end of the first period, the President of the Republic has the power to renew the Prosecutor for an additional four years. It is also the President who can dismiss the Prosecutor, when he/she is declared incompetent or negligent in agreement with the Supreme Court.

A. Horizontal Mergers

On the issue of horizontal mergers, there is no pre-merger notification requirement.[11] Despite the fact that the FNE's merger guidelines establish thresholds that determine whether the FNE will oppose, further evaluate, or approve a merger (much in the spirit of the U.S. Merger Guidelines), no matter the size of the merger there is no obligation for the parties to *ex-ante* notify the TDLC.

Voluntary consultation with the TDLC triggers a non-adversarial process. It has two important advantages for the merging firms: first, an adversarial challenge to the merger cannot be brought to the TDLC after it has ruled in a non-adversarial consultation process; and second, the Supreme Court cannot modify the TDLC ruling on a voluntary consultation process, although it can modify the remedies imposed by the TDLC. Despite the advantages of *ex-ante* voluntary consultation vs. an *ex-post* adversarial challenge, merging firms still face a trade-off as the *ex-post* challenge may not occur.

A set of clear rules that determine whether the TDLC must scrutinize mergers will bring certainty to the merging parties and also to the FNE and could save them valuable resources. These rules should establish thresholds on total sales and/or assets of the merging parties and should be industry specific.

B. Imprisonment and the Leniency Program

The most relevant modifications to the Competition Act introduced in 2009 were the increase of maximum fines and the introduction of a leniency program. A hotly debated topic was also the introduction of imprisonment for certain offenses, but these were ultimately not incorporated by the legislators.

The leniency program, which is detailed in a set of ad-hoc FNE guidelines, provides an exemption or reduction of fines to the company that makes the initial report and provides truthful and accurate information with respect to the collusive agreement.

In practice, however, the leniency program has encountered some difficulties with different jurisdictions of various courts. While prison sentences are not covered by the specific competition laws, criminal prosecutors have denounced executives from accused firms (condemned by the TDLC for crimes of collusion) and they could end up facing imprisonment; the resolutions of these processes are still pending. Logically, this uncertainty limits the

[10] The President selects a person from the shortlist provided or he can reserve the right not to select anyone, in which case a new shortlist should be proposed. None of the previous candidates can be included in the new shortlist.

[11] In fact, pre-merger notification (to the TDLC or regulatory bodies) is compulsory only in a few specific sectors. In a few cases, the TDLC has imposed, as a remedy to approve a merger, the obligation of notifying future mergers or acquisitions in certain markets.

effectiveness of the leniency program since the penalty reduction does not include those penalties determined by courts other than that of the TDLC.

These inconsistencies could be solved in two ways: by changing the law such that it is impossible to impose imprisonment for crimes against free competition or by making it clear that prison terms can be imposed in these cases and including any reduction or exemption related to these terms in the leniency program. In our opinion, this second option would be most effective given the large deterrent effect of imprisonment.

C. Maximum Fines and Damages

The TDLC is allowed to impose fines up to a maximum of around U.S. $27.5 million (this figure is 1.5 times the cap prior to the 2009 amendment). The fine is to the benefit of the government and is supposed to be related to: (i) the economic benefit obtained, (ii) the offense for which the company is being convicted, (iii) the extent to which the company has cooperated with the investigation, and (iv) whether or not the convicted company is a repeat offender.

Claims for damages (to consumers or other companies) are not processed by the TDLC but instead by the lower district courts only after the TDLC has found a breach of the competition law. In this civil trial, the amount of damages and the link between the violation and the damages (but not the violation itself) must be proved. This is to some extent inefficient—not only because court proceedings are duplicated, but also because there is failure to take advantage of a specialized court such as the TDLC. In general, an assessment of damages involves the use of econometric techniques and economic models, in which the TDLC has a clear advantage. The experience in compensation lawsuits is so far very limited. [12]

The relatively low ceiling of a maximum fine of U.S. $27.5 million, the difficulty to sue for damages, and the fact that the damages are only compensatory damages (excluding punitive damages) imply that, for certain industries or companies, any deterrent effect in favor of free competition policies is limited. Since the substantive law states that the fines imposed by the TDLC must be related to the extra profits that companies obtained from their illicit conduct, it would not be problematic to remove the absolute cap on the fines and set fines as a factor of extra benefits obtained.

D. Rule of Reason and Per Se Standards

The Antitrust Act establishes that the judges must assess the evidence according to the rule of reason standard (*sana crítica*), which requires the judges to evaluate the evidence based on their experience, formal rules of logic, and economic theory. There are no offenses that can be considered *per se* illegal, as is the case of price-fixing agreements in other jurisdictions.

This is clearly inefficient. With the new powers that were granted to the FNE since 2009, and that allow them to obtain hard evidence of potential agreements, it is not reasonable that

[12] Additionally, class actions are quite infrequent. They were introduced in legislation in 2004, but the legal procedures have been structured such that the incentives for initiation are scarce or nonexistent, *see* A. Barroilhet, *Class Actions in Chile*, L. BUS. REV. OF THE AMERICAS, 18, 275 (2012). These problems are worsened by the fact that treble or punitive damages are not contemplated in the Chilean legislation and "moral damages" are explicitly banned in class actions.

once such hard evidence on agreements is found, it has to be demonstrated before the TDLC that the agreement is anticompetitive. As Whinston[13] puts it, the "justification of the per se rule is really nothing more than an application of optimal statistical decision making."

The expected cost of sanctioning a price agreement that has pro-competitive effects does not compensate for the cost of having to analyze, and eventually condemn under the rule of reason, all other price agreement cases with anticompetitive effects.[14]

IV. TO CONCLUDE

The last decade in Chile has seen, more than in the previous 50 years, a significant improvement in terms of antitrust policies and associated enforcement institutions.

Still, there is a road ahead to follow in terms of several dimensions to protect competition and ensure the benefits of free markets on resource allocation of the economy. Hopefully, current and future governments will be willing to follow that road and prevent interest groups from blocking the reforms to protect their own economic resources.

[13] M. WHINSTON, LECTURES ON ANTITRUST ECONOMICS, (2006).

[14] The judges of the TDLC do not need to be convinced that the agreement actually harmed competition. If the agreement had the "objective" capacity of causing harm it is enough for a conviction, *see* OECD, *supra* note 5. This standard clearly facilitates condemning such violations (compared to the case in which the damage has to be proved), but does not significantly reduce the costs of administering justice.