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### Working Party No. 3 on Co-operation and Enforcement

#### INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Chile --

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*This note is submitted by Chile to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.*

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## 1. Pre-Merger Notification Regime

*Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)*

1. Because Chile does not have a mandatory merger control or notification system, there are no thresholds that subject mergers to any reporting requirements. Instead, the merger control system is voluntary, and companies decide whether or not to initiate a consultation before the Competition Tribunal (“Tribunal de Defensa de la Libre Competencia, “TDLC”) to have the transaction reviewed.

2. The benefit of seeking approval by the TDLC is that the merger—the “acts or contracts” approved by the TDLC—cannot subsequently give rise to liability under the Competition Act except in the event that, subsequently, on the basis of new evidence, it is deemed as contrary to competition by the same Competition Tribunal (See Competition Act, Article 32). Along with this benefit, the principal incentive for seeking approval of a transaction is to avoid the uncertainty created by the possibility that the National Economic Prosecutor’s Office (Fiscalía Nacional Económica, “FNE”) or third parties might initiate a proceeding before the TDLC.

3. The TDLC may review a merger using one of two different types of proceedings: (a) a contentious (adversarial) proceeding, and (b) a non-contentious (non-adversarial) one.

4. Contentious proceedings are utilized only when the merger has already been consummated. The legal basis for this is the assumption that an anticompetitive transaction satisfies general formula for competition offenses under Article 3 of the Competition Act (namely, that the merger is an “*action, act or convention that impedes, restricts or hinders competition, or tends to produce said effects*”). This general formula is utilized in merger analysis because there are no *specific* regulations regarding mergers in the Chilean Competition Act. Thus, merger control is consequence of the application of these broader rules. The TDLC may intervene to review a merger in a contentious proceeding at the request of (i) a third party affected by the transaction or (ii) the FNE.

5. On the other hand, non-contentious proceedings may be initiated whether or not the merger has already been consummated. Again, non-contentious proceedings are not followed only in the merger context, but rather may be used with respect to *any* non-contentious matter in which acts or actions, or contracts that are either in effect or to be executed, could infringe the provisions of the Competition Act (See Article 18 N°2 Competition Act).

6. As there are no mandatory notification requirements in Chile, there is not any prescribed period during which the parties are prohibited from consummating a merger. However, while a merger is being reviewed by the TDLC in a non-adversarial (non-contentious) proceeding, the parties cannot proceed with the merger if it is not consummated yet. This prohibition is not established by the Competition Act, but rather is set forth in a TDLC decree (“Auto Acordado N° 5/2004”). That decree establishes the procedures for addressing complaints or requests (in adversarial proceedings) and consultations (in non-adversarial proceeding) before the TDLC that concern the same facts (its rules define which proceeding should be followed).

## 2. Review of Mergers Falling Below Notification Thresholds

***For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?***

7. As a logical consequence of not having mandatory notification requirements under Chilean law, the FNE always have the authority to investigate consummated un-notified mergers. The remedies available will depend on the type of proceeding used by the FNE, as will be explained.

***If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.***

8. Given the legal framework described above, every challenge of a consummated transaction involves a merger that was not subject to mandatory notifications provisions.

9. The TDLC may intervene (review a merger) under the two different types of proceedings described above: adversarial proceedings (which apply only if the merger is already consummated); and non-adversarial proceedings (which are usually applied for non-consummated mergers). Adversarial proceedings begin with a complaint or a request made by the FNE or a third party before the TDLC based on a violation of the competition laws, namely Article 3 of the Competition Act. Non-adversarial proceedings begin with a consultation by the FNE, the parties of the merger transaction or third parties that have a legitimate interest.

10. In both types of proceedings, the FNE or third parties may request remedies, although there are some differences:

- In an adversarial proceeding, the TDLC may (Article 26 Competition Act):
  - a) Modify or terminate acts, contracts, covenants, systems or agreements that are contrary to the Competition Act (i.e., establish some kinds of structural or behavioral remedies);
  - b) Order the modification or dissolution of partnerships, corporations and other legal persons of private law involved in the acts, contracts, covenants, systems or agreements referred to in the previous letter (i.e., undo the merger or impose structural remedies);
  - c) Order fines up to an amount equivalent to twenty thousand Annual Tax Units (20.000 UTA, presently about USD \$19,2 MM).
- In a non-adversarial proceeding, the TDLC may (Article 18 N°2 Competition Act) establish “*the conditions which must be met in the actions, acts or contracts*” that are the subject of the consultation, which includes all kinds of remedies (structural or behavioral).

11. The main practical difference between the adversarial and the non-adversarial proceeding regarding merger remedies is TDLC’s power to impose fines, which may be done only in adversarial proceedings.

12. To date, the FNE has challenged just one consummated merger (under the adversarial proceeding), in a 2012 lawsuit involving a merger between two of Chile's three largest cinema chains ("cinemas case"<sup>1</sup>). The FNE originally requested structural remedies, consisting of the divestiture of certain acquired cinemas by the merged firm. Ultimately, the case ended in a settlement between the FNE and the buyer (which was approved by the TDLC in January 2013) that fulfilled the objectives of the FNE because the buyer was required to sell those cinemas that generated unilateral competitive risks. The case provides an important precedent in Chilean competition law, signaling the consequences that may result when the merging parties do not initiate a consultation before the TDLC for a transaction that generates risks for competition.

13. Since the creation of the TDLC in 2003 (which began operations in 2004), the Competition Tribunal has reviewed 12 mergers. Three cases have been reviewed after the transaction had closed (*consummated mergers*). One of those twelve, the cinemas case, was reviewed by the TDLC in an adversarial (contentious) proceeding. The other two consummated mergers reviewed by the TDLC were done using the non-adversarial proceeding, through a consultation (*ex post*) by the parties to the merger.

***Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?***

14. *Notifiable/non-notifiable transactions*: Because there are no mandatory notification provisions in Chilean law, differences between notifiable and non-notifiable transactions do not exist<sup>2</sup>.

15. *Consummated/non-consummated transactions*: There are no differences in practice or procedures for the FNE's investigation depending on whether or not a transaction has been consummated (with the exception described in the footnote N° 2, regarding non-consummated transactions that are voluntarily reported by the parties to the FNE). As explained in answer to question N°3, differences in the challenge of a merger before the TDLC depend on the type of proceeding that applies (adversarial/non-adversarial). Adversarial proceedings are used only if the merger is consummated. Non-adversarial proceedings may be used whether or not the merger is already consummated, although these have usually been applied for non-consummated mergers.

16. The main differences between the two proceedings are:

- (i) The basis of the adversarial proceeding is a breach of competition law (the non-adversarial one does not involve a breach of law, its basis is a consultation before the TDLC, i.e. a non-contentious issue<sup>3</sup>);

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<sup>1</sup> Requerimiento de la FNE contra Hoyts Cinemas Chile y Otros. (TDLC, causa Rol C 240-12).

<sup>2</sup> However, the "Guide for the Analysis of Merger Transactions" published by the FNE in 2012 establishes internal procedures that the FNE has committed to following in its investigations if the merging parties voluntarily report the merger to the FNE before it is consummated. These special rules only concern the FNE's investigation (not any challenge or proceedings before the TDLC)<sup>2</sup>. The main differences/benefits of voluntary reporting under the 2012 guidelines are: (i) the FNE agrees to deliver its opinion on the risks of the merger in a period of 60 working days (whereas no such period exists in a non-reported transaction); (ii) if FNE considers it necessary to bring a consultation before the TDLC on the potential effects of the merger, the agency will encourage the parties themselves to initiate the consultation (and if the Parties agree to do so, a time frame within which the query must be raised will be agreed upon as well). The purpose of these special rules, among others, is to give incentives to the party to promptly inform the FNE of the merger in the absence of mandatory merger provisions.

<sup>3</sup> See Article 18 N°2 Competition Act: "The Tribunal de Defensa de la Libre Competencia will have the following powers and duties: [...] 2) Oversee and try, at the request of a party that has a legitimate interest,

- (ii) In a non-adversarial proceeding, the TDLC is not entitled to impose fines, just remedies (whereas in an adversarial proceeding, it may order fines, too) (see *supra*, answer to question N°3);
- (iii) The primary rules for each type of proceeding are different: the adversarial procedure is highly regulated (Articles 19 – 29 of the Competition Act) and its rules are similar to the common rules of a trial; the non-adversarial procedure is more concentrated (Article 31 Competition Act) and is structured so that each potential party affected by the merger (which has a legitimate interest) is entitled to deliver an opinion on the effects of the transaction;
- (iv) The adversarial procedure takes longer in practice. The non-contentious (considering only the non-adversarial proceedings about mergers) last 278 calendar days on average before the TDLC<sup>4</sup>; contentious cases (including cases of cartels and abuses) last between 12 to 20 months<sup>5</sup>.

### 3. Review of mergers that should have been notified but were not

***If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? (II) In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? (III) Is there a time limit on when the agency can bring an enforcement action?***

17. Because there is no a mandatory merger control or notification system in Chile, there are no penalties arising from the parties' failure to report a transaction.

18. Nevertheless, it should be noted that in many instances the TDLC has imposed as a remedy (in the context of control of certain mergers, and of competition law breaches) that the parties must consult the Tribunal with respect to any future mergers<sup>6</sup>. In those cases, a failure to report a merger would be a breach of competition law (contravention of a judgment), and the party would be subject to penalties.

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or the National Economic Prosecutor, those non-contentious matters that could infringe the provisions of the present law, of actions, acts, or existing or to be executed contracts, for which it can determine the conditions which must be met in said actions, acts or contracts [...]”.

In the traditional meaning given to the expression in procedural law, a “non-contentious or non-adversarial matter” is a matter of law in which there is no dispute (no *litis*) between parties. Commonly, national legal doctrine explains this difference through the divergent purpose that both proceedings have: while the non-contentious does not seek to punish those who carry out the behavior consulted before the TDLC (even if the conduct is determined anticompetitive no penalties will be imposed), the contentious one implies establishing that competition law has been breached and therefore someone must be punished (it would imply a dispute).

For this reason, it has also been said that the power of the TDLC in the non-contentious proceeding is preventive: it is used to declare unlawful a conduct which, if it persists or does not meet the conditions imposed by the TDLC, may be punished in the future, through a contentious proceeding.

<sup>4</sup> This number considers the average of the 11 cases of mergers reviewed by the TDLC under the non-adversarial (non-contentious) proceeding.

<sup>5</sup> Is important to note that, in both proceedings (contentious and non-contentious) the TDLC decision can be reviewed by the Supreme Court (if is appealed by the parties).

<sup>6</sup> Many retailers in the supermarket sector, for instance, are required to consult the TDLC regarding any future merger in the sector.

19. As there is no mandatory merger control or notification system in Chile, the FNE has the same powers to review (investigate and challenge before the TDLC) a consummated merger and a non-consummated one.

20. The Competition Act does not establish specific time limits concerning enforcement actions on mergers (consummated or not). Thus, the general rule regarding competition offences applies (Article 20 Competition Act), which establishes a limitation period of three years.

***If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.***

21. As explained above, because there are no mandatory merger notification provisions in Chilean law, this question does not apply to the Chilean case.

22. However, is important to note that the FNE is entitled to investigate and challenge (and has investigated and challenged) consummated mergers before the TDLC.

#### **4. Subsequent review of previously cleared and consummated mergers**

***If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? (II) What remedies are available then? (III) Is there a time limit on when such a post-merger review can take place? Please provide examples.***

23. The FNE has no legal authority to decide if a merger is anticompetitive or not. The FNE investigates mergers and decides to challenge them before the TDLC or not.

24. There are no specific legal provisions regarding merger investigations. In accordance with the general provisions of Chilean law, however, the FNE can always reopen an investigation<sup>7</sup>.

25. The FNE cannot challenge a merger already approved by the TDLC based on the same facts considered by the Tribunal.

26. A decision by the TDLC can be appealed before the Supreme Court within 10 days of the ruling. Once the decision is not appealable (because 10 days elapsed or because the Supreme Court decided the case), though, the possibility of reviewing a decision is explicitly provided in Article 32 Competition Act:

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<sup>7</sup> The Competition Act has general provisions on FNE's investigation procedures. The provisions does not expressly regulate investigations reopenings. As the National Economic Prosecutor has the power to "conduct investigations deemed appropriate to prove infringement of this law..." (Article 39 Competition Act), it's understood to have the power to initiate a new investigation or reopen a previous one. Complementing all these provisions, the FNE has released an internal guide (Internal Guide for the Development of the FNE's Investigations and Legal Actions), available at: <http://www.fne.gob.cl/english/2013/06/07/internal-instructions-or-the-national-economic-prosecutors-office-enforcement-proceedings/> (last visited December, 2013).

decisions (v.gr. the TDLC approval of a merger) could be reviewed before the TDLC on the grounds of new evidence or change of circumstances (Competition Act, Article 32)<sup>8-9</sup>.

27. If the FNE reopens a closed (filed) investigation regarding a merger the available remedies (which the FNE may request before the TDLC) are the same.

28. Similarly, if the TDLC reviews a merger that previously has been reviewed in a non-adversarial proceeding on the grounds of new evidence, the remedies the TDLC may impose are the same as in the first decision (Article 18 N°2).

## 5. Final Comments

29. It's a difficult task to timely investigate merger transactions in the absence of mandatory notification provisions. The lack of public information before a merger agreement is reached, the confidential nature of negotiations by the merging parties, and even strategic behavior by the parties to avoid the intervention of the FNE, hinders the FNE's work.

30. However, because preventive (*ex-ante*) intervention is preferable, the FNE's *Mergers and Research Division*—created in 2012—devotes part of its efforts to identify possible mergers (negotiations, purchase agreements, etc.) that could affect competition, and initiates early investigations in order to assess its effects.

31. The main sources of information for these efforts involve (i) monitoring national and international communications released by publicly-traded companies to the stock market's regulator; and (ii) reviewing international and national –general and specialized- press, which is undertaken every day by a designated team within the division.

32. This monitoring tends to be relatively effective when considering that in most of the cases the FNE has opened the investigation before the mergers are closed.

33. However, a general problem with the lack of mandatory notification provisions is that some anticompetitive mergers may never be identified (or at least not in time to intervene), particularly those undertaken every day by corporations whose shares are not publicly traded on the stock market.

34. When the FNE learns of a consummated or unconsummated merger that impedes, restricts or hinders competition, or where the FNE does not have enough information to dismiss the concerns on the risks of such transaction, the agency initiates (*ex officio* or by complaint) an investigation immediately. If, following the investigation, the FNE concludes that the merger is anticompetitive, it requests the TDLC's intervention.

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<sup>8</sup> Some authors of the national legal doctrine have obliquely argued that Article 32 applies only to decisions which the TDLC or the Supreme Court has taken in non-contentious proceedings. However, this position fails to comply with the wording of the law (Article 32 Competition Act) which refers to “decisions” (without any distinction between the two proceedings).

<sup>9</sup> Article 32: Acts or contracts executed or entered into in accordance with the decisions of the Tribunal de Defensa will not bear responsibility whatsoever in this matter, save in the case that, subsequently, on the grounds of new evidence, these were deemed as contrary to fair competition by the same Tribunal, from when, in its case, the resolution that determines as such is notified or published.