THE ROLE OF THE TRIBUNAL FOR THE DEFENCE OF FREE COMPETITION IN COMPANY MERGERS AND IN COMBATING HARD-CORE CARTELS

CHILE

Chile is a small and open economy whose Gross Domestic Product depends heavily on exports, especially of commodities. In the last two decades our country has managed to grow at a relatively high rate, taking into account the events of the last few years. We have succeeded in generating confidence among foreign investors that our country is a serious and responsible partner. The functioning of the legal framework and public institutions in general has been of great importance in achieving and maintaining this positive image of Chile as an investment platform.

In addition to the foregoing, the existing confidence in our economy is based on the existence of an obvious respect for the functioning of the free market system. In this field Chilean economic regulation aims in essence at defending free competition in the markets while endeavouring to keep regulation and price controls to the minimum required; they are applied specifically to cases where natural monopolies exist.

It is a fact that the "pure" perfect competition model is only a special case which is rarely observed in the real world. Each market is a world in itself, with its own particular characteristics which set it apart from the traditional model in one way or another. For that reason, what is required is a body which can observe, analyse and correct potential deficiencies in specific markets by bringing the effects of the functioning of these markets more into line with what ought to be expected in competitive markets.

It was with this objective in mind that more than 40 years ago the Anti-Trust Commission (*Comisión Antimonopolio*) was created in Chile, through Law 13.305. This legislation was then improved with the promulgation of Decree-Law No. 211 of 1973, which created the National Economic Prosecutor's Office (*Fiscalía Nacional Económica*), which is the body that represents the general interest of the community and whose main function is to investigate any deeds, acts or agreements which would tend to impede, eliminate, restrict or obstruct competition in the markets. This institutional set-up was supplemented by the Regional Preventive Commissions (*Comisiones Preventivas*), the Central Preventive Commission and the Resolutory Commission (*Comisión Resolutiva*), which for their part had as their objective to follow up the investigations of the Prosecutor's Office and to take measures that would tend to correct possible deficiencies in the proper functioning of the market.

A little over a year ago, with the enactment of Law 19.911, the Preventive Commissions and the Resolutory Commission were abolished and replaced by the new Tribunal for the Defence of Free Competition (*Tribunal de Defensa de la Libre Competencia*). The main objective of this change was to create an autonomous institution, which would operate with a permanent structure, consisting of a group of regular judges with expertise

commensurate with their responsibilities and subject to the rules governing conflicts of interest, thereby ensuring their independence, and alternate judges to take the place of the regular judges in the event any of the latter being absent or non-competent, and which would also have full-time professional and administrative staff to support them.

The current revised text of Decree-Law No. 211 sets the Prosecutor's Office and the Tribunal a clear objective: "To promote and defend free competition in the markets"[1]. That is to say, the main purpose of the anti-trust system in Chile is to promote and protect the competitive process in the interests of economic efficiency and the well-being of consumers.

The law does not define free competition but it does mention a series of circumstances which provides the Tribunal with a yardstick against which to consider deeds, acts or agreements which might impede, restrict or obstruct free competition.

For instance, Article 3 of D.L. 211 itemises a number of types of conduct which will be deemed deeds, acts or agreements that impede or restrict free competition in a list which is far from exhaustive. It is the responsibility of the Tribunal itself to define in what circumstances there exists a real or potential infringement of free competition. For that reason, the work of the Tribunal in this initial period of operation is considered very important, since now is when the community in general is being informed of the broad outlines of what is meant by free competition in this country and what specific types of conduct are considered to run counter to it.

Under the reforms implemented by Law No. 19.911 the Tribunal cannot act on its own initiative, that is, it can only act in response to instructions from the National Economic Prosecutor's Office or at the request of any private individual. Secondly, the fines structure was amended and prison sentences were abolished. It should, however, be emphasised that prison sentences had never been imposed while the previous law was in force. On the other hand, the maximum fines applicable were increased from a value of 10,000 UTM[2] (an amount equivalent to approx. US$ 516,000 / € 423,000) to a maximum of 240,000 UTM (equivalent to approx. US$ 12,400,000 / € 10,150,000). This measure in particular was resisted by some sectors.

It should also be noted that the National Economic Prosecutor's Office has full powers to investigate private individuals regarding possible acts that infringe free competition; these powers include being able to call on the assistance of the police. In the event of a lack of cooperation from the private individuals being investigated, the Prosecutor is authorised to seek a warrant to arrest the person in question from a criminal court judge.

The Tribunal believes that the changes just described are positive; being able to impose bigger fines is a faithful reflection of the importance attached to penalising acts which infringe free competition, such as, for example, hard-core cartels.

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[1] Article 1, Decree-Law No. 211 of 1973

[2] *Translator's Note: Unidad Tributaria Mensual* : Monthly Tax Unit - an inflation-indexed unit of account used for tax purposes

Even so, the new changes have created greater certainty that acts of collusion are unlawful, which is an advance on the previous legislation. Even though acts of collusion were prosecuted previously, the fact that these acts are considered unlawful was not enshrined so explicitly in the law. On the other hand, it can now be seen that Article 3, letter a), of Decree-Law No. 211 confirms that what shall be deemed to be deeds, acts or agreements that impede, restrict or obstruct free competition are *"explicit or tacit agreements between economic agents or practices agreed between them that are intended to fix sale or purchase prices, limit production or assign to them market areas or quotas, which constitutes an abuse of the power that said agreements or practices confer on them"*.

As far as company mergers are concerned, it must be pointed out that Chilean legislation requires neither prior authorisation nor notification of mergers. Nevertheless, in this, its first year of operation, the Tribunal for the Defence of Free Competition has had to express an opinion on two major telecommunications mergers that were referred to it. This occurred, presumably, because the interested parties preferred to consult the Tribunal about the legitimacy of the transaction with regard to its effects on competition before exposing themselves to the risk that the Prosecutor's Office or any private individual who might be affected by it might initiate legal proceedings. The consultation procedure is quicker and provides the guarantees of a due process by enabling possible interested parties to make their views known.

Where the consultation procedure is used, the parties must abide by the Tribunal's decision. On the other hand, as already indicated, either the National Economic Prosecutor's Office or any third party may start proceedings against the parties involved in any act which in their opinion infringes free competition. This includes company merger processes.

In order to assess whether a merger should be approved, refused or approved subject to conditions, in practice the Tribunal weighs up the information available in accordance with the rules of healthy criticism by inviting all the interested parties to present whatever evidence they deem to be material.

There are no pre-set recipes or guides for determining that a particular merger should be approved or refused, which will depend on the pre and post-merger scenario in each market analysed. Nevertheless, the Tribunal has endeavoured to lay down criteria regarding the method of analysing a merger process, shaping them on the rulings that have been handed down up to now.

In fact, two rulings of great importance have been handed down in respect of mergers, which relate to:

1) The VTR–Metrópolis merger; this case involved the amalgamation of the two largest cable television companies in the country;
2) The Telefónica Móvil–Bellsouth merger, which involved the amalgamation of the second and fourth largest mobile telephony companies in the country, a market which at the time consisted of four operators.

With regard to the first merger, it should be emphasised that what was approved, subject to conditions, was the creation of a company which accounts for virtually 100% of the cable television market. This merger was approved because the Tribunal considered that the benefits that the greater competition in the broadband Internet and fixed-line telephony markets would bring outweighed the costs of the potential abuse of a dominant position that a company enjoying a virtual monopoly might create. On the other hand, it was considered that these costs could be effectively limited by imposing restrictions on the merger when it was approved. Without exception, these restrictions tend to limit and/or control the market power that the merged company is gaining in the cable television market. And so, given that in the Tribunal's opinion there were great benefits and that the costs arising from the monopoly could be limited by imposing conditions, the merger was approved, even though eight conditions that the new company had to meet were set.

Some examples of the conditions imposed on the merged company are described below. Firstly, it was prohibited from participating, either directly or indirectly, in the ownership of satellite or microwave television operating companies in Chile. The objective of this condition is to facilitate eventual competition in the pay-to-view television market. It was also prohibited from participating in the ownership of those companies designated as dominant in the fixed-line telephony market, so as to prevent a company from concentrating market power in two of the three markets in which it offers services. Also prohibited were bundled sales of the services offered, which can be offered as a package only if they are also offered separately; this restriction seeks to avoid cross-subsidies between regulated (telephony) and non-regulated services. In addition, acceptance was also given to the merged company's proposal with regard to not increasing prices or reducing pay-to-view programme quality for a period of three years from the coming into effect of the merger.

In any event, if it becomes evident that the merged company is failing to comply with the conditions laid down or shows any signs of conduct that infringes free competition, the Tribunal may follow up any instructions, referral, request or complaint from any private individual or the National Economic Prosecutor's Office. Furthermore, the Prosecutor's Office has been specially entrusted with the task of monitoring compliance with such conditions.

In the case of the second merger, when it was approved the number of mobile telephony operators in Chile fell from four to the three. As in the previous case, both the costs and the benefits of this merger were assessed, as were potential technological developments in the market in question. On the basis of all this evidence, the Tribunal for the Defence of Free Competition concluded that the efficiency gains and cost savings that would be achieved by the merger outweighed the costs of the potential abuse of a dominant position. Once again, as in the case of the VTR–Metrópolis merger, the merger was approved by the Tribunal subject to certain conditions which seek to minimise the risks of abuse of a dominant position by the merged company. For example, the merged company is required to transfer part of the spectrum for which it was granted a licence in a particular frequency band, since following the merger the company would come to control 100% of that band of the spectrum, which would prevent competing companies from exploiting possible technological advances applicable to this frequency band, and, secondly, it would have the cost asymmetry that would benefit an already dominant company with much

more spectrum per client than the rest of its competitors. The Office of the Under-Secretary of State for Telecommunications was asked to ensure the maximum possible reduction in the barriers with which consumers are faced when trying to change mobile telephony provider, so as to limit the existence of captive clients in the various companies and to increase competition in the mobile telephony market.

To sum up: in only one year the Tribunal for the Defence of Free Competition has expressed opinions on two mergers of great significance for the country. It should be emphasised that even though public opinion has not always agreed with the decisions, in discussions it is believed that these decisions were soundly based and were taken honestly and responsibly; apart from natural divergences, public opinion in general has taken the view that the Tribunal has functioned as it was hoped it would do when Law 19.911 was promulgated – as an autonomous, professional and responsible organisation.

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