GETTING THE DEAL THROUGH

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Merger Control

The international regulation of mergers and joint ventures in 73 jurisdictions worldwide

2013

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Decree Law 211 of 1973 (DL 211 or the Antitrust Law) establishes the legal framework for antitrust matters in Chile.

DL 211 provides that the Tribunal de Defensa de la Libre Competencia (the Antitrust Court) and the National Economic Prosecutor's office (FNE) are responsible for enforcing competition law in Chile.

The FNE is an independent administrative entity in charge of investigating conduct that may constitute violations to the Antitrust Law, representing the public interest before the Antitrust Court and seeking enforcement of resolutions, decisions and instructions issued and passed by the Antitrust Court.

In turn, the Antitrust Court is a special, independent court of law, subject to the supervision of the Supreme Court. Its role is to prevent, correct and sanction anti-competitive conduct, to decide all cases that the FNE or private persons may submit to its considerations. It is also in charge of issuing general guidelines for the enforcement of competition law.

2 What kinds of mergers are caught?

Any concentration transaction, including horizontal, vertical and conglomerate transactions are subject to DL 211 to the extent they could prevent, restrict or hinder free competition or tend to produce such effects.

3 Are joint ventures caught?

As mentioned above, DL 211 states that every act or conduct that prevents, restricts or hinders free competition or that tends to produce such effects are caught by the Antitrust Law, regardless of the legal nature of the act or conduct that produces such effect.

Therefore, joint ventures are caught by DL 211 in the same manner as mergers, acquisitions or any other act or conduct as long as they produce or are conducive to such effects.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Antitrust Law does not define 'control'. However, Law No. 18,045 ('the Securities Market Law'), article 99 defines control as 'any person or group of persons acting together, which, directly or through other persons or companies, controls at least the 25 per cent of the shares of a company', providing also for certain exceptions to this rule.

Minority and other interests less than control are not caught by the aforementioned definition.

5 What are the jurisdictional thresholds?

There are no mandatory jurisdictional thresholds in Chile.

Nevertheless, in October 2006, the FNE issued its 'Internal Concentration Operation Guidelines' (the Guidelines) establishing very conservative thresholds for their own internal review. According to the Guidelines, the FNE will presume that a concentration transaction that does not exceed the following thresholds will have no potential antitrust effect and, therefore, the FNE will rule out a further investigation. For this effect, the FNE will use the Herfindahl-Hirschman Index or market concentration (HHI):

- if the post-merger index is lower than 1000;
- if the post-merger index is 1000<HHI<1800 (the value of this index indicates a moderately concentrated market), and ΔHHI>100; and
- if the post-merger index is HHI>1800 (the value of this index indicates a highly concentrated market) and ΔHHI>50.

However, the Antitrust Court is not obliged to follow FNE's criteria on the matter.

Also, in June 2012, the FNE published a draft for new merger Guidelines, which includes a relevant change in the HHI thresholds, establishing higher thresholds (similar to those established by the US Department of Justice and the Federal Trade Commission in their 2010 Horizontal Merger Guidelines).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing in Chile is voluntary, being no legal obligation to previously notify a horizontal integration or concentration transaction to the antitrust authorities or to make any mandatory filing seeking its approval.

Parties to such transactions may voluntarily request its approval to the Antitrust Court, by initiating a voluntary consultation proceeding.

However, there are some exceptions regarding specific markets that do require mandatory pre-merger notifications, as mentioned in question 8 (below). In addition, certain companies, regardless of the market in which they participate, can be compelled to notify according to a judicial order issued by the Antitrust Court as a remedy imposed in specific cases.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

According to DL 211, the Antitrust Court may review any act or contract that prevents, restricts or hinders free competition or is conducive to such effects in Chile, irrespective of the place of execution of any such act or contract.

DL 211 does not limit the Antitrust Court power to review a merger depending on the nationality or place of incorporation or

business of the undertakings concerned. Any possible impact on the Chilean internal or external relevant market of a future merger would be sufficient to give jurisdiction to the Chilean antitrust authorities. Therefore, foreign-to-foreign mergers may be notified and there will be a local effects test, as if the merger were made by two national entities, as long as the transaction is deemed to be against DL 211.

However, the fact that the transaction is an international merger affecting several jurisdictions may be an element that the antitrust authorities will consider when analysing it. As a practical matter, it will not be considered a straightforward 'exemption', but it may relax to some degree the standard of scrutiny and the likelihood of being challenged.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Foreign investment is regulated by Decree Law No. 600 and chapter XIV of the International Exchange Regulation of the Chilean Central Bank. Nonetheless, these regulations do not regulate concentration transactions but the entrance of foreign capital to Chile.

In addition, there are special regulations and relevant approvals for the following matters.

Securities market

See question 14.

Banks and financial institutions

Decree with force of Law 3 of 1997 (the Banking Law), regulates banks and financial institutions and created the Superintendencia de Bancos e Instituciones Financieras (SBIF). The Banking Law provides that no one may acquire, directly, through third parties or indirectly, shares of a bank which, by themselves or added to those previously held by the same person, amount to more than 10 per cent of bank capital, without the prior consent of the SBIF.

Insurance

Decree with force of Law 251 of 1931 (the Insurance Companies Law) regulates the insurance market. According to article 38 of the Insurance Companies Law, insurance companies must report to the Superintendencia de Valores y Seguros (SVS) on any change to their shareholding structure entailing the acquisition of a 10 per cent or greater share of their capital by a shareholder. In turn, the shareholder who acquires this interest must report to the SVS on the identity of its controlling partners and provide evidence that they have not been declared guilty of certain crimes, or declared bankruptcy or been penalised by the SVS.

Mass media

Law No. 19,733 on Freedom of Opinion and Information and Journalism requires that any relevant event or act in connection with the modification or change of ownership or control in a media company must be reported to the FNE within 30 days from its consummation. However, in the case of media companies subject to the state-sponsored licensing system, this relevant event or act must be the subject of a previous report prepared by the FNE assessing its impact on the media market. This report must be issued within 30 days from the filing of this application, otherwise to be deemed as not meriting any objection.

Water utilities

Decree with Force of Law 382 of 1989, Ley General de Servicios Sanitarios (the Water Utilities Law) establishes certain restrictions to entry into the water utilities sector for controlling shareholders of electric distribution utilities, local telephone companies and pipe gas utilities that are natural monopolies, with customers in excess of 50 per cent of all users of one or more of these utilities in the areas under concession to any given water utility in those same geographical areas.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As mentioned before, filing is not mandatory and as a result there is no deadline for it. As there is no mandatory merger review a failure to make a consultation will not itself trigger a sanction.

However, under the general rules, any horizontal integration or concentration transaction that has not been consulted before the Antitrust Court may be challenged by any individual or the FNE before the Antitrust Court, initiating an adversarial proceeding if such transaction is deemed to violate the Antitrust Law. The claim may be filed prior to or after completion of the relevant transaction. All legal actions (except for collusion) arising from the Antitrust Law have a three-year statute of limitations from the execution of the relevant agreement.

10 Who is responsible for filing and are filing fees required?

Since there is no mandatory filing required there is no one responsible for it.

Nevertheless, as mentioned before, the Antitrust Law states that 'whoever' carries out or enters into any act or contract that hampers, restricts or hinders free competition or that tends to produce such effects may be penalised by the Antitrust Court. In the case of fines, it may be applied to both the infringing entity and its directors, managers or any person taking part in the relevant act. In the case of fines against entities, their directors, managers and persons who derived benefit from the relevant act will be jointly and severally liable, provided they took part in the penalised act.

Therefore, every party involved in a transaction is responsible for initiating a voluntary proceeding if the act or contract is deemed to be against DL 211.

Regarding the practice followed in Chile with respect to initiating voluntarily consultation proceedings, it depends on a case-by-case basis, which depends on how risk adverse (of being challenged afterwards) the parties are. In general, parties are reluctant to initiate such proceedings as it takes several months to go through it and they lose control of the process.

No fees are required if the parties initiate a voluntary proceeding at the Antitrust Court.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

If the parties involved in the transaction file a voluntary consultation requesting its approval before the Antitrust Court, the procedure may last between eight and 12 months, depending on the complexity of the transaction and of the information provided to the Antitrust Court by the parties. The parties may also file a '*recurso de reclamación*' against the resolution issued by the Antitrust Court before the Supreme Court. Such procedure may take four to six additional months.

Once a consultation is filed the Antitrust Court has the power to suspend the transaction. According to the Auto Acordado No. 5/2004 issued by the Antitrust Court, given that the non-litigious proceeding has precisely the purpose of obtaining from the Antitrust Court a pronouncement in order to grant or deny to the consultant party the legal certainty established in DL 211, and because is inherent to the nature of the consultation proceeding to wait until the pronouncement, from the date in which the consultation is filed the facts, acts or contracts shall not be celebrated, executed or concluded by the consultant party without prior court approval.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

In accordance with the information stated in question 11, once a voluntary consultation proceeding has been filed parties may not close the transaction without prior approval of the Antitrust Court.

If the parties closed the transaction before a final ruling has been issued, the measures mentioned in question 23 below could be applied by the Antitrust Court.

13 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

As there is no mandatory pre-merger review, no acceptable solutions are needed in order to close before clearance in a foreign-to-foreign merger.

By filing a voluntary pre-merger consultation the parties to the transaction avoid the initiation of a litigious proceeding. Therefore, the Antitrust Court may not impose fine at the end of the consultation proceeding but only impose conditions, restrictions, or block the merger.

14 Are there any special merger control rules applicable to public takeover bids?

Law No. 19,705 modified and added a new chapter to the Securities Market Law regarding public takeover bids and establishes all the requirements for an operation of takeover of open-stock corporations.

The general rule in Chile is that any takeover (entailing a change of control) of a corporation that publicly trades its shares must be conducted through a tender offer (an OPA). The OPA is a public offer to acquire shares through the procedure detailed in the Securities Market Law, ensuring equal opportunity and fair dealing among all shareholders of the OPA target company.

Consequently, if in a two-company business integration one of them is a corporation that publicly offers it shares; such integration must be subject to the OPA procedure. This is a general rule, however, so there are exceptions established by the Securities Market Law.

15 What is the level of detail required in the preparation of a filing?

The Antitrust Court, within the scope of its authority, has issued a court decree (Auto Acordado No. 12-2009) establishing its formal criteria regarding preventive control in horizontal integration or concentration transactions (the Resolution).

The Resolution states that a voluntary consultation before the Antitrust Court must include the following information:

- the parties to the transaction;
- the full description of the consulted transaction, including documents and the annexe containing the transaction, the structure of property and control after the consulted transaction is completed, the countries in which it may produce effects, the schedule and the existence of non-competitive clauses; and
- the relevant market; including a full description of the goods and services commercialised by each party, the market size and the market share of each of the parties, the structure and characteristics of the actual and potential offer and demand of the relevant goods and services, costs, description of the existent distribution and commercialisation systems of the relevant goods and services, prices, existence of exclusivity and cooperation agreements and joint ventures of each of the parties.

Once a consultation has been filed before the Antitrust Court, all this information must be provided. Otherwise is very likely the Antitrust Court will request all the aforementioned information ex officio.

16 What is the timetable for clearance and can it be speeded up?

See question 11.

17 What are the typical steps and different phases of the investigation?

According to DL 211, the FNE has authority to investigate acts that could constitute violations of the Antitrust Law. For these purposes, the FNE has issued the aforementioned Guidelines, which contain the proceeding of investigation.

Initiative

The head of the FNE may commence investigations to ascertain violations of the Antitrust Law ex officio, at the request of any interested party or the Antitrust Court. The FNE can take notice of a concentration transaction from any source, such as private information, parties to the transaction, public offices and the mass media.

If the FNE, according to the available information, finds that the transaction may be deemed to produce anti-competitive effects, the head of the FNE will submit an order of preliminary investigation to the Mergers and Research Division.

The correspondent division, together with the Technical or Economical Analysis Division accordingly, may issue a preliminary report within 10 working days. With this report, the head of the FNE will submit an order to file the preliminary investigation or to openly investigate the transaction within the next three working days.

Procedure

The investigation is regulated by the general rules of investigation stated in the DL 211. Within 10 working days after the initiation of the investigation, the FNE will require information from:

- the parties at the transaction;
- parties from the affected market;
- the authorities; or
- any other person likely to have the required information. The required information will have relation to the following matters:
  - the transaction itself;
  - its legal, economical, commercial and financial aspects;
  - the characterisation of the relevant market and the products and geographical zones involved;
  - the market shares;
  - the concentration level of the industry;
  - the conditions for entrance;
  - the evolution of prices; and
  - the qualities and strategies of the participants of the affected market.

Each of the requirements will mention the deadline. The FNE can request for more information within the 10 working days following the date on which it received the originally requested information.

With all the background information, the correspondent Legal Division will issue a report to the head of the FNE about the concentration transaction (the Division Report), within 45 working days after all the required information is received by the FNE.

Final report

The report to the head of the FNE will contain a description of the concentration transaction as well as suggestions about the course of action to take. Within five working days the head of the FNE may call the FNE's counsel in order to get a recommendation for his decision.

However, within the next 10 working days from the issuance of the Division Report, the head of the FNE may take one of the following courses of action:

(i) close the investigation;
(ii) make recommendations to the parties to the transaction of adopting certain preventive measures;
(iii) make suggestions to the authorities related to the matter; or

(iv) file a claim before the Antitrust Court in order to obtain enforceable preventive, correctional or prohibitive measures.

The actions mentioned in (i) and (iii) are regardless of the authority to file a claim before the Antitrust Court in any case.

In any of the aforementioned cases, the head of the FNE will communicate its decision to the parties at the transaction.

In addition, there is a draft of a new version of these Guidelines currently undergoing public comment. This new version will introduce significant changes in merger review matters.

Substantive assessment

18 What is the substantive test for clearance?

The commissions under the old system issued case law in establishing the scope, content and implications of anti-competitive behaviour. Those commissions had considerable precedent-setting leeway given the relative scope of their decisions and the fact that they were authorised by statute to decide in equity. Consequently, the jurisprudence of those commissions has so far patterned, intermittently, the regulations applicable in Chile to horizontal and vertical business combinations.

From a detailed case-by-case analysis of the resolutions and decisions issued by the former commissions and the Antitrust Court, we have gathered the following principles or criteria generally applicable to market concentration cases:

Definitions

First of all, one must define the relevant markets involved, to determine the degree of market segmentation and applicable segmentation criteria. Only then is it possible to predict the attitude competition authorities are likely to take in dealing with a specific event, act or contract referred to their attention.

Competition authorities are obviously entitled to determine at their entire discretion which is the relevant market to be considered. This discretion is subject, at any rate, to the rule of reason in justifying which perspective will be used.

Barriers to entry and market growth

The existence or absence of barriers to entry is an important factor when attempting to determine the consequences of horizontal combinations from a competition law perspective.

Chilean antitrust authorities have usually held that the risks of monopolistic abuses are considerably lower in markets without any legal or natural barriers to the entry of potential competitors, that is, with high market contestability. Likewise, a growing market is probably better suited to withstand a horizontal combination given the probable incursion of new competitors into the market.

Reasons for a merger

The financial or business reasons on which a merger is based are key elements in assessing the probability of success should any dispute arise with the competition authorities. Legitimate business reasons, such as economies of scale or scope, or the need to tackle highly competitive markets, are considered reasonable justification to proceed with a horizontal business combination.

Ultimately, the actual existence of merger-specific efficiencies or synergies is an element that is especially held in regard by the Antitrust Court when approving or rejecting horizontal merger operations, particularly when such efficiencies have an impact in consumer surplus.

Chilean competition case law shows that the authorities do not consider market concentration as anti-competitive per se. Such a determination would require evaluating the likelihood that the company that survives the merger will abuse its dominant position in the applicable relevant market.

Regarding the economic crisis, it must be noted that no consultation were filed but in normal conditions, there being no 'failing firm' as party to any consulted transaction. Thus, the authorities did not experiment with any change of criteria due to the economic crisis.

19 Is there a special substantive test for joint ventures?

As mentioned in question 3 above, joint ventures are subject to the same regulation as any other transaction that prevents, restricts or hinders free competition or that tends to produce such effects. Therefore, there is no special substantive test for joint ventures and, consequently, they are subject to the same test than mergers.

20 What are the 'theories of harm' that the authorities will investigate?

See question 18.

21 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Non-competition issues have not been relevant in the review process, considering that DL 211 is focused only competition matters and so has been held by the Antitrust Court in its rulings.

22 To what extent does the authority take into account economic efficiencies in the review process?

From the analysis or recent resolutions issued by the Antitrust Court and the investigations carried out by the FNE, we can conclude that both antitrust authorities had given great importance to how efficiencies arising from an operation should compensate the potential antitrust risks of a transaction, analysing how such efficiencies are proved and how they will be effectively transferred to consumers. The Antitrust Court has also analysed whether such efficiencies could be obtained by the parties without generating potential antitrust risks (ie, greenfield entrance or organic growth versus merger and acquisitions).

Remedies and ancillary restraints

23 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

According to articles 18 No. 2 and 31 of DL 211, the Antitrust Court may set the terms and conditions for the consulted transaction. However, there are two precedents in which the Antitrust Court finally blocked the consulted transaction (merger between D&S and Falabella/acquisition of Organización Terpel Chile SA by Quiñenco SA). Therefore, the Antitrust Court has understood that the law entitles it to even block a merger.

24 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The parties to a merger may enter into a settlement agreement with the FNE, which should be approved by the Antitrust Court. This agreement may consider divestments and behavioural remedies by the undertakings. So far, there is only one precedent on this regard, in which the parties (LAN Airlines and TAM Linhas Aereas) filed a settlement agreement entered with the FNE in January 2011 before the Antitrust Court. The agreement considered several commitments by the merged company and also limitations to its competitive position post-merger. However, the Antitrust Court finally dismissed the settlement agreement, due to a prior voluntary consultation proceeding filed by a third party regarding the same merger.

In its final ruling, members of the Antitrust Court expressly stated that its dismissal of the settlement was grounded not only because of the prior consultation filed by the third party, but because

the law does not allow the FNE to enter into settlement agreements on non-adversarial issues, as would be the case in merger clearance procedures. Thus, there is some uncertainty as to whether the Antitrust Court would accept pre-merger settlement agreements between the FNE and the undertakings. On 5 April 2012, the Supreme Court confirmed this ruling of the Antitrust Court.

25 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no specific rules for this matter. Therefore, basic conditions and timing issues would be determined case by case by the Antitrust Court.

26 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The only precedent regarding foreign-to-foreign mergers in Chile, under the actual regulation, is Resolution No. 02/2005 of the Antitrust Court, regarding the acquisition of BellSouth Chile Inc and BellSouth Chile Holdings Inc (together 'BellSouth') by Telefónica Móviles SA. The Antitrust Court approved the transaction based on the efficiencies that the integration would create, despite the existence of entry barriers in a highly concentrated market. The post-merger scenario suggested a decrease in the number of market operators from four to three, with the consequent increase in market concentration. The Antitrust Court approved the merger subject to the following conditions:

(i) Telefónica Chile must transfer part of its telecommunication concessions in a public tender in which the conditions were previously approved by the Antitrust Court;
(ii) the subsistent company after the merger, Telefónica Chile, must be subject to the rules established by Law No. 18,046 for open-stock companies and be under the supervision of the SVS; and
(iii) Telefónica Chile is prohibited from on 'on-net' and 'off-net' discrimination pricing policies while the concessions mentioned in (i) are not transferred.

27 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

To the extent that the related agreements (ie, non-competition) prevents, restricts or hinders free competition, the Antitrust Court may review such related agreements.

Involvement of other parties or authorities

28 Are customers and competitors involved in the review process and what rights do complainants have?

According to the article 31 of the Competition Law, the review process is instituted by the Antitrust Court by a decree that is published on its website as well as in the Official Gazette, notified by an official letter to the FNE, to authorities directly involved and to the economic players related to the matter at the Antitrust Court's sole discretion. Within not less than 15 business days, the notified parties and those having a legitimate interest in the matter may provide information to the Antitrust Court. Thus, customers and competitors are involved in the review process as long as they have a legitimate interest in the matter subject to review. As mentioned, the only right that third parties at the review are entitled to is to provide information for use in the process.

29 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As a general rule, Chilean legislation states that every act, resolution and information that constitutes the process is public, and therefore access to the information is granted to anyone who requests it at the Antitrust Court.

In order to protect the parties from the disclosure of the sensitive information, however, the Antitrust Court has issued a resolution (Auto Acordado No.11-2008 as amended by Auto Acordado No.15-2012) regarding the reserve or confidentiality of the information provided to the process. The resolution states that the Antitrust Court may rule that certain information will remain under 'reservation' or 'confidentiality'. For this purpose 'reservation' shall mean that access to the information will be granted only to the parties present at the process, and 'confidentiality' shall mean that access to the information will be restricted only to the providing party of the information.

30 Do the authorities cooperate with antitrust authorities in other jurisdictions?

In order to facilitate the investigative activities undertaken by the head of the FNE, the FNE may enter into agreements with other civil services and public entities, with national, foreign or international entities or institutions, providing for the electronic transfer of data not classified as either confidential or proprietary. Currently there are seven cooperation agreements in force between the FNE and other competition authorities regarding mutual technical assistance and the application of their competition laws as a whole, and not specifically focused on cartels (Canada, Costa Rica, Mexico, El Salvador, Spain, Ecuador and Brazil).

Likewise, several free trade agreements currently in force (with Canada, EFTA, the European Union, Korea and the United States) are playing a very important role regarding cooperation between competition authorities due to their antitrust sections, which are real frameworks for mutual technical assistance, exchange of information, notifications and communications and the application of competition law.

Recently, on 31 March 2011, the FNE celebrated an agreement on antitrust cooperation with the United States Department of Justice and the United States Federal Trade Commission.

Judicial review

31 What are the opportunities for appeal or judicial review?

The final resolution of the Antitrust Court is subject to Recurso de Reclamación before the Supreme Court.

Other resolutions issued by the Antitrust Court may only be subject to motions for reconsideration before the same tribunal, which may be heard as a collateral issue or resolved summarily.

32 What is the usual time frame for appeal or judicial review?

The appeal must be filed by the head of the FNE or any of the parties to the proceedings within 10 business days from service of process, a term that may be extended as applicable depending on the domicile of the affected party if other than Santiago, according to the general rules of articles 258 and 259 of the Civil Procedure Code.

To follow up on the petition the parties must appear before the Supreme Court, in a procedure that may take between four and six months.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

As mentioned in question 26, the only record regarding foreign-to-foreign mergers is the merger case of *Teléfonica Móviles SA/Bellsouth Corporation*.

Regarding national mergers, the most important recent enforcement case is Resolution No. 24/2008 regarding the merger of Fala-

Update and trends

On 26 April 2012, the Antitrust Court rejected the acquisition of Organization Terpel Chile SA by Quiñenco SA, declaring that this transaction in the wholesale and retail distribution of liquid fuels market would affect free competition. This is the second time the Antitrust Court has altogether rejected a merger since the creation of the Antitrust Court in 2004. The Antitrust Court:

- concluded that there is a high concentration in the market segments of the wholesale and retail distribution of liquid fuels and that there are significant barriers of entry and expansion of competitors in the same markets;
- considered reasonable that companies currently participating in these sectors grow organically in those where there are no significant barriers to expansion, thereby preserving competition in the whole industry;
- recognised the existence of risks of unilateral and coordinated behaviour due to the high concentration and the low supply substitutability mainly in the retail sub-sector, and other quality characteristics of the market, such as the homogeneity of the product, ease price monitoring and the inelasticity of consumer demand; and
- considered that these risks would not be compensated by any of the efficiencies claimed by the parties of the proposed transaction, because they do not fulfilled the requirements requested by the Antitrust Court to give them the ability to produce, with a high probability and within a reasonable period of time, a more intensive competition in the market.

This decision has been subject to a strong debate since (i) the main participant in the relevant market (COPEC) has around the 60 per cent of the market share; and (ii) the dissenting vote of this ruling argued that the Antitrust Court was almost assuming that M&A transactions prevents, restricts or hinders free competition per se. Therefore, they stated that any M&A transaction would have to be rejected – following the rationale of the majority vote – in the absence of strong evidence that such transaction would benefit consumers.

bella and D&S, two of the most important competitors in retail in Chile. In this case, the Antitrust Court did not approve the concentration transaction, on the basis that no measure could mitigate the anti-competitive effects of such merger.

See also 'Updates and trends' for a discussion of the April 2012 ruling by the Antitrust Court regarding the acquisition of Organización Terpel Chile SA by Quiñenco SA and whether this acquisition would have harmful effects on competition.

34 What are the current enforcement concerns of the authorities?

In December 2011, the President of Chile called for a commission of experts in antitrust matters. The commission issued a report in July 2012 in which, regarding merger review matters, they suggested a 'mixed system' in which concentration operations above certain thresholds to be determined should be compelled to file a mandatory consultation.

35 Are there current proposals to change the legislation?

There is a bill at the Chilean Congress (Boletín No. 3718-2003) that proposes to establish an obligatory filing procedure for any concentration transaction that, as a consequence, increases its market share to 30 per cent or more of the market or where the sales of the parties considered together, on a yearly basis, are over 20 billion Chilean pesos.

However, for more than six years, this bill has not resulted in any movement or discussion.

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