GETTING THE DEAL THROUGH

GCR
GLOBAL COMPETITION REVIEW

Merger Control

The international regulation of mergers and joint ventures in 75 jurisdictions worldwide

2014

Consulting editor: John Davies

Published by *Getting the Deal Through* in association with:

Allens
Anastasios Antoniou LLC
Bae, Kim & Lee, LLC
Bowman Gilfillan
ČAKMAKOVA Advocates
Carey
Castañeda y Asociados
C&C Partners (Chitale & Chitale)
Corpus Legal Practitioners
Davis Polk & Wardwell LLP
D'Empaire Reyna Abogados
Djingov, Gouginski, Kyutchukov & Velichkov
Drew & Napier LLC
Dr Kamal Hossain and Associates
ELIG, Attorneys-at-Law
Elvinger, Hoss & Prussen
Epstein, Chomsky, Osnat & Co & Gilat Knoller & Co
Freshfields Bruckhaus Deringer
GRATA Law Firm
GTG Advocates
Guevara & Gutierrez SC – Servicios Legales
Kinstellar
Koep & Partners
Konnov & Sozanovsky
Kromann Reumert
Lenz & Staehelin
LEX
Mannheimer Swartling
Marques Mendes & Associados
Mason Hayes & Curran
Mboya Wangong'u & Waiyaki Advocates
McMillan LLP
M & M Bomchil
Oppenheim
Posse Herrera Ruiz
Raidla Lejins & Norcous
Revera Consulting Group
Rizkiyana & Iswanto, Antitrust and Corporate Lawyers
Robinson Bertram
Roschier, Attorneys Ltd
Rubin Meyer Doru & Trandafir LPC
Russell McVeagh
Sanguinetti Foderé Abogados
Sele Frommelt & Partners Attorneys at Law Ltd
SimmonsCooper Partners
TozziniFreire Advogados
UGGC Avocats
Vainanidis Economou & Associates
Webber Wentzel
Weerawong, Chinnavat & Peangpanor Ltd
Wikborg Rein
WKB Wierciński Kwieciński Baehr
Wolf Theiss
YangMing Partners
Zulficar & Partners

GETTING THE DEAL THROUGH

Merger Control 2014

Consulting editor
John Davies
Freshfields Bruckhaus Deringer

Publisher
Gideon Roberton

Business development managers
Alan Lee
George Ingledew
Dan White

Account managers
Zosia Demkowicz
Megan Friedman

Trainee account managers
Cady Atkinson
Joseph Rush
Dominique Destrée

Media coordinator
Parween Bains

Administrative coordinator
Sophie Hickey

Trainee research coordinator
Robin Synnot

Marketing manager (subscriptions)
Rachel Nurse
subscriptions@gettingthedealthrough.com

Head of editorial production
Adam Myers

Production coordinator
Lydia Gerges

Senior production editor
Jonathan Cowie

Senior subeditor
Caroline Rawson

Director
Callum Campbell

Managing director
Richard Davey

Merger Control 2014
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

First published 1996
Eighteenth edition
ISSN 1365-7976

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

FSC www.fsc.org MIX Paper from responsible sources FSC®

CONTENTS

Continued overleaf

CONTENTS

Chile

Claudio Lizana, Lorena Pavic and Juan E Coeymans

Carey

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 What types of joint ventures are 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 25 per cent of the shares of a company', providing also for certain exceptions to this rule. The Antitrust Court, when analysing this matter (Ruling No. 117/2011), has referred to the definition and exceptions contained in article 99 of Securities Market Law, but has also considered a broader definition of control – focused on competition – stating that control means 'the ability of a natural person or corporation to exercise a decisive influence in the adoption of competitive decisions by other natural persons or corporations'.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are no mandatory jurisdictional thresholds in Chile.

Nevertheless, in October 2012, the FNE issued a new version of its 'Internal Concentration Operation Guidelines' (the Guidelines) establishing certain thresholds for its own internal review. According to the Guidelines, the FNE will use the Herfindahl-Hirschman Index (HHI) and will presume that a transaction that does not exceed the following thresholds will have no potential antitrust effect and, therefore, the FNE will rule out a further investigation:

- if the post-merger index is lower than 1,500 points;
- if the post-merger index is between 1,500 and 2,500 points (which indicates a moderately concentrated market), and the change in the HHI is below 200 points; and
- if the post-merger index above 2,500 points (which indicates a highly concentrated market) and the change in the HHI is below 100 points.

However, neither the Antitrust Court nor the FNE are obliged to follow these thresholds when analysing a specific transaction.

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

The filing in Chile is voluntary, there 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 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 reduce the likelihood of being blocked.

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 15.

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. So far, there has been only one case in which the FNE has challenged a transaction already completed and requested the imposition of fines against the merged companies. 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 may be considered responsible for initiating a voluntary proceeding if the act or contract is deemed to be against DL 211. As explained before, there has been only one case in which the FNE has challenged a transaction already completed and requested the imposition of fines against the merged companies.

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 an appeal remedy before the Supreme Court against the resolution issued by the Antitrust Court. This procedure may take four to eight 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 24 could be applied by the Antitrust Court.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There are no particular sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers and therefore the general measures mentioned in question 24 could be applied by the Antitrust Court.

14 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 fines at the end of the consultation proceeding but only impose conditions, restrictions, or block the merger.

15 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.

16 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.

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

See question 11.

18 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 a particular proceeding of investigation applicable when (i) the transaction has not been closed; and (ii) the transaction has been voluntarily notified by the parties to the FNE. Its principal steps are the following:

Notification and opening the investigation

Parties should notify the transaction to the FNE by filing a form available on the FNE's website. Within a term of five business days, the FNE should issue a resolution opening the investigation which will be notified to the parties and will be available on the FNE's website. However, if parties notify the transaction under confidentiality, the investigation will not be opened until the transaction has become public.

Proceeding

The proceeding should take no more than 60 business days from the date of the resolution opening the investigation. This term can be mutually extended by the FNE and the parties. However, if the transaction is notified under confidentiality, the investigation will not be opened, and therefore the 60-day term will not begin until the transaction has become public.

During the proceeding, the FNE has all the investigative powers granted by the DL 211 and is allowed to require information regarding any matter in connection with the transaction, including:

- the transaction itself;
- the transaction's legal, economical, commercial and financial aspects;
- the characterisation of the relevant market and the products and geographical zones involved;
- the market shares;
- the conditions for entrance (market contestability);
- the evolution of prices; and
- the qualities and strategies of the participants of the affected market.

Final decision

Before the 60-day term (or its extension) has expired, the FNE should communicate to the parties its decision to:

- conclude the investigation;
- enter into a settlement with the parties; or
- consult the transaction before the Antitrust Court (given the parties the option to consult the transaction by themselves).

Where the FNE decides to enter into a settlement with the parties, and if the parties are willing to do so, they will schedule a timetable to conduct the negotiation of the general terms and conditions of the settlement. If it is not possible to reach to an agreement within such timetable, the FNE will consult the transaction before the

Antitrust Court offering the parties the chance to consult the transaction by themselves. If the settlement agreement is reached, it must be approved by the Antitrust Court within a term of 15 business days.

Alternative proceeding

If the parties close the transaction before notifying the FNE or if they do not notify the transaction, the FNE can initiate an investigation following the general proceeding established to investigate any antitrust infringement on the 'Internal Guidelines of Investigation Developed by the FNE'. Such proceeding may commence ex officio, or at the request of any third party. For such purpose, the FNE will issue a resolution opening the investigation, and will notify the affected parties of the opening of the investigation.

This general proceeding of investigation should be performed in a reasonable term considering:

- the nature of the transaction;
- the proceeding merit;
- the complexity of the case; and
- the collaboration of the parties.

During the proceeding, the FNE has the investigative powers granted by the DL 211. The investigation should finished either by:

- closing the investigation;
- filing a claim before the Antitrust Court; or
- reaching a settlement agreement with the parties that should be approved by the Antitrust Court.

Substantive assessment

19 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. Also, the Antitrust Court will analyse whether the transaction could reduce the level of competition by facilitating the coordination among the merged company and its competitors.

20 Is there a special substantive test for joint ventures?

As mentioned in question 3, 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.

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

See question 19.

22 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.

23 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

24 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. That was the case of the merger between D&S and Falabella and the acquisition of Organización Terpel Chile SA by Quiñenco SA. In this second case, the transaction was blocked by the Antitrust Court but it was finally approved by

the Supreme Court (imposing restrictions and conditions). Therefore, the Antitrust Court has understood that the law entitles it to even block a merger.

25 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 are three precedents in this regard.

In the first one, the parties (LAN Airlines and TAM Linhas Aereas) filed a settlement agreement entered into 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.

In the second case, the parties (Iron Mountain Chile SA and Storebox SA) filed a settlement agreement entered into with the FNE in March 2013 before the Antitrust Court. The agreement imposed behavioural remedies in order to reduce barriers to entry. In particular, a reduction on the costs charged to their customers for terminating services was agreed. The Antitrust Court approved the settlement agreement in April 2013.

Finally, in the third case, Nestlé and Pfizer filed a settlement agreement entered into with the FNE in April 2013 before the Antitrust Court. The transaction was part of a global transaction by which Nestlé acquired Pfizer's infant formula division. By this settlement agreement, Nestlé was committed to sell all the assets corresponding to Pfizer's infant formula business developed in Chile. The Antitrust Court approved the settlement agreement in May 2013.

26 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.

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

The only two precedents regarding foreign-to-foreign mergers in Chile, under the actual regulation, are the following:

- 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.
- Resolution No. 7/2013 (AE) of the Antitrust Court, regarding the acquisition of Pfizer's infant formula division by Nestlé. As explained, the FNE and the parties entered into a settlement agreement in which Nestlé was committed to sell all the assets corresponding to the Pfizer's infant formula business developed in Chile.

28 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

29 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.

30 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.

31 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

Update and trends

In December 2012 the Antitrust Court filed a resolution regarding the acquisition of Supermercados del Sur SA (SDS) by SMU SA (SMU), two large Chilean supermarket chains.

The proceeding was initiated by SMU, requiring the imposition of certain remedies in order to eliminate its eventual antitrust effects. The Antitrust Court found additional risks to those that were identified by SMU, and consequently imposed stricter conditions than those proposed by SMU. Among these conditions, the Antitrust Court forced SMU to (i) sell as one 'economic unit' numerous supermarket stores and the SDS's distribution centre; and (ii) sell its share in a third supermarket chain named 'Montserrat'. The parties appealed the referred resolution and the Supreme Court's ruling is still pending.

A relevant innovation made by the Antitrust Court on the SMU case, was the inclusion in the analysis of the 'upward pressure on price index' (UPP) proposed by Joseph Farrell and Carl Shapiro, leading economists at the Federal Trade Commission and Department of Justice of the United States respectively. This index involves comparing two opposing forces: the loss of direct competition between the merging parties, which creates upward pricing pressure, and marginal-cost savings from the merger, which create (offsetting) downward pricing pressure.

Further, on the *SMU* case, the Antitrust Court dedicate several sections of its ruling to analyse efficiencies. In this regard, the Antitrust Court established that to countervail anti-competitive effect, efficiencies must fulfil the following requirements:

- parties should file sufficient evidence to prove the alleged efficiencies;
- efficiencies cannot likely be obtained by other means (ie, organic growth);
- efficiencies must be transferred to consumers (at least in part) by lowering prices in a reasonable term;
- efficiencies cannot be obtained by simply reducing the output or the quality of the products.

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.

Also, 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

32 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.

In this regard, in January 2013, the Supreme Court handed down an important Antitrust Court Resolution that had blocked the acquisition of Organización Terpel Chile SA by Quiñenco SA. The Supreme Court approved the transaction imposing Quiñenco SA the obligation of divesting its sale gas stations in all districts where the variation of the HHI exceeds the threshold established in the Guidelines of the FNE and the termination of all storage agreements executed by Terpel.

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

The appeal must be filed by 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 eight months.

Enforcement practice and future developments

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

The only recent record regarding foreign-to-foreign mergers is the acquisition of Pfizer's infant formula division by Nestlé (see question 25).

Regarding national mergers, the most important recent enforcement case is Resolution No. 39/2012 on the acquisition of Organización Terpel Chile SA by Quiñenco SA. The transaction was first

/Carey

Claudio Lizana clizana@carey.cl
Lorena Pavic lpavic@carey.cl
Juan E Coeymans jecoeymans@carey.cl

Isidora Goyenechea 2800, 43rd floor
Las Condes
Santiago
Chile

Tel: +562 2928 2200
Fax: +562 2928 2228
www.carey.cl

blocked by the Antitrust Court but finally the Supreme Court approved it imposing certain restrictions and conditions. See also 'Update and trends' for a discussion of the December 2012 ruling by the Antitrust Court regarding the acquisition of Supermercados del Sur by SMU.

35 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. The suggestions proposed by the commission have not been yet materialised in a formal bill.

36 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.

 ISSN 1365-7976