

July, 2014

REPORT BY THE OECD: ASSESSMENT OF MERGER CONTROL IN CHILE

1 Introduction In July, 2014 the OECD Secretariat launched a report called "Assessment of Merger Control in Chile". This report analyzes the Chilean merger control system, identifies its chief problems and makes recommendations in order to overcome such shortcomings. The main conclusion of the report is that the Chilean merger control regime "lacks transparency, legal certainty and predictability"¹. Following such statement, the OECD Assessment suggests several proposals in order to correct the regime's failures.

2 Main Recommendations Principales Recomendaciones

a) Add the merger control regime to the Competition Act (DL 211).

b) Within the scope of Merger Control:

- Make a legal definition of "Concentration Operations", in order to identify the operations that will be under the competition authorities' scrutiny;
- Set forth a merger notification system before the enforcers. A mandatory or hybrid² notification regime is recommended. Likewise, sanctions should be established in case of failure of notification.
- Establish notification thresholds.

c) Regarding the Review Powers and Procedures:

Fijar un procedimiento de análisis de concentraciones de 2 fases. En la primera etapa, las operaciones no problemáticas serían evaluadas y aprobadas. En la segunda, se evaluarían las operaciones más complejas. Se sugiere que las facultades de análisis sean ejercidas por la Fiscalía Nacional Económica (FNE) y por el Tribunal de Defensa de la Libre Competencia

- Adopt a two-phase specific merger procedure. In the first stage, unproblematic operations would be assessed and cleared. In the second, only complex mergers requiring a substantive in depth analysis would be evaluated. The report recommends the reviewing powers to be exercised by the National Economic Prosecutor ("FNE") and the Antitrust Court ("TDLC").
- The OECD Assessment also proposes two different models implementing the two-phase procedure:



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¹Assessment of Merger Control in Chile, Report by the OECD, OECD 2014, p.7 2 Compulsory system if certain thresholds are achieved.

Option 1: Phase I before the FNE, and Phase II with TDLC;

Option 2: Phase I and II before the FNE, and judicial review exercised by the TDLC.

- Fulfill the fair conditions in the merger control review. In order to achieve that, the following must be ensured:
 - A reasonable and determinable period of time;
 - That Parties obtain the required information, transparency in the decision-making procedure, and that Parties are well informed about how and when to propose remedies or conditions;
 - A suspensory effect on the reviewing process established by law;
 - General transparency, with the purpose of informing the rules to the public; and
 - Confidentiality, namely to protect confidential and privileged information provided during the assessment.
- Specify the rules applying to the un-notified mergers, which do not reach the thresholds, but still raise competition concerns. Such rules should determine whether un-notified mergers can be reviewed ex officio, and if so, under which circumstances and conditions.
- Issue a policy regarding the statute of limitations with respect to the review powers, both ex ante and ex post.

d) Establish by law the merger control substantive standards review. Also, provide proper guidance relating to qualitative and quantitative factors that are significant within the substantive assessment process. The report suggests as well, incorporating a fast track procedure together with a simplified notification form, to be applied in mergers that surpass the notification thresholds, but do not raise anticompetitive concerns. **e)** Add to the DL 211 sanctions and enforcement tools against rules violations; such as the failure to notify, consummation of an operation being assessed, obstruction of the information gathering and non-compliance of remedies. These sanctions would be different from those contained in Article 26 of the DL 211 (which apply with respect to anticompetitive acts or deeds).

3 Conclusion This report is the outcome of an investigation carried out by the OECD, and it mainly contains recommendations. The conclusions and proposals offered by the Assessment have not yet been discussed by the appropriate Chilean authorities. Recently, the Chilean Government has stated that it will prepare a bill to be sent to Congress, with the purpose of improving the current merger control regime, adopting measures in line with the OECD Report.