OVERVIEW OF COMPETITION LAW IN LATIN AMERICA

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I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

Decree Law no. 211 of 1973 and its subsequent amendments ("DL 211") establish the main legal framework for antitrust matters in Chile.

Additionally, there are several other –more or less relevant in terms of competition laws and regulations– DL 211-related regulations, such as Law no. 20,169 of 2007 (unfair competition), DFL no. 323 of 1931 (gas services), DFL no. 1,122 of 1981(water code), Law no. 18,168 of 1982 (telecommunications), DFL no. 70 of 1988 and DFL no. 382 of 1989 (both sanitary services), Law no. 18,840 of 1989 (Chilean Central Bank), Law no. 19,039 of 1991 (industrial property), Law no. 19,342 of 1994 (new plant variety protection), DS no. 900 of 1996 (public works concessions), Law no. 19,496 of (consumer protection), Law no. 19,518 of 1997 (training and employment), Law no. 19,542 of 1997 and DS no. 104 of 1998 (both state port sector), Law no. 19,545 of 1998 (exports), Law no. 19,733 of 2011 (freedom of opinion), DLF no. 1 of 2003 (labor code) and DLF no. 4 of 2007 (electrical services).

b. Theories of harm present in the law

Article 3 of DL 211 states, generically, that whoever carries out or enters into, individually or collectively, any conduct, act or agreement that "impedes, restricts or hinders free competition or that tends to produce such effects", will be sanctioned with the measures contemplated therein.

In that sense, any conduct with horizontal or vertical effects, both unilateral and coordinated, that lessen free competition may be sanctioned. There is no definition of free competition in DL 211.

c. Authority in charge of enforcement of antitrust law and regulations

The Antitrust Court (Tribunal de Defensa de la Libre Competencia, "TDLC") and the National Economic Prosecutor's Office (Fiscalía Nacional Económica, "FNE") are responsible for enforcing Chilean antitrust laws within their own scope of authorities.

On one hand, the TDLC is a special and independent court of law, composed of 3 lawyers and 2 economists, and subject to the supervision of the Supreme Court. Its role is to prevent, correct and sanction anti-competitive conducts, to decide all cases the FNE or private

persons may submit to its consideration. The TDLC is also in charge of issuing general guidelines for the enforcement of competition law.

On the other, the FNE is an independent administrative entity in charge of investigating conducts that may constitute antitrust infringements, representing the public interest before the TDLC and seeking enforcement of resolutions, decisions and instructions issued and passed by such Court.

d. Nature of antitrust enforcement

Chilean antitrust enforcement has a hybrid nature. In terms of the nature of the Prosecutor (i.e. the FNE) and of the sanctions we could say that Chilean antitrust enforcement is administrative. However, it is worth noticing that the sanctions are subject to the decision of a court of law (i.e. the TDLC and eventually the Supreme Court).

Since the amendment of 2003, which created the TDLC, criminal sanctions were eliminated to focus on administrative ones. They include:

(i) the modification or termination of the acts or agreements against free competition;

(ii) order the modification or dissolution of the companies involved in the violations;

(iii) fines up to approximately USD 15 million or USD 22 million in cartel cases; and

(iv) other preventive, corrective or prohibitive measures the TDLC may find relevant.

However, after the pharmacies case initiated in 2008, the Criminal Prosecutor opened a criminal investigation arguing that cartel behaviour affecting prices may qualify as a criminal offence as well pursuant to Article 285 of the Criminal Code, which contemplated imprisonment from 61 days to three years for "fraudulent natural price adulteration". Nevertheless, in December, 2015 the Court of Appeals upheld the Criminal Court's ruling that acquitted the accused executives, weakening this criminal enforcement attempt. In this regard, one of the most important topics of the currently ongoing antitrust bill of law (Bulletin no. 9950-03, the "Bill") is the establishment of hardcore cartels as a criminal offense. The conduct would be punishable by imprisonment between 5 years and one day and 10 years.

Finally, there is also a civil scope in the antitrust enforcement (see letter l.).

e. Investigational powers of authority

The FNE may request collaboration and information necessary to its investigation from any officer of public services or entities, municipalities, and the companies in which the government –and its companies, entities or municipalities– have representation or participation.

In addition, the FNE may request private persons and companies –investigated or third parties– to provide any information and records that it may consider necessary for the ongoing investigation. However, individuals and representatives of legal entities from whom the FNE requests information that may damage their own interests may request the TDLC to annul or amend such request. The FNE may also summon private persons –investigated or third parties– to intervene.

Finally, the 2009 amendment of the DL 211 granted new powers to the FNE in order to strengthen anti cartel enforcement. Pursuant to article 39 (n), the FNE assisted by the police may:

(i) access to private or public premises and, if necessary, unlock or break in;

(ii) register and seize any kind of objects or documents that may be useful to prove the existence of an infringement;

(iii) intercept any kind of communications; and

(iv) order to any company that renders communication services to give access to copies or registers of transmitted or received communications. Such measures shall be authorized by a Judge from the Court of Appeals, based on a well-founded request pre-approved by the TDLC. The authorization, only to be given in serious and qualified cases in regard to cartel investigations, shall precisely mention the measures allowed, the term and the individuals that may be affected.

f. Attorney-client privilege

Pursuant to Article 220 of the Criminal Procedure Code, applicable to DL 211, the following information, which could be considered as "privileged", cannot be seized:

(i) communications between the accused and individuals that are not obliged to declare as witnesses, considering its family relationship or their duty of secrecy (e.g. external legal counsels);

(ii) notes taken by the people previously mentioned in relation to said communications; and

(iii) any other objects or documents to which the non-declaration faculty naturally extends to.

Such Article states that the prohibition shall rule only in regard to the communications, notes, objects and/or documents that are under the control of the individuals that are entitled to this non-declaration guaranty (i.e. the attorney). A contrario sensu, when said information is under the control of the client, although arguably, we believe it could be taken away since the client, as such, does not have such non-declaration guaranty. Nevertheless, the affected party would be able to request such evidence not be used in trial. We acknowledge that the law is not clear on this respect and this matter may be subject to debate in the future.

In addition, both the Criminal Procedure Code and DL 211 state that communications between the investigated party and its attorney cannot be wire tapped.

g. Interactions with other regulators

As stated in letter e., the FNE may ask for collaboration and information necessary to its investigation from any officer of public services or entities. In such case, the officers are obliged to comply with the request.

The FNE may also enter into agreements with public bodies for mutual collaboration and in order to agree on electronic transfer of information. In this regard, the FNE has signed with the National Consumer Service (SERNAC), the Criminal Prosecutor, the General

Comptroller Office, the Ministry of Public Works, the Ministry of Agriculture, the Department of Public Procurement (ChileCompra), the National Institute of Industrial Property (INAPI), the Administrative Corporation of the Judicial Power (CAPJ), the Internal Revenue Service (SII), the Production Development Corporation (CORFO), the National Commission of Energy (CNE) and the National Public Health Procurement Office (CENABAST).

h. Treaties in place

Several treaties signed by Chile contain antitrust provisions. For instance, Free Trade Agreements with Canada, Central America (Costa Rica, El Salvador, Honduras, Nicaragua and Guatemala), the United States of America, Mexico, Peru, EFTA (Iceland, Liechtenstein, Norway and Switzerland), Republic of Korea and Australia; the Economic Complementation Agreement with Mercosur (Argentina, Brazil, Paraguay and Uruguay); the Economic Partnership Agreements with the European Union and Japan; and the Trans-Pacific Partnership Agreement P4 with New Zealand, Brunei and Singapore.

i. Standards of evidence

DL 211 provides a rather open frame in regard to the admissible evidence and its assessment by the TDLC. Apart from the ones applicable to civil procedures –documents, parties and third parties depositions, court's own inspection and assumptions– shall be admissible "all evidence or information which is, as per the TDLC, suitable to establish the relevant facts". The TDLC may also, at any time and when essential to clarify still obscure facts, decree evidentiary procedures it deems convenient. The TDLC shall assess the evidence according to the rules of "reasoned opinion" ("sana crítica").

Notwithstanding the above, the standard of evidence is not established in the DL 211. However, there would be a common understanding that the antitrust standard should be situated in between the "preponderance of the evidence" (civil matters) and "beyond all reasonable doubt" (criminal matters) standards. To which one is closer have changed depending on the unlawful conduct, the origin of the ruling (issued by the TDLC or the Supreme Court) and the year it was issued. Nowadays, taking into account the difficulty to gather direct evidence (even with the FNE's intrusive investigative powers), the standard tends to be more flexible.

j. Methods of engagement with authority

DL 211 procedures impose a formal engagement through briefs which become part of the public record of the procedure.

On the contrary, the investigation procedures before the FNE tend to be flexible (more or less, depending on the kind of investigation and the quality of the party). Although formal engagements are the main ones –offices and request of meetings and depositions– phone calls or emails would be permitted if necessary.

k. Judicial review of decisions

The TDLC's final judgment is subject to a remedy of complaint before the Supreme Court. Such remedy has to be well-founded and may be filed by any of the parties before the TDLC, within 10 days of the respective service.

The filing of the remedy does not suspend the enforcement of the judgment issued by the TDLC except for payment of the fines. However, at the request of a party, and upon a well-founded resolution, the Supreme Court may suspend the effects of the judgment in whole or in part.

l. Private litigation

Along with the FNE, privates are also entitled to directly file a claim before the TDLC. However, contrary to the FNE, which represents the "general interest of the collective economic order", the TDLC has stated that a private party requires being an "immediate passive subject" of a conduct that may violate DL 211 in order to file a claim. Furthermore, the TDLC has understood that for an agent to be considered as a direct victim of a free competition violation, it must currently or potentially participate in the market which is directly affected by the alleged anticompetitive activity or in other related markets that can reasonably be indirectly affected by the alleged unlawful activity.

Currently, private actions for civil damages caused by cartels may also be brought before the competent civil court in a summary proceeding once the TDLC has declared the existence of antitrust violation and has imposed sanctions. The only subject that may be analyzed after an administrative cartel decision is if there is a direct relation (cause-effect) between the antitrust infringement and the damage. Also, the amount and nature of the damages require to be proved.

II – MERGER CONTROL

a. Types of transactions

As mentioned in chapter I, letter a., DL 211 states that whoever carries out or enters into, individually or collectively, any conduct, act or agreement that impedes, restricts or hinders free competition or that tends to produce such effects will be sanctioned; that is to say, regardless of the legal nature of the act or agreement. In that sense, any concentration operation is subject to DL 211 to the extent it could impede, restrict or hinder free competition or tend to produce such effects.

The FNE's Guidelines on Concentration Operations (the "Guidelines"), which established an alternative voluntary consultation procedure with the FNE, states that concentration operations are directed towards the change in incentives that occurs when two independent economic entities, through some contractual or factual arrangement, align their incentives in order to maximize their joint profits. The FNE's definition is grounded on economic concepts and therefore, it may comprise a broad and varied range of legal phenomena, such as

mergers, assets and stock acquisitions, partnerships and even joint ventures, acquisition of minority shareholdings and interlocking directorates.

Finally, the Bill would include a wide scope as well, defining concentration operation as "any action, act or convention, or group of these, having for effect that two or more economic agents, previously independent between them, lose such independence, in any area of their activities." This would include:

(i) mergers, regardless of the corporate organization of the merging entities or the resulting one;

(ii) direct or indirect acquisitions of rights that allow, individually or jointly, decisively influence in the management of other;

(iii) associations in any form to create a separate and independent economic agent which perform its functions permanently; and

(iv) acquisitions of control over the assets of another.

b. Notification of foreign-to-foreign mergers

There is no special regulation in this regard. Both local and foreign-to-foreign mergers may be reviewed if they affect the domestic market, irrespective of the execution place and the nationality of the companies.

c. Definition of "control"

Control is not defined in DL 211. However, Law Act no. 18,045 –Securities Market Act– defines control as "any person or group of persons acting together, which, directly or through other persons or companies, controls at least 25% of the shares of a company", provided certain conditions are met.

The TDLC has taken into account such definition, and has also provided its own concept of control as "the capacity of a natural or legal person of excerpting a decisive influence in competitive decision-making of other natural or legal persons" (ruling no. 117/2011).

d. Jurisdictional thresholds

There are no mandatory jurisdictional thresholds in Chile. Although not mandatory, the Guidelines states that the FNE would rule out further analysis:

(i) if the HHI after the merger is below 1500;

(ii) if $1500 < HHI < 2500$ (the value of this index shows a mildly concentrated market) and $\Delta HHI < 200$; and

(iii) if $HHI > 2500$ (the value of this index represents a highly concentrated market) and $\Delta HHI < 100$.

On the contrary, the FNE would thoroughly analyze mergers that exceed those thresholds.

The Bill is proposing a mandatory pre-merger notification if both of the following thresholds are met:

(i) if the sum of the sales within Chile of the economic agents planning to concentrate, reaches, in the previous exercise to the one in which the notification takes place, an amount equal or higher to the threshold set by the Regulation issued by the Ministry of Economy; and

(ii) if at least two of the economic agents planning to concentrate, have separately generated sales in Chile, during the previous exercise to the one in which the notification takes place, for an amount equal or higher to the threshold set by Regulation issued by the Ministry of Economy.

However, these thresholds have not been defined yet as they are to be set by Regulation issued by the Ministry of Economy.

According to the Bill, operations falling below such thresholds may be nevertheless investigated by the FNE within a year, if the latter believes that the operation may have infringed DL 211.

e. Triggering event for filing and deadlines

According to the DL 211 there is no legal obligation to previously notify a concentration operation or to make any filing seeking its approval. Thus, if the parties have closed the transaction without clearance, they should not be subject to sanctions if there are no competition concerns derived from the transaction. However, this may be challenged by the FNE and fines may be sought anyway. Notwithstanding the above, the parties to such operation may voluntarily request its approval to the TDLC or notify the transaction to the FNE before its execution. Taking this into account, there are no triggering events for filing.

The Guidelines do not establish triggering events either, but the notification shall be filed before the consummation of the concentration operation. In that regard "the FNE will consider that a merger has been consummated when two or more economically independent companies become one single company, become part of the same corporate group or when a non-transitory change in the control of the entity takes place. The materialization or conclusion of a merger transaction includes, but is not limited to, the conclusion of the legal acts that convey it."

f. Exemptions

Taking into account the non-mandatory merger control in DL 211, there would be no exceptions. However, see letter d. for the exemptions given by the Guidelines and the Bill due to falling below the thresholds.

g. Rules regarding foreign investment, special sectors or similar 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 do not regulate concentration transactions but the entrance of foreign capital to Chile.

There are special regulations and relevant approvals for the following matters, regarding:

(i) securities markets: in general, any takeover entailing a change of control of an open-stock corporation must be conducted through a tender offer (an OPA). The OPA is a public offer for acquiring shares through the procedure described in the Securities Market Act. Such process ensures equal opportunity and fair dealing among all shareholder of the OPA target company;

(ii) banks and financial institutions: 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% of bank capital, without the prior consent of the Bank Superintendence;

(iii) insurers: according to Insurance Companies Law, insurance companies must report to the Securities and Insurances Superintendence any change to their shareholding structure entailing the acquisition of a 10% 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 penalized by the SVS;

(iv) mass medias: Freedom of Opinion and Information and Journalism Law 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 Antitrust Court 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 TLDC assessing its impact on the media market. This report must be issued within 30 days from the filing of this application, otherwise is to be deemed as not meriting any objection; and

(v) sanitary services: Sanitary Services 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% 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.

h. Information requested for the filing

In 2009, considering the lack of clear regulation, the TDLC issued an internal decree – Auto Acordado no. 12– establishing its criteria regarding preventive control in concentration transactions made subject to a consultation before the TDLC. It provides that a voluntary consultation before the TDLC must include the following information:

(i) parties to the transaction and its related parties;

(ii) full description of the proposed transaction, including its nature, related documents and exhibits that reveal the seriousness of the operation and precedent conditions, resulting structure of ownership and control after the execution of the

transaction, schedule, the existence of ancillary restraints clauses and countries where the transaction shall produce effects;

(iii) the relevant market, including a description of the goods and services provided by each party, its substitutes, market size and market share of each party, structure and characteristics of the actual and potential supply and demand of the goods and services, costs, description of distribution and commercialisation systems, prices and existence of exclusivity and cooperation agreements;

(iv) objectives pursued;

(v) expected effects in the market; and

(vi) mitigation measures proposed. If such information is not filed along with the consultation, the TDLC may request all listed information ex-officio.

Similar information is required in the Guidelines procedure. In this regard, if the FNE considers that there is missing or incomplete information, it will not initiate the proceeding and will ask the parties for the relevant information. Notwithstanding this, additional information may be requested during the procedure as well.

The Bill establishes that the information requested would be the necessary backgrounds to identify the operation and the parties, as well as the risks of it and exhibits that reveal the seriousness of the operation. However, the details would be left to another Regulation.

i. Sanctions applied for late or no filing

As stated in letter e., there is no legal obligation to previously notify a concentration operation and, therefore, not notifying parties should not be subject, in principle, to sanctions if there are no competition concerns derived from the transaction.

However, if a concentration transaction is not consulted before the TDLC by the parties, the FNE is able to file a consultation before the TDLC initiating a non-adversarial proceeding, prior the completion of the relevant transaction, if it considers it poses antitrust's concerns. The FNE may also open an investigation prior the filing. Additionally, after the completion of a non consulted relevant transaction, any third party or the FNE may file an antitrust claim before the TDLC initiating an adversarial proceeding if they consider it violates antitrust law. According to Chilean jurisprudence, there has been only one claim filed after the transaction has been conducted. In such case the FNE and the parties of the transaction entered into a settlement before the TDLC[1].

The Bill would propose a fine of up to approximately USD 15,000 per day of delay since the execution of the concentration operation. In addition, not notifying an operation, executing it after the notification and while suspended, executing it without considering the measures imposed or notifying it giving false information may as well be sanctioned. In this case, the TDLC may apply the proposed general sanctions (e.g. fines up to an amount equivalent to the double of the economic benefit obtained due to the infraction. If such amount cannot be clearly

[1] Case: FNE v Hoyts Cinemas Chile Holding Limited and others, June 2012. The FNE requested the "reversion" and "disinvestment" of the transaction. Finally, the parties ended the conflict through a settlement approved by the TDLC.

determined by the tribunal, then the highest fine shall be the 30% of the sales of the offender that had taken place during the infraction period).

j. Parties responsible for filing

Any of the parties to the operation may file a consultation proceeding before the TDLC. On the contrary, when following the Guidelines procedure, all of the parties to the operation shall make the filing. The Bill is proposing in the same sense.

k. Filing fees

There are no filing fees in the voluntary proceeding before the TDLC or in the one before the FNE.

l. Effects of notification

Once a notification is filed before the TDLC such court shall issue a resolution admitting or rejecting it. Article 31 of DL 211 fixes the procedure to be followed once a consultation is admitted. In regard to the suspensory effect on the proposed transaction of the notification, there are no specific provisions. Taking that into account, the TDLC issued the Auto Acordado no. 5, which states that since the date of initiation of the consultation proceeding, the consulted transaction cannot be closed by the consultant parties without the prior approval of the TDLC. However, the legality of such Auto Acordado is an arguable topic. Notwithstanding this, when the FNE files the consultation it may expressly request the suspension and the TDLC may also declare it ex-officio.

The Guidelines fixes its own especial procedure. Once a notification is filed before the FNE it shall asses it in order to review the completeness of the information. As stated in letter h., if the FNE considers that there is missing or incomplete information along with the notification, it will not initiate the proceeding. If, during the procedure, the parties execute the transaction, the FNE will close the procedure and initiate a confrontational investigation.

Finally, the Bill establishes that after the notification the FNE shall asses its completeness in order to initiate the procedure. Once filed, the transaction is expressly under suspensory effect until the final resolution.

m. Gun jumping and closing – sanctions

Gun jumping is not specifically regulated neither in the DL 211 nor in the Guidelines or in the Bill. In that sense, rules governing general exchange of sensitive information are applicable.

n. Type of remedies and their negotiation

Remedies to be imposed by the TDLC are applicable to its sole discretion and not negotiable by the parties. On the contrary, remedies in the Guidelines' procedure are negotiable

by the parties due to the collaborative nature of such procedure. In both cases, there are no fixed types of remedies, so the TDLC or the FNE and the parties may freely impose the most suitable remedies (e.g. divestment, modification or maintenance of agreements, obligations toward third parties, etc.).

o. Timetable for clearance

There are no significant fixed terms in the DL 211 procedure. According to official data, the procedure lasts nearly 8 months on average. This could last longer if a remedy of complaint is filed before the Supreme Court (see Chapter I, letter k.), up to 18 months in total.

The timetable for clearance in the procedure established in the FNE Guidelines is the following:

(i) within 5 business days, the FNE should issue a resolution opening the investigation, which shall be notified to the parties and published on the website. However, if the parties notify the transaction under confidentiality, the investigation shall not be opened until the transaction becomes public;

(ii) the proceeding should not take more than 60 business days after the beginning of the investigation. This term may be extended by mutual agreement of the parties and the FNE; and

(iii) before the expiration of the 60 day term (or its extension), the FNE should issue its resolution (see letter q.). If the FNE decides to enter into a settlement agreement, it shall schedule a timetable for the negotiations. If there is no agreement within such timetable, the FNE shall initiate a consultation before the Antitrust Court. If the settlement agreement is reached, the Antitrust Court must approve or reject it within 15 business days.

p. Involvement by third parties

According to Article 31 of DL 211, the resolution initiating a consultation procedure shall be published in the Official Gazette and on the TDLC's website. Also, the TDLC shall inform by official letter to the FNE, the authorities directly concerned and the economic agents that, in the TDLC's exclusive judgment, are related to the matter. Within not less than 15 business days, the notified parties, and those having a legitimate interest in the matter (e.g. customers and competitors) may provide information to the TDLC.

q. Types of resolutions that may be issued

In the procedure followed before the TDLC, it may finally:

(i) reject the transaction;

(ii) approve it; or

(iii) approve it with some measures or conditions to be complied by the parties. In the last two cases, DL 211 creates a safe harbor by providing that the acts or agreements executed in accordance to the ruling of the TDLC would not cause any liability unless new facts prove the contrary.

In the procedure followed before the FNE, it may conclude with any one of the following resolutions:

(i) the FNE decides not to review or investigate any further as it deems that the transaction has no anticompetitive effects;

(ii) the FNE requests mitigation measures to the parties and enters into a settlement with the parties (which must be approved by the TDLC); or

(iii) the FNE files a voluntary consultation procedure before the TDLC as described above. In this case, the FNE should previously grant the option to the parties involved in the transaction to make the filing before the TDLC.

r. Review of ancillary restraints

To the extent that the related agreements (e.g. non-competition, cooperation, exclusivity and licensing) may impede, restricts or hinder free competition or that could tend to produce such effects –and, therefore, raise the risks derived by the proposed transaction– the TDLC may review ancillary restraints. As stated in letter h., related agreements are part of the information required by the TDCL and FNE.