



Organisation for Economic Co-operation and Development

DAF/COMP/AR(2019)5

Unclassified

English - Or. English

21 May 2019

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Chile

-- 2018 --

5-7 June 2019

This report is submitted by Chile to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-7 June 2019.

JT03447786

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Executive Summary

1. This report summarizes recent developments in competition policy in Chile. It also addresses the main precedents related to competition law enforcement, to competition advocacy activities as well as other developments that occurred during 2018.
2. The Fiscalía Nacional Económica (hereinafter, “the FNE”) is an independent government competition agency whose main responsibilities entail the enforcement of competition law. Furthermore, it is responsible of issuing technical reports and studies, and to undertake competition advocacy. From 2016, the FNE performs preventive merger control in regards to operations which surpass certain thresholds. The Tribunal de Defensa de la Libre Competencia (hereinafter, “the Competition Tribunal”, or “the TDLC”) is an independent judicial body with exclusive and excluding jurisdiction to decide antitrust claims, including the resolution of adversarial matters (e.g., complaints brought by the FNE or private parties regarding collusion and abuse of dominance) as well as non-adversarial matters. Decisions and resolutions issued by the TDLC can be challenged before the Supreme Court. The competition law is Decree Law No. 211 and its subsequent modifications.
3. In particular, during 2018, the Competition Tribunal issued its judgment on the Intravenous drug cartel (Ruling No. 165/2018) in November 2018. In a unanimous ruling, the TDLC concluded that the three pharma companies accused of a hard-core cartel, celebrated and executed a single and continuous conspiracy aimed to affect tenders called by the Supply Center of the National System of Health Services (Cenabast) to purchase medical ampoules from 1999 to, at least, 2013.
4. Regarding new cases, the FNE filed a complaint before the TDLC accusing the National Professional Football (soccer) Association (ANFP) of anticompetitive conducts that caused entry barrier to the sports spectacle’s market. It also submitted an injunction to the TDLC against two beef and veal producing and marketing companies that violated the DL 211 by perfecting a concentration operation, they had notified to the FNE, before knowing the agency’s statement on the matter.
5. Furthermore, the FNE submitted an injunction against the Forest Fire Fighting Companies for having planned and executed an anti-competitive agreement to prevent, restrict or obstruct competition in the fighting and extinguishing of forest fires by tanker aircraft in the national territory during the seasons between 2009 and 2015.

1. Changes to competition laws and policies, proposed or adopted

1.1. Summary of new legal provisions of competition law and related legislation

6. There are no new legal provisions on competition law.

1.2. Other relevant measures, including new guidelines

7. During this year, the FNE published two relevant guidelines. In November 2018, a draft of the "Internal Guide for Penalty Requests" was published, this document was submitted to a public consultation process. Through this guide we try to explain the manner in which the FNE will base their respective requests for fines, taking into consideration the legal circumstances and especially the deterrence the fine might

produce. The other guideline is an “Internal Guidelines for Filing Criminal Claims for Cartels”. This document specifies the criteria that the institution will use to place complaints against those responsible for collusion, exercising the power that was granted in the legal modification made in August 2016.

1.3. Government proposals for new legislation

8. No proposals have been submitted by the Government to the National Congress during 2018. However, in November, 2018, a Congressman submitted a draft proposal (Boletín No. 12.286) to modify the current recursive system in Competition proceedings, restricting the review power of the Supreme Court. This bill is still in the first legislative process.

2. Enforcement of competition laws and policies

2.1. Actions against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1. Summary of activities of:

FNE

Injunction against the national Professional Football Association

9. The FNE accused the National Professional Football (soccer) Association (ANFP) of anticompetitive conducts.

10. In its investigation, the FNE was able to determine that, considering its income and assets, and the difficult access to Second Division club’s credits, the quota for participating in First B Championships constitutes a real entry barrier to the sports spectacle’s market. Indeed, it is highly probable that many of these clubs will not be able to finance the entry fee and, therefore, cannot participate in the First B championships that they would have had access thanks to their sporting merits.

11. For all of the above, the FNE requested the TDLC to order the ANFP to stop the imputed conduct and impose a 5,000 UTA fine, equivalent to approximately US \$ 4.7 million.

Complaint filed against two companies for price fixing and allocating contracts in the aerial firefighting industry

12. The FNE submitted an injunction against the Forest Fire Fighting Companies Faasa Chile Servicios Aéreos Limitada and Martínez Ridao Chile Limitada for having planned and executed an anti-competitive agreement in the fighting and extinguishing of forest fires by tanker aircraft market in the national territory during the seasons between 2009 and 2015.

13. The FNE charged this companies of coordinating actions in the Chilean market and, within the framework of that agreement, determining marketing conditions, prices and the participation of bidders in public and private hiring processes.

14. In the claim, submitted on July 18, the FNE asked the TDLC to apply Faasa a 3,000 UTA fine, equivalent to approximately US \$ 2.6 million, and a 4,000 UTA fine (US \$ 3.5 million) to Martínez Ridao for this behavior.

15. This amount considers the seriousness and temporal extension of the conduct, together with the fact that these companies have concentrated almost all of the sales associated with these services, so that their clients, both public and private, have had to pay the prices of the cartel by not having alternative offers.

Companies producing and marketing beef and veal - Minerva S.A. and JBS S.A.

16. The FNE submitted a claim to the TDLC against the beef and veal producing companies Minerva S.A. and JBS S.A., requesting a 2,000 UTA fine (equivalent to US \$ 3.8 million in total) to each of them.

17. The submission states that Minerva and JBS violated the DL 211 by perfecting a concentration operation they had notified to the FNE, before knowing the agency's statement on the matter (*gun jumping*).

18. The FNE indicates that it was notified on July 14, 2017, but the aforementioned companies perfected the merger two weeks later (on July 31 of the same year), with Minerva acquiring 100% of the shares of JBS subsidiary companies, although they were obliged to keep the operation suspended while the FNE had not approved it.

19. In this manner, the companies failed to comply with article 49 of DL 211, which indicates that once a concentration operation has been submitted to the notification procedure before the FNE, the parties have a duty not to carry it out as long as there is no prior authorization from the FNE.

TDLC

20. During the period covered by this report, 28 new adversarial cases were initiated before the TDLC. Eight cases were related to unilateral conducts, one referred to infringement of remedies previously settled with the FNE, eight referred to Public Administration acts that undermine competition, three referred to collusion and the remaining three referred to unfair competition. Moreover, two judicial settlements were reached between the FNE and the defendants during ongoing trials and approved by the TDLC. The TDLC shall approve a judicial settlement whenever said settlement does not harm competition, includes a recognition or an agreement about the facts involved in the lawsuit, and incorporates commitments from the defendants.

21. The TDLC issued six decisions or rulings in adversarial cases during the period covered by this report. The average length of these proceedings was 503 days. These cases stem from claims filed by the FNE, as well as from complaints filed by private parties. In three of these rulings the TDLC acquitted the defendants and one decided an appeal challenging the FNE's decision to reject a merger within the merger control system, revoking the FNE's act. The other two were condenatory. Four out of the six decisions were challenged before the Supreme Court and they are still under review. In this regard, please bear in mind that the ruling that revoked the FNE's decision in the merger control system is not subject to review by the Supreme Court.

Decision in the Intravenous drug cartel (Ruling No. 165/2018)

22. One of the main decisions issued by the TDLC during the relevant period is the Intravenous drug cartel (Ruling No. 165/2018). In this case, the TDLC ruled in favor of the FNE collusion complaint against Biosano and Fresenius Kabi Chile and its subsidiary Sanderson, for forming and maintaining a cartel to affect tenders called by the Supply Center of the National System of Health Services (Cenabast) to purchase medical ampoules. According to the TDLC's decision, these companies celebrated and executed a single and continuous conspiracy aimed to affect tenders called by Cenabast to purchase ampoules (generic injectable medicines contained in smaller volume containers) from 1999 to, at least, 2013.

23. In a unanimous resolution, the Competition Tribunal imposed Sanderson laboratory a 30 thousand Annual Tax Units (UTA) fine (equivalent to US \$ 25.6 million) and a 2,463 UTA fine (equivalent to US \$ 2.1 million) to Fresenius Kabi Chile, whereas Biosano laboratory was benefited with a fine exemption by the TDLC due to its participation in the cartel leniency program. Along with the foregoing, the TDLC required Sanderson and Fresenius to adopt a five-year Competition Compliance Program in accordance with the the FNE guidelines ("Implementation of competition programs for the compliance of antitrust regulations").

24. This ruling is currently under review by the Supreme Court.

Decision in the Air Transport Services (Decision No. 54/2018)

25. In another relevant case, on August 2016, a Trade Association asked the TDLC to review and reject two Joint Business Agreement (JBAs) for the air transport service of passengers and cargo: one of them to be executed by LATAM and American Airlines, for flights between South America, United States and Canada and the other by LATAM, Iberia and British Airways for flights between South America and Europe.

26. The TDLC decided to clear, with remedies, both of the consulted JBAs. The remedies imposed on the parties indicate: (i) establishing an income distribution formula in the JBAs; (ii) maintain the capacity offered on the Santiago-Miami and Santiago-Madrid direct routes; (iii) increase the capacity offered on the North America and Europe routes; (iv) avoid to charge implicit negative prices on indirect routes that have the Santiago-Miami and Santiago-Madrid flights as the backbone; (v) offer frequent passenger program agreements to new entrants on the Santiago-Miami and Santiago-Madrid direct routes; (vi) offer tariff combination agreements for new entrants on the Santiago-Miami and Santiago-Madrid direct routes; (vii) offer special prorated agreements to new entrants on the Santiago-Miami and Santiago-Madrid direct routes; (viii) appoint a consultant to oversee these conditions; and (ix) consult to the TDLC six months before any of the JBAs has been in effect for 5 years. Measures (i) to (viii) correspond only to air transport of passengers.

27. The TDLC decision is currently under review by the Supreme Court.

Supreme Court.

28. During the period covered by this report, five competition cases were decided by the Supreme Court. In one of them they reversed the TDLC's decision. In this case, the Supreme Court overturned a TDLC's decision, which had acquitted the incumbent telecom companies for their participation in the bidding process of the 700 MHz band. This case was brought before the Supreme Court by a Consumers Association who

claimed that the incumbents had surpassed the maximum spectrum limit (60 MHz) imposed by a previous decision of the Supreme Court concerning the bidding process of the 1.200 MHz band (Case No. 4794-2008 Supreme Court).

29. In its ruling, the Supreme Court stated that the telecom companies (Entel, Claro y Telefónica) were subject to 60 MHz limit and thus, according to the Supreme Court, the spectrum in the 700 MHz band awarded constituted an antitrust violation. Consequently, the Supreme Court ordered the divestiture of the same amount of spectrum acquired by the defendants in the 700 MHz bidding process, giving them the option to choose the band to alienate. In addition, the Supreme Court ordered to the Telecom Regulator (Subtel) to enforce the maximum spectrum limit or submit a non-adversarial consultation to the TDLC to establish the new limits. The Subtel initiated a non-adversarial procedure before the TDLC to change the oversaid spectrum limit for incumbent companies.

2.1.2. Description of significant cases, including those with international implications

30. Please refer to section 2.1.1.

2.2. Mergers and acquisitions

2.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws

31. The implementation of the new merger control system, that instituted a mandatory notification to this agency of all merger operations projects, has been satisfactory. The results for the year 2018 were the successful control of 63 merger operations, in which 53 were approved purely and simply, 8 were approved subject to conditions and 2 were denied. All these investigations took, in average, a third of the time spent in previous years to evaluate the merger operations.

2.2.2. Summary of significant/ongoing cases

Acquisition of Nutrabien by Ideal

32. In the context of the new merger control system, the FNE decided to prohibit the acquisition of Alimentos Nutrabien S.A. by Ideal S.A., an operation that was notified in July 2017.

33. After the notification, the FNE investigated to determine the risks that this operation could have caused, and concluded that the integration of both companies would have reduced the competitive intensity in the affected markets and that this would not have been sufficiently compensated by the efficiencies of the operation that the companies argued, nor for the mitigation measures that they offered.

34. This was the first time that the Chilean competition authority prohibited a concentration between companies, since the entry into force of the new merger control system, in June 2017. The examination included, among other measures, contributions of clients and competitors, reports of economists commissioned by the companies, and the conduction of two consumer surveys to understand the affected markets: one commissioned by the FNE and another by the parties of the operation, both applied in supermarkets and other store formats.

35. The TDLC revoked the FNE's decision (Ruling No. 166/2018) establishing that the merger efficiencies were greater than the risks involved in the merger and hence, approved the transaction with the remedies proposed by the companies within the merger control procedure before the FNE. Given that this was the first appeal of a rejected merger, the TDLC established a standard of review stating that it has the power to review in depth the analysis of the FNE on a merger reviewing the merit and the validity of the FNE's resolutions that prohibit the operation. In this sense, the TDLC is able to use the background information contained in the FNE investigation file and the information that it directly collects, either ex officio or at the request of any party.

Prohibition of the entry of Banco Santander to Servipag

36. The FNE prohibited the concentration operation consisting of the entry of Banco Santander Chile (Santander) to the property of the Society of Collection and Payment of Services Limited (Servipag), a company that today belongs in equal parts to the Banco de Chile and the Credit and Investment Bank.

37. The operation, notified on October 26, 2017, through the concentration control system, contemplated the entry of Santander as a new partner, in a way that each bank would own one third of Servipag's property.

38. The FNE investigated to determine the risks that this operation could cause, performing an analysis of market shares and concentration indexes based on different definitions of the relevant market, and evaluating the upward price pressure, based on the competitive closeness of the companies and services involved.

39. After this work, it was concluded that the entry of Santander into the Servipag property would have substantially reduced competition in the digital collection and payment markets, and determined that there are coordinated risks, which would not have been sufficiently compensated, through the efficiencies that the banks argued, nor by the mitigation measures they offered.

40. Since the entry into force of the new mandatory merger control system, this was the second time that the Chilean competition authority prohibited a concentration between companies.

Linde/Praxair

41. In October 2018, the FNE approved with mitigation measures the merger of global gas production and marketing companies Linde Aktiengesellschaft and Praxair Inc., which operate in Chile through its subsidiaries Linde Gas Chile S.A. and Praxair Chile Limitada, leading to the creation of a new entity called Linde plc.

42. The most significant measure imposed by the FNE was the divestment of all of Praxair Chile's assets, which must be transferred to an independent third party within a maximum period of nine months from the approval of the operation.

CDF/Turner

43. In December 2018 the FNE approved, with mitigations measures in Phase 2, the acquisition agreement through which Turner International Latin America, Inc. (Turner) would acquire all the shares of Television Services Canal del Fútbol Limitada (CDF), whose sole owners were the National Association of Professional Soccer (ANFP) and Management of Limited Television (GTV).

44. The measures offered were the following:
1. Prohibition of bundled and packaged sales between the CDF product and the Turner channels.
 2. Prohibition of refusal of sale to cable operators who are willing to pay for the CDF content.
 3. Obligation to submit to an arbitration at the request of the cable operator for the resolution of disputes in the negotiations.
 4. To not discriminate arbitrarily between the different cable operators.
 5. To maintain the confidentiality of commercially sensitive information of the competitors of the merged entity.
 6. Inclusion of Chilevisión in the commitments when certain conditions are met.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

3.1. FNE

45. During 2018 the FNE released two Market Studies in the market of annuities (pensions) and public notaries. The former was released in April and concluded that the existence of distortions in the market were related to regulatory problems, especially how the information was presented to the public and the role the sales force was having in determining decisions of pensioners. The FNE suggested regulatory amendments in order to simplify the functioning of the system and improve the way in which information is presented to people, in such a way that encourages pensioners to make the best decisions, safeguarding their freedom to choose.

46. On the other hand, in the public notaries market study the FNE verified the hypothesis of lack of competition. The study reveals that the system, which is in place since colonial times, is not working properly and that competition restrictions which may have been necessary in the past, are not in present times. The study suggests to make a structural reform which completely changes the current system.

47. Both the annuity market study and the market study of notaries gave way to the creation of bills of law. Both bills widely reflect the legislative changes proposed by FNE in the aforementioned market studies and are currently being processed in the Chilean congress.

48. Here we provide the links for both Market Studies:

- Annuities:
http://www.fne.gob.cl/wp-content/uploads/2018/01/Informe_preliminar_EM01_2018.pdf
- Public Notaries:
http://www.fne.gob.cl/wp-content/uploads/2018/06/Informe_Preliminar_Final-1.pdf

49. An also for the ongoing bills:

- Annuities Bill:
https://www.camara.cl/pley/pley_detalle.aspx?prmID=12718&prmBoletin=12212-13
- Public Notaries Bill:
https://www.camara.cl/pley/pley_detalle.aspx?prmID=12611&prmBoletin=12092-07

3.2. TDLC

3.2.1. Decision in the gas industry

50. A Consumers Association asked the TDLC to review the existing ownership relationships (horizontal and vertical) between the different companies that operate in the gas market (petroleum and natural). In this procedure, the TDLC detected horizontal and vertical risks and imposed several measures, including the divestiture of one of the Natural Gas Terminal (“Gasmar”) by two companies that operate in the natural gas distribution market.

4. Resources of competition authorities

4.1. FNE Resources overall (current numbers and change over previous year)

4.1.1. Annual budget (in your currency and USD)

51. The annual budget assigned to the FNE is shown in the table below:

Table 1.

Year	Chilean Pesos	USD
2012	4,220,158,000	6,403,882
2013	4,507,826,000	6,840,404
2014*	4,675,937,000	7,095,504
2015	7,070,663,000	10,729,382
2016	5,816,708,000	8,826,568
2017	6,575,860,000	9,813,544
2018	6,981,152,000	10,236,443

Note:

* Includes only operational budget. The total budget for 2014 is around USD 11,237,281 and includes the change of headquarters of the FNE

Change USD December 31 2018: \$681,99 (Servicio de Impuestos Internos)

4.1.1. Number of employees (person-years)

Table 2.

Staff	2013	2014	2015	2016	2017	2018
Economists	20	20	20	19	31	30
Lawyers	36	42	39	42	47	50
Other professionals	20	19	23	22	21	11
Support staff	14	15	10	11	13	18
All staff	90	96	92	94	112	99

4.2. FNE Human resources

Table 3.

	2014	2015	2016	2017	2018
Enforcement against anticompetitive practices	45	33	33	39	52
Merger review and enforcement	8	11	13	22	21
Advocacy efforts	8	11	11	13	6
Litigation	12	18	18	15	

4.3. FNE Period covered by the above information

52. The budget for the FNE refers to the period of January to December of each year. Staff as of January of each year.

4.4. TDLC Resources overall (current numbers and changes over the previous year):

Table 4. Annual budget (in your currency and US\$)

Chilean Pesos		
Year	Chilean Pesos	USD
2013	1,228,933,000	1,864,845
2014*	1,434,228,420	2,176,371
2015	1,729,560,000	2,624,522
2016	1,795,283,000	2,724,253
2017	1,849,141,000	2,759,582
2018	1,897,219,000	2,781,886

Note: *Includes only operational budget. The total budget for 2014 is around USD 3,334,517 and includes the change of headquarters of the TDLC.

Table 5. Number of members (including staff members + judges)

Staff members + judges	
2013	21
2014	21
2015	22
2016	23
2017	23
2018	25

Table 6. Informing separately for each year

	2014	2015	2016	2017	2018
Economists	6	6	6	6	7
Lawyers	8	8	9	9	10
Support staff	7	8	8	8	8
All staff	21	22	23	23	25

4.5. Period covered by the above information:

53. The budget for the TDLC refers to the period of January to December of each year. Staff as of January 1st of each year.

54. Change USD December 31 2018: \$681,99 (Servicio de Impuestos Internos)

5. Summaries of or references to new reports and studies on competition policy issues

55. The power of the FNE to develop market studies was granted in 2016 in the last amendment of the Competition Act and a specific market studies division of the FNE was created in 2017.

56. Please refer to section 3 for detail of the developed market studies.