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COMPETITION COMMITTEE****Common ownership by institutional investors and its impact on competition - Note  
by Chile****6 December 2017**

This document reproduces a written contribution from Chile submitted for Item 6 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at [www.oecd.org/daf/competition/common-ownership-and-its-impact-on-competition.htm](http://www.oecd.org/daf/competition/common-ownership-and-its-impact-on-competition.htm)

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## Chile

### 1. Introduction

1. On August 30, 2016, Law No. 20.945 amended the Chilean competition law (or “DL 211”). Among other reforms, and according to the concerns that were raised at the time by the Fiscalía Nacional Económica (Chilean Competition Authority or “FNE”), the law introduced two innovations regarding the structural links between competing companies. On one side, an express prohibition of interlocking in article 3 letter d) of DL 211; and, on the other hand, a system of mandatory notification on acquisitions of minority interests in the ownership of competitors, in its articles 4 bis<sup>1</sup> (and also 4 transitory). Nevertheless, before explaining in detail this new regulation, it is important to highlight how this issue was approached before the new law will be given.

### 2. Study on minority shareholding and interlocking

2. The discussion for the law approved in 2016 was preceded by the study of the FNE “Minority participations and common directors between competing companies” published in November 2013, which could be pointed as the direct source of the new regulation. The study dealt with the competition analysis of both figures, with reference to the North American and European systems. For its preparation, special consideration was given to the contributions on the subject drafted by Mr. Michael Jacobs, who was commissioned for these purposes.

3. The 2013 study dealt with the framework of identifiable risks that the minority participation or interlocking relationships between companies could provoke, explaining in detail what is the incentive change generated by both. In a manner similar to a unilateral risk analysis in relation to concentration operations, it was then argued, the active and passive minority participations alter the incentives to compete in a scenario of independence between the firms. This study also addressed the way in which direct interlocking and minority participation could increase coordination risks, as they increased symmetry or transparency and decreased the incentives to deviate from possible collusion.

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1 “Article 4 bis. - The acquisition, by a company or an entity that belongs to its business group, of direct or indirect participation, in more than 10% of the capital of a competing company, considering its own shares and those managed by third parties, must be informed to Fiscalía Nacional Económica no later than sixty days after its conclusion. The FNE may open an investigation regarding to those acts in order to verify infractions to article 3.

The obligation to inform established in the previous paragraph will only apply in the event that the acquiring company, or its business group, as appropriate, and the company whose participation is acquired, have, each separately, an annual income from sales, services and other related activities that exceed one hundred thousand UF in the last calendar year. In case the obligation to inform established in this article is infringed, the measures of article 26 can be applied, as well as those preventive, corrective or prohibitive measures that may be necessary.”

### 3. New notification system for minority partnerships

4. The notification system introduced by art. 4 bis introduces a legal obligation to inform the FNE of the acquisition of a minority participation in a competing firm within sixty days of the completion of the operation. The law establishes sanctions in case of contravention of this obligation.

5. According to the law, the minority participation acquisitions must be notified when the following conditions are met:

1. a company or entity that is part of its business group - by itself or through third parties-, directly or indirectly acquires more than 10% of the capital of a competing company, and
2. both companies - the acquiring and the acquired- or the business groups to which they belong, each in the last calendar year have annual revenues for sales, services or other related activities exceed the limit established in the law (currently, around USD 4.2 million).<sup>2</sup>

6. If the criteria established above are met and the obligation is not fulfilled within the legal period of sixty days, the same article authorizes the imposition of the sanctions of art. 26 DL 211 and other preventive, corrective or prohibitive measures deemed adequate. Given the nature of the obligation, the sanction will consist essentially in the imposition of a fine up to 60,000 tax units per year ("UTA") -USD 53 million, approximately-<sup>3</sup>. For the determination of the amount in particular, the judge is required to consider the standards established in the final clause of art. 26 letter c)<sup>4</sup>. As a reference for other sanctions for non-compliance or delay in satisfying obligations contained in the same law, it might be considered, the fines imposed per day of delay in the notification of merger operations<sup>5</sup> and for the breach of the obligation to provide background information in an investigation carried out by the FNE<sup>6</sup>.

7. To facilitate the transmission and systematization derived from the new obligation to inform, the FNE prepared a form with the essential elements to notify<sup>7</sup>.

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2 A threshold of 100,000 Unidades de Fomento (approximately USD 4.2 million, at October 30, 2017) has been established by the law.

3 Considering the value of \$561,432 pesos of the UTA in October 2017, and the average value of \$ 629.18 of the dollar observed during the same month.

4 The economic benefit obtained with the infraction, if any; severity of the behaviour; dissuasive effect; recidivism; economic capacity of the offender; and the collaboration that has been provided to the Prosecutor before or during the investigation.

5 The art. 26 letter e) authorizes the application of a fine of up to 20 UTA for each day of delay.

6 The final paragraph of art. 39, letter h) allows the application of a fine up to 2 UTA for each day of delay, when the request for information was not answered unjustifiably, or only partially answered.

7 See: <http://www.fne.gob.cl/2016/12/02/formulario-para-notificar-participaciones-en-empresas-competidoras/>

#### 4. Analysis of potentially anti-competitive cases

8. If in the analysis of the operation, the FNE finds risks of anticompetitive effects considered as relevant, such as, for example, the concentration of the market, the percentage of the acquired participation in the competitor or the symmetry between the offered products, it may initiate an investigation to determine the existence of such effects, and the most appropriate measures<sup>8</sup>. The maximum term to file those actions regarding a notified operation is the statute of limitations for most competition offenses: three years from the execution of the operation, for those notified by Art. 4 bis.

9. The study of potential effects derived from minority participation includes an analysis of the risks and efficiencies involved in the operation, which is similar to the analysis carried out in relation to the review of a merger, focusing on unilateral and coordinated risks. When facing an operation that is already executed, it is possible that there may also exist anticompetitive effects (materialized risks), which must be assessed. In addition to a defense of efficiencies by the party who makes the investment, the analysis considers the risks level of these operations according to the competition conditions in the relevant market.

10. In case the risks and/or anticompetitive effects are significant, the FNE may conclude that the minority participation in the competitor is one of those facts, acts or conventions that impede, restrict or interfere with free competition, or tend to produce such effects, in accordance with article 3 paragraph 1 of DL 211. If so, the main sanctions and relevant measures of art. 26 of DL 211 may be applicable such as imposition of fines, the disinvestment of minority participation, and the establishment of restrictions on the rights that result from the participation<sup>9</sup>, in order to mitigate the identified risks.

#### 5. Interlocking directorates regulation

11. Prohibition of interlocking was also introduced by the 2016 amendment (article 3, letter d), taking the form of a legal presumption.

12. Our jurisdiction prohibits the participation of a person in relevant executive positions or as a director, in two or more undertakings that compete with each other, if the business group to which the undertakings belongs, has annual incomes for sales, services or other activities, over USD 4,3 million approximately.

13. The legislator assumed that a dual presence in relevant positions might conduce to anticompetitive conducts, such as sensitive commercial information exchange, but limited the prohibition to larger firms due the effects they could have in the market, in comparison to smaller firms.

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8 The Fiscalía Nacional Económica develops its investigations in accordance with the provisions of DL 211, as established in the Internal Instructions for the Development of Investigations of the FNE. Document elaborated in May 2013, available at: [http://www.fne.gob.cl/wp-content/uploads/2017/05/Instr.\\_investigaciones\\_2013.pdf](http://www.fne.gob.cl/wp-content/uploads/2017/05/Instr._investigaciones_2013.pdf)

9 Adjusting them towards a passive participation, in which the purchaser renounces his rights of administration, delegation or election of directors, access to commercially sensitive information, among other measures.

## 6. Minority interests by institutional investors

14. In relation to minority participations by institutional investors, the first thing that must be underlined is that, with a high degree of probability, they will not be covered by the above-mentioned obligation to inform, unless that - by themselves or jointly with third parties- they maintain control over one of the competitors, or they had investments in another institutional investor.

15. It should be noted that due to the recent introduction of the notification system for minority participations, there is still no jurisprudential development about the level of risks that will be acceptable in relation to these types of shareholdings. These investments, nevertheless, may also be investigated under the general infraction, which can be found in the first paragraph of art. 3 DL 211, on a case by case basis, to assess the effects and risks that they generate to competition on a particular market.

16. Notwithstanding the above, under the previous regulatory framework –with no explicit rule regarding minority shareholding- an interesting case was analyzed:

17. The case involved the an acquisition that involved interlocking problems and the presence of minority interests among two competitors in the market of institutional health providers (Rol FNE F1-2013 "Acquisition of Golden Cross Hive by Private Fund / LarrainVial"). This operation gave influence to an economic agent over two clinics that were direct competitors.

18. The analysis of competition was addressed considering the existence of crossed financial interests between competing companies and the possibility of the agent to influence the decision making of some of them, which could eventually give rise to unilateral or coordinated behavior. The FNE defined the relevant market, from the point of view of the product as that of medical services of high and medium complexity and, geographically, according to the residential profile of the clients that once attended the different clinics, contrasting it with the declarations of various market agents. In accordance with the above, the FNE determined which were the institutional providers that were within the same relevant market.

19. The FNE concluded, in summary, that the presence of the link between the two competitors generated a negative influence on the incentives to compete by both players, a risk that was not sufficiently compensated by the efficiencies. Finally, the acquiring agent decided to dispose of its shares in both companies, thereby eliminating the potentially harmful nature of the operation.