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Conglomerate effects of mergers – Note by Chile

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Chile

1. Introduction

1. In Chile, the current mandatory merger control regime was established in 2017, and since then the National Competition Authority (Fiscalía Nacional Económica or "**FNE**") has mainly assessed horizontal mergers. However, a few cases have been analyzed as conglomerate mergers.[1] In particular, a recent case involving two digital platforms raised a challenge for the FNE to assess this type of mergers.[2]

2. The FNE does not have a conglomerate mergers guideline. In practice, when analyzing these types of cases, it considers as a theoretical framework the merger guidelines and best practices' reports of other bodies and jurisdictions, and relies on economic literature.[3] In addition, in past decisions the Chilean Competition Tribunal ("**TDLC**") has provided some guidelines of the so-called portfolio effects in a merger between broadcasting companies.[4]

3. On the one hand, conglomerate mergers can generate efficiency gains, mainly because of the presence of economies of scale and scope due to the existence of shared costs. By producing a set of different goods and services, firms can save on costs that are common across production lines, and hence be more efficient. However, on the other hand, the merged firm could have the possibility to leverage its market power from one market in which is dominant, to another market in which it could face more competition. For instance, a leverage strategy can be implemented through tying or bundling practices, which may result in the exclusion of more efficient competitors.[5] For analyzing such strategies is important to evaluate the relationship between the products sold by the parties.[6]

[1] Recent cases in which the FNE assessed conglomerated effects are the following: "Fusión Outotec Oyj con Metso Oyj" Case Nº FNE F218-2018 (available at: https://www.fne.gob.cl/wp-content/uploads/2020/04/inap1_F218_2019.pdf); "Asociación entre Puertos y Logística S.A. y CMA CGM S.A." Case Nº FNE F189-2019 (available at: https://www.fne.gob.cl/wp-content/uploads/2019/07/inap1_F189_2019.pdf); "Adquisición de Red Hat, Inc. por International Business Machines Corporation y Socrates Acquisition Corp" [Acquisition of Red Hat by IBM], Case Nº FNE F188-2019 (available at: https://www.fne.gob.cl/wp-content/uploads/2019/07/inap1_F188-2019.pdf); "Adquisición de control por Henkel Ireland Operations and Research Ltd. en Aislantes Nacionales S.A.", [Acquisition of Aislantes Nacionales by Henkel] Case Nº FNE F156-18 (available at: https://www.fne.gob.cl/wp-content/uploads/2018/12/inap_F156_2018.pdf); "Operación de concentración de Coca-Cola y Comercializadora Novaverde S.A." [Acquisition of Novaverde by Coca-Cola] Case Nº FNE F131-2018 (available at: https://www.fne.gob.cl/wp-content/uploads/2018/07/aprob54a_F131_18.pdf).

[2] "Adquisición de Cornershop por Uber Technologies Inc." [Acquisition of Cornershop by Uber] Case N° FNE F217-2019.

[3] For example, the *Guidelines on the assessment of non-horizontal mergers* from the European Commission.

[4] Decision No. 41 TDLC "*Consulta de la Fiscalía Nacional Económica relativa a la adquisición por parte de Radiodifusión SpA de concesiones de radiodifusión de Comunicaciones Horizonte Ltda.*" [Consultation about the acquisition of Comunicaciones Horizonte by Radiodifusión SpA], dated September 27th, 2012.

[5] *See,* OCDE (2020), op cit., pp. 10-11.

[6] Id., p.11.

Usually conglomerate mergers include products that are complements but, even if they are not complementary, conglomerate effects can arise if consumers of the products overlap.[7]

4. In Chile, the TDLC has stated that anticompetitive conglomerate effects may arise in a merger in which the following conditions are satisfied: (i) the firm has significant market power in one of the markets involved in the merger; (ii) there is a significant overlap of consumers in the markets involved, or consumers in these markets value the joint purchase of these goods or services; (iii) there are economies of scale in the market of the tied good or service; and, (iv) rival firms cannot replicate, at reasonable costs, the commercial strategy applied by the merging party.[8]

5. Anticompetitive conglomerate effects can restrict effective competition or dissuade entry. The FNE has evaluated different strategies that can restrict competition, mainly tying and bundling, by assessing whether the merging parties have the ability and incentives[9] to engage in these types of practices.

6. The merged firm may have the ability to implement tying or bundling strategies, if it can exploit the complementarity between the goods or services because of its market position[10]. The existence of both barriers to entry (i.e., by new firms) and/or barriers to expansion (i.e., of incumbent competitors) can increase the ability of the merged firm to engage in practices that may restrict competition. In turn, the incentives of the merged firm to implement an exclusionary strategy are assessed via a cost-benefit analysis.

7. Finally, regarding the investigation procedure, the merger notification form provides the FNE with relevant information to assess potential conglomerate effects.[11]

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[7] Id., p.11.

[8] Consultation about the acquisition of Comunicaciones Horizonte by Radiodifusión SpA, op cit., p. 31. This case consisted in the acquisition of assets from Comunicaciones Horizonte (a radio station holding company) by TV-Medios Limitada (a subsidiary of a broadcasting company). The assets made possible the operation of eleven radio stations. At the time of the merger, both parties were active on the radio broadcasting industry. Moreover, C13 –TV-Medios Limitada's– parent company was a relevant actor in the market for broadcasting television. Considering a national market, both radio and television broadcasting were relevant for the advertising activity, having a complementary relationship. Therefore, the transaction can be defined as a horizontal merger with conglomerate effects. In particular, the theory of harm considers possible tying, bundling and arbitrary discrimination, as a consequence of C13's activities in both markets. In terms of the possible efficiencies, the TDLC considered the eventual economies of scope and the benefits raised by the bundling of two goods with a complementary relationship, from the demand side. But, the efficiencies claimed were considered insufficient to compensate the potential harm to competition from the merger. It was approved subject to the following remedies: (i) prohibition of tying and arbitrary discrimination; (ii) bundling was permitted subject to certain conditions.

[9] This was assessed on the case of Acquisition of Aislantes Nacionales by Henkel, in which the FNE analyzed the possibility of a leverage strategy for other products of the firm, to exclude rivals. First, the evidence showed that the parties would have the ability to implement an exclusionary strategy, mainly because of its significant market shares. However, the investigation demonstrated that the incentives to engage in an exclusionary scheme were low. The evidence showed low economies of scale and that the parties did not introduced new products in other categories.

[10] For example, in the case of Acquisition of Novaverde by Coca-Cola the FNE determined that Coca-Cola would have the ability to engage in exclusionary practices because of its relevant market share (over 60%) and the fact that, both carbonated drinks and juices, were offered to the final consumer for the same use. However, regarding the incentives of the merged entity to exclude, the FNE did not found evidence of previous exclusivity clauses or significant discounts to leverage the soft drink's position to other beverages of the portfolio. A similar assessment was made in Acquisition of Red Hut by IMB, where the possibility that IBM's execute some kind of post-operative strategy associated with bundling RHEL with other products in its portfolio was analyzed.

[11] The parties must submit all the information of the affected relevant markets. One of the hypotheses for establishing an affected relevant market includes market shares of more than 30% in markets of (i) complementary products or

Moreover, the FNE can gather all the essential information (including third parties' data) needed to perform the economic analysis of conglomerate mergers. In the case of digital markets, it is important to consider that these markets tend to be more complex and that firms are constantly innovating and reshaping themselves, creating new innovate forms of businesses. For this reason, such form may fall short of certain digital platforms data therefore the FNE is always looking at ways, if necessary, to adapt its merger notification form and request relevant information for the assessment of cases in this new market.

2. Recent analysis of conglomerate mergers: Acquisition of Cornershop by Uber

8. Recently, the FNE assessed a merger that involved two multi-sided platforms that operate different services through apps, which required a different framework of analysis than in previous cases. This case was the acquisition of Cornershop Technologies LLC ("C**ornershop**") by Uber Technologies Inc. ("**Uber**").[12]

9. Uber is a company dedicated to the development of multi-sided platforms, providing the service of intermediation of different products and/or services among different users. In Chile, it operates as Uber Rides in the ride-sharing market and as Uber Eats in the food delivery market. Cornershop is a company that operates in the grocery delivery market.

10. In this case, the FNE identified four different affected markets: (i) the market of digital platforms that offer grocery delivery, in which Cornershop competes with the on-line delivery services of supermarket chains and other multi-sided platforms; ii) the market of platforms that provide the service of food delivery, excluding the delivery services provided directly by restaurants; iii) the market of digital platforms that offer delivery services from other stores, different than supermarkets and restaurants (e.g., pharmacies, liquor stores, flower shops, among others); and iv) the market of digital platforms providing ride-sharing services. Cornershop is the leader on the grocery delivery market with a market share above 60%, while Uber is the main player in the ride-sharing market and a relevant actor in the food delivery market.

11. Based on the evidence collected in the first stage of the investigation ("Phase 1"), the FNE identified three theories of harm: 1) the loss of a potential competitor in the grocery delivery market; 2) a decrease in the merging parties' incentives to innovate; and 3) the existence of conglomerate effects, mainly linked to the potential use of mixed bundling and increased data collection capabilities. These theories required an in-depth investigation in Phase 2.

12. Notably, the different conglomerate theories of harm considered in this case are the following: (i) the potential market foreclosure through mixed bundling, (ii) market foreclosure as a result of further data accumulation, (iii) deterioration of consumers' privacy policies and (iv) deterioration of the conditions of service for delivery partners, shoppers and drivers (for both Uber and Cornershop).

13. In particular, the analysis carried-out by the FNE regarding conglomerate effects was mainly based on the collection of firms' internal documents, a representative consumer survey (directly designed and implemented by the FNE to consumers of both Cornershop

(ii) bought by the same time of customers for the same final use. *See*, "Regulation for the notification of a concentration", dated March 1st, 2017, article 2, letter d), subsection iii.

[12] The notification was dated October 15th, 2019.

and Uber) and further information collected during the investigation.[13] Notably, the ability and incentives of the firm to implement practices such as tying or bundling, were assessed considering the particularities of digital markets.

2.1. Market foreclosure through mixed bundling

14. Regarding the first theory, **the market foreclosure through mixed bundling of services (via loyalty programs)**, the FNE analyzed two different possibilities: (i) the leverage of Cornershop's position in the grocery delivery market to benefit Uber and restrict competition in the food delivery and ride-sharing markets, which may result in the foreclosure of Uber's competitors and (ii) the leverage of Uber's position in the ride-sharing and food delivery markets to benefit Cornershop and restrict competition in the grocery delivery market, which may result in the foreclosure of Cornershop's competitors. Note that even if the services offered by the parties were not complements, anticompetitive effects may still arise with products or services that are weak substitutes or unrelated, as long as there is a significant overlap of final users among the different markets involved in the transaction.[14]

15. The assessment of conglomerate effects in this case, follows the same structure proposed by the EC merger guidelines, and it contains the three requirements that must simultaneously occur in order for the bundling of products or services to be considered as anticompetitive: (i) the ability of the merged firm to foreclose the market, (ii) the incentives of the merged firm to incur in bundling with foreclosure effects, and (iii) the potential anticompetitive effects that may arise from a bundling strategy.

2.1.1. Leverage of Cornershop's position to foreclose Uber's competitors:

16. Regarding the **ability of the merged firm to foreclose the market using its position in the grocery delivery market as leverage**, the FNE arrived to the conclusion that even though Cornershop was currently the market leader, there were some elements evidencing a lack of significant market power and that competition from other firms was likely to increase in the near future. Indeed, the market for grocery delivery is at an early stage of development, competitors' sales are growing and they have expansion plans that are likely to materialize in the short to medium term, and the results of the consumer survey evidence low consumers' switching costs.

17. In analyzing the **incentives of the merged firm to foreclose the market**, the results of the consumer survey indicated that: (i) Cornershop final users did not have a strong valuation for a loyalty program that would bundle Cornershop and Uber services and benefits and (ii) there were signs of multi-homing in both markets in which Uber participates. Therefore, the implementation of a bundling scheme (via a loyalty program) aimed at foreclosing Uber's competitors in the ridesharing and food delivery markets would be costly to implement.

18. Finally, regarding the potential anticompetitive **effects linked to this practice**, the FNE observed that: (i) Cornershop user base was significantly smaller than Uber's user base in both services, thus even in an extreme scenario where all users of Cornershop would switch, Uber's rivals would not see their scale of operation affected in a significant manner, and (ii) in practice only a small fraction of users of Uber Eats used Cornershop services.

[13] The FNE also considered economic literature and comparative jurisprudence in its assessment.

[14] OECD (2020), op. cit., p.11.

2.1.2. Leverage of Uber Rides position to foreclose Cornershop's rivals:

19. The leadership of Uber in this market was reflected in its large market share and internal documents of the parties and competitors. Moreover, Uber has already a loyalty program in other countries in which it offers benefits for the usage of Uber Rides and Uber Eats. The FNE considered that these facts give the merged entity the **ability** to potentially implement a foreclosure strategy. Regarding the **incentives to do so**, internal documents of Uber's loyalty program, show that the program indeed increases the usage of Uber services. However, the evidence suggests that the program did not have a significant impact on Uber's competitors' user base, hence if a similar scheme was implemented to link Uber and Cornershop services, it would probably not affect the grocery delivery market in a significant way either. **With respect to foreclosure effects**, the FNE arrived to the conclusion that it was not likely that Cornershop's competitors would be foreclosed. Indeed, supermarket chains and other platforms could also offer attractive loyalty programs, linking online and offline channels (mainly for supermarkets) and potentially engaging in partnerships with alternative ride-sharing players or even firms in other industries.[15] Moreover, Cornershop's competitors have relevant expansion projects to improve their services to be executed in the short term.

2.1.3. Leverage of Uber Eats position to foreclose Cornershop rivals:

20. The FNE concluded that Uber Eats did not have a significant position such that it could leverage to benefit Cornershop and restrict competition in the grocery delivery market. Indeed, Uber's competitors in this market have similar market shares and their sales have increased in recent years. Regarding incentives, the consumer survey indicated that Uber Eats consumers did not have a high valuation for a loyalty program that could link Cornershop and Uber Eats services. Therefore, a bundling strategy with foreclosure effects would be costly to implement. With respect to potentially anticompetitive effects, they were discarded using a similar assessment than the one considered for the case of a possible leverage of Uber's position in the ridesharing market.

21. The FNE also analyzed the **dynamic components of possible conglomerate effects**, in particular linked to indirect network effects. For this assessment, the FNE analyzed whether the number of suppliers (i.e., supermarkets and restaurants) participating in each platform increased with the size of the platform (in terms of total sales). At least in the grocery delivery market, the FNE did not observe a strong positive correlation between the number of suppliers and platform sales, reaching the conclusion that indirect networks effects were not likely to amplify conglomerate effects.[16] For the case of the food delivery market, the role of indirect network effects were mitigated by other factors such as: the presence of multi-homing by users and restaurants, the possibility of differentiation among platforms, and the existence of some limitations for economies of scale. Moreover, in the food delivery market there is a geographic component related to indirect network effects, since users and restaurants value interactions through the platform that are specific to a local geographic area (i.e., users do not necessarily obtain benefits from the total number

[15] For instance, Uber's competitors Rappi and PedidosYa had subscribed partnerships with banks to give benefits to their users. Also, in Mexico Rappi has affiliated with the ride-sharing platform Didi.

[16] In the supermarket segment, it was possible to see that the platforms that competed with Cornershop were affiliated with more supermarkets but their sales were fifteen times lower. Also, the supermarkets own delivery services operate exclusively with their own supermarket chain and exhibit significant sales. The same was evidenced in the food delivery segment, in which PedidosYa had considerably more restaurants affiliated but similar sales with Uber Eats, while Rappi had a similar number of restaurants to Uber but lower sales.

of restaurants participating in a given platform, but only from the number of restaurants that belong to the relevant geographic area where the user is located, and vice versa).

22. Finally, **other conglomerated effects** were analyzed. In particular, considering the fact that digital platforms use consumer data to develop their businesses, the FNE analyzed the possibility of foreclosure through data accumulation that could give the merged entity a competitive advantage that could be used to restrict competition in the markets affected by the merger.

23. The analysis took into consideration mainly two factors that are required for a foreclosure practice to be plausible: (i) the additional data that would be collected by the merged firm should be a necessary input to compete in the markets affected by the merger, and (ii) the possibility for competitors of obtaining, at a reasonable cost, similar data.[17] Regarding the first requisite, the FNE arrived to the conclusion that even though data was indeed used for the functioning of the platforms in these markets, it was mainly used as an input for improving their services, but it did not seem to be a key input for competition on those markets. Regarding the second requisite, the FNE arrived to the conclusion that competitors such as supermarket chains have access to relevant data as well, and that other platforms would not be a priori constrained to access information as a function of their interactions with supermarkets and final users.

24. Another data related theory of harm was the possibility that the merged entity would worsen the data privacy policies for final users. However, in line with FNE's previous conclusions, this risk is mitigated by the fact that final users could eventually switch to alternative providers if faced with unfavorable privacy terms and conditions.

25. Finally, the FNE assessed the possibility of a worsening of the service conditions for delivery, drivers and shopper partners. The FNE determined that these partners had relevant alternatives to switch in case of unfavorable conditions, and that in any case the parties were not close substitutes for partners which would mitigate the risk of observing a horizontal unilateral anticompetitive effect in this side of the platforms.

26. For the abovementioned analyses and conclusions, the merged was cleared unconditionally by the FNE.

3. Conclusion

27. Conglomerate mergers account for only a small fraction of mergers that are notified to the FNE, however the competition assessment of these cases, especially those involving digital platforms, represent a significant challenge for the authority. In addition, the FNE foresees an increase in the number of mergers involving conglomerate effects, especially if one considers the central role played nowadays by digital markets. This latter fact will certainly impose new challenges to the authority and eventually will require the consideration of new theories of harm. For this reason, the FNE is constantly looking for new economic tools, in order to strength and ensure a high quality and accuracy of its assessments.

[17] Shelanski, H. (2013), Information, Innovation, and Competition Policy for the Internet, University of Pennsylvania Law Review Vol.161:1663: *"If customer information is both a necessary input of production and a "rivalrous" good— meaning that one user of information can exclude another —a platform's acquisition of customer information may have an exclusionary effect on competition."*, p.1687.