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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**Monopolisation, Moat Building and Entrenchment Strategies – Note by Chile**

11 June 2024

This document reproduces a written contribution from Chile submitted for Item 2 of the 139th meeting of Working Party 3 on 11 June 2024.

More documents related to this discussion can be found at  
[www.oecd.org/competition/monopolisation-moat-building-and-entrenchment-strategies.htm](http://www.oecd.org/competition/monopolisation-moat-building-and-entrenchment-strategies.htm)

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## Chile

### 1. Introduction

1. The concept of economic moat refers to a structural competitive advantage that allows a firm to protect its market power and profitability from rivals over the long term<sup>1</sup>. On the other hand, the concept of entrenchment is related to a behavioral and dynamic process, often associated to specific actions and measures adopted by a firm to maintain and solidify its dominant market position over time<sup>2</sup>.

2. These concepts have rarely appeared in the cases of abuse of dominant position in Chile. In the last five years, there have been only three cases that can be related to moat building or entrenchment (Ruling No. [174/2020](#), Ruling No. [186/2023](#) and Ruling No. [191/2024](#)).

3. In Ruling No. 191/2024, the Tribunal ruled that moat building practices occurred before it was determined that the defendant held a dominant position, so the anticompetitive effects appeared only later, when market conditions changed. Therefore, it is a case of a moat built preventively by a monopolist, but with a very precarious structure, a business model whose sustainability over time was uncertain, and faced with a counterpart with significant bargaining power.

### 2. Context of Ruling No. 191/2024

4. Canal del Fútbol SpA (“CDF”) was established at the beginning of 2003 by the National Association of Professional Football (“ANFP”), in its capacity as representative of the professional football clubs, in order for CDF to exclusively exploit the broadcasting rights of the National Professional Football Championship (“NPFC”) matches. Although the holders of the broadcasting rights are the clubs individually, they are obliged to retain the ANFP as their representative for the commercialization of these rights.

5. As can be seen, the football clubs, through the ANFP, jointly opted for a special form of commercial exploitation consisting of the broadcasting of NPFC matches, carried out directly and exclusively through CDF (now owned by Turner) and not through other content providers.

6. On December 4<sup>th</sup>, 2020, the Fiscalía Nacional Económica<sup>3</sup> (“FNE”) filed a complaint against CDF accusing it of violating Article 3, paragraphs one and two, letter b) of Decree Law No. 211 (“D.L. No. 211”), by abusing its monopolistic position in the market for live broadcasting of the NPFC matches. This allegedly occurred through the establishment and imposition of commercial practices on cable operators, consisting of: (a) the limitation or control of promotions to end consumers; (b) the establishment of a

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<sup>1</sup> OECD (2024). *Monopolisation, moat building and entrenchment strategies*. Code: DAF/COMP/WP3(2024), p. 7.

<sup>2</sup> *Ib.*, p. 8.

<sup>3</sup> The FNE is an independent government competition agency whose main responsibilities entail the enforcement of competition law. Furthermore, it is responsible for issuing technical reports and studies, and to undertake competition advocacy. From 2016, the FNE performs preventive merger control regarding transactions which surpass certain thresholds.

minimum resale price for the CDF Premium and CDF HD signals; (c) the arbitrary setting of a minimum guaranteed number of subscribers; and (d) the requirement for cable operators to purchase and distribute the CDF Basic signal to their entire customer base as a condition to access the CDF Premium and/or CDF HD signals.

7. In addition, on July 30, 2021, VTR Comunicaciones SpA ("VTR"), one of the largest cable operators in Chile, filed a lawsuit against CDF. VTR requests that it be declared that CDF has violated the antitrust law, by having engaged in practices that have prevented, restricted, or hindered free competition, or that have tended to generate those effects, in the market for live broadcasting of men's football events of the NPFC and other tournaments organized by the ANFP.

### 3. The Ruling N° 191/2024

8. On May 14<sup>th</sup>, 2024, the Tribunal de Defensa de la Libre Competencia<sup>4</sup> ("TDLC") accepted the request filed by the FNE and the lawsuit filed by VTR against CDF, imposing a fine of 32,000 UTA (approximately USD 27 million) on the latter, as well as the obligation to modify its contracts with pay television operators. This is the highest fine ever imposed by the agency.

9. Regarding the practices challenged by the plaintiffs, it was established that: (a) CDF sells premium channels bundled with the CDF basic signal, requiring that this latter channel be distributed to all the operator's customers, charging a price per subscriber higher than that of equivalent channels, which has a discriminatory effect among operators; (b) CDF requires a minimum guaranteed number of subscribers related to the number of each operator's television subscribers, which also has a discriminatory effect among operators; and (c) the limit on promotions and other restrictions related to the public price of its premium channels is an accessory mechanism that allows CDF to maintain the discrimination implemented through the guaranteed minimums.

### 4. Monopoly vs dominant position

10. The TDLC defined the relevant market directly affected by the behaviors accused by VTR and the FNE as the wholesale provision of television signals that broadcast the PNFC in the national territory. In this market, from 2003 until the date the actions were filed, CDF had the exclusive rights to broadcast the PNFC, thus acting as a monopolist. That is, the source of CDF's market power stems from the exclusive broadcasting rights that the ANFP transferred to it for the PNFC broadcasts.

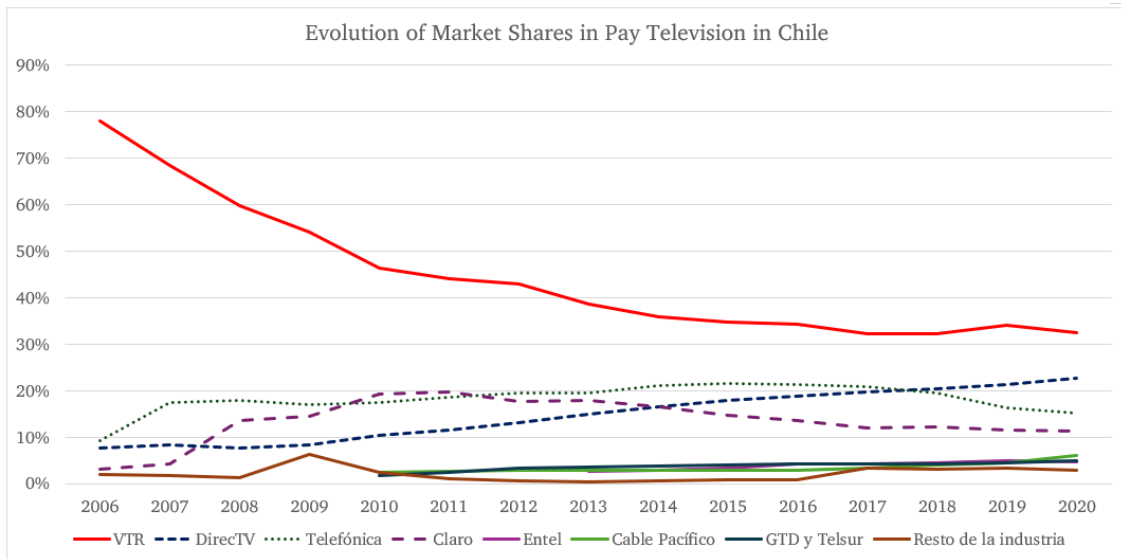
11. Although the broadcast of the PNFC has been monopolistic since the inception of CDF, it was relevant to determine from when the company acquired the dominant position that would allow it to commit the abuses it is accused of. The answer is not obvious, since in 2003, when it was created, CDF was an incipient project with a business model proposing to manage the broadcasting rights of the PNFC in a different way, in a market that was hardly identifiable, and where the viability of the proposed business model was

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<sup>4</sup> The TDLC is an independent judicial body with exclusive jurisdiction to decide antitrust lawsuits, including the resolution of adversarial matters (e.g., complaints brought by the FNE or private parties, regarding anticompetitive behavior) as well as non-adversarial matters. TDLC's rulings and decisions can be challenged before the Supreme Court. The competition law is Decree Law No. 211 and its subsequent modifications.

uncertain. Furthermore, at that time the pay-TV market was highly concentrated and VTR had significant countervailing and negotiating power in relation to CDF, being the main channel through which CDF could distribute its product to end consumers.

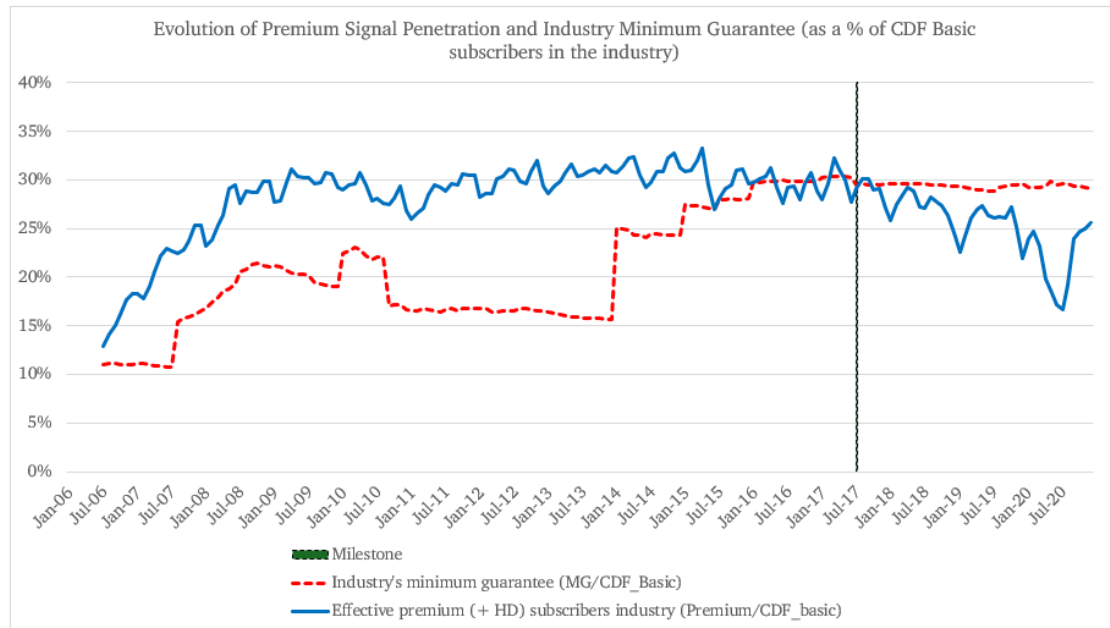
Figure 1. Evolution of Market Shares in Pay Television in Chile



12. VTR's position as a player in the analysis of CDF's abuse of dominant position should be emphasized. It was the cable operator that could represent the most serious counterweight to CDF's actions, as it had a market share close to 80% in 2006, when the first contracts with all the questioned clauses are observed, but by 2013 its market share had dropped to less than 40%, as shown on graph No. 1. By that time, according to the criteria of the FNE, the market had ceased to be highly concentrated and had become moderately so, a situation that reverses the potential counterweight of VTR that could have occurred previously.

13. Coinciding with this structural change in the distribution and renewal of contracts, July 2017 can be identified as a milestone from which the guaranteed minimums consistently exceed the actual premium subscribers, as observed in Graph No. 2.

Figure 2. Evolution of premium signal penetration and industry minimum guarantee



14. Thus, only from July 2017 that it is possible to clearly and convincingly establish that CDF holds a dominant position from which it could abuse by imposing a level of guaranteed minimums consistently higher than the actual penetration of premium subscribers to VTR and other operators. This date was considered by the TDLC as the milestone from which CDF holds a dominant position.

## 5. Metering

15. In the contracts signed by CDF with cable operators, it is stipulated as a condition for accessing the Premium signals that the CDF Basic signal must be purchased and distributed to the entire subscriber base of the cable operator. Thus, the controversy regarding this practice is whether CDF, by requiring the purchase of the basic signal when acquiring the premium signal and distributing it to all subscribers, would enhance its market power, potentially making this practice constitute an abuse of dominant position.

16. One approach, which has been substantially more accepted in the literature since the early 1960s (e.g., Burstein, M. L. *The Economics of Tie-In Sales*. *The Review of Economics and Statistics*, vol. 42, no. 1, 1960, pp. 68–73; and Adams, W. & J. Yellen. *Commodity Bundling and the Burden of Monopoly*. *The Quarterly Journal of Economics*, vol. 90, no. 3, 1976, pp. 475–98), suggests that tying a product offered under competitive conditions would allow the monopolist, under certain circumstances, to measure consumers' willingness to pay and to charge differentially, which ultimately constitutes arbitrary price discrimination in disguise, known as metering.

17. The explicit price that cable operators pay for premium subscribers only partially reflects the true actual price because, in addition to the price of the premium signal, there must be added an additional financing given by subscribers who do not value the basic signal. In this sense, each cable operator will pay a total amount for both premium and non-premium customers, a total payment that, when divided exclusively among premium customers, will yield a different value per cable operator. Essentially, this is a practice that, while not appearing discriminatory, is indeed so.

18. There is a set of conditions for tied sales to allow for differential pricing based on each cable operator's valuation and thus discriminate between them. Therefore, the TDLC focused on determining the presence of these conditions, which are: (a) heterogeneity in the willingness to pay for the premium signal among cable operators; (b) the infeasibility of direct differential charging based on willingness to pay; and (c) the existence of some good or service over which CDF does not have market power, but whose consumption is positively related to the willingness to pay of the cable operators.

19. The TDLC found evidence of demand heterogeneity and a different willingness to pay CDF for each subscriber to the premium signal. In fact, the willingness to pay of cable operators to CDF is equal to the difference between the final consumer's valuation and the costs of providing the service by the cable operator prior to CDF's charge. Thus, with a willingness to pay from final customers for the CDF Premium signal that does not depend on the cable operator, but where the costs of providing the service differ between cable operators, the willingness to pay of the cable operators will indeed be different. The evidence provided indicates that the costs of cable operators would differ due to the existence of economies associated with size. This allows the TDLC to conclude that indeed the willingness to pay of larger operators for the premium signal will also be higher. In summary, the condition of operator heterogeneity is satisfied, and according to the reports presented by CDF, it can be concluded that the willingness to pay for the CDF signal increases as the size of the cable operator increases.

20. The second condition for the tied sales model as a discrimination mechanism to be applicable to the current case is that it is unfeasible to charge differentially in a direct manner. The Chilean jurisprudence on discrimination, prevents ruling out this condition.

21. Regarding the condition that there is a service in which CDF does not have market power and its consumption is positively correlated with the cable operator's willingness to pay, CDF's practice indicates that this would be the service provided with the basic signal. In fact, the imposition of this signal on all subscribers directly relates an excessive charge for this signal to the size of the cable operators and, as previously mentioned, to their willingness to pay. Viewed from a complementary perspective, the average price (total cost per premium customer) increases as the penetration of the premium signal decreases. Thus, the basic signal effectively serves the purpose of measuring willingness to pay, so that a higher charge for the basic signal allows for more surplus to be extracted from operators with the highest willingness to pay.

22. As described, the differential charge per premium customer to each cable operator is achieved through the surcharge applied per subscriber to the basic signal. Therefore, this discrimination against cable operators has the potential to adversely affect non-subscribers to the premium signal. It is clear that the cost for each cable operator to serve a customer who does not value the football championship and does not demand CDF will increase. To the extent that this cost is passed on to the plans demanded by those who do not subscribe to the premium signal, they will end up subsidizing those who do.

## 6. Final Remarks

23. In the Chilean competition cases does have rarely appeared the terms moat building or entrenchment in the cases of abuse of dominant position by the Court. However, in Ruling No. 191/2024, the Court heard a case in which a monopolist without initial market power preventively built a moat, so that later, when it acquired market power, it could abuse it by discriminating against different cable operators.