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Efficiencies in Merger Control – Note by Chile

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1. Introduction

1. While concentrations between companies could raise competition concerns, they may also be pro-competitive, in the form of efficiencies achieved by the merging companies. If certain standards are met, these efficiencies may even offset the potential adverse effects on competition resulting from a merger.

2. Given the above and considering that efficiencies are a potential effect of a merger, it is important for the competition authorities and courts involved in merger control processes to establish an analytical and objective framework that provides market participants with legal certainty and clarity regarding who bears the burden of proving such efficiencies, when these must be claimed, and the requirements for their consideration in the analysis.

3. This contribution explores how efficiencies have been addressed within the Chilean legal framework. It then analyzes the analytical approach and criteria applied for the assessment of efficiencies in the context of merger control. Finally, it examines how efficiencies should be considered when analyzing potential remedies for the competition concerns arising from a merger.

2. Assessment of efficiencies under Chilean regime

2.1. General framework

4. Chilean legal framework for competition analysis, established under Decree Law No. 211 (“**DL 211**”)¹, allows for the introduction of efficiency claims in the review of mergers. Although efficiencies are not directly addressed in DL 211, they are included in the Regulation on the Notification of a Concentration² and the guidelines issued by the National Competition Authority (Fiscalía Nacional Económica or “**FNE**”) in 2022 on horizontal mergers. Since the introduction of mandatory merger control in 2017, and subsequent updates to guidelines and practice by the FNE and the caselaw of the Chilean Competition Court (“**TDLC**”), the treatment of efficiencies has evolved according to international standards.

5. In this sense, the framework applied by the FNE to analyze efficiency claims in the merger control system is mainly developed through the 2022 Horizontal Merger

¹ English version available at: <https://www.fne.gob.cl/wp-content/uploads/2018/09/DL_211_English.pdf> [last viewed 30.05.2025].

² Approved by Supreme Decree No. 41 of the Ministry of Economy, Development and Tourism, published in the Official Gazette on November 2, 2021. Spanish version available at: <<https://www.fne.gob.cl/wp-content/uploads/2021/11/Reglamento-N%C2%B041-D.O.-02.11.2021.pdf>> [last viewed 30.05.2025].

Guidelines³, and the same has been the case with the TDLC, which has provided guidelines to assess efficiencies in merger cases in specific rulings⁴.

6. According to FNE's 2022 Horizontal Merger Guidelines, the burden of proof rests entirely with the merging parties. They must proactively submit verifiable evidence demonstrating that the efficiencies meet the criteria for their consideration.

7. The FNE does not analyze efficiencies on its own initiative if the merging parties do not present them as part of their defense after competition concerns have been informed by the FNE. In this sense, the FNE focuses its assessment determining whether a transaction may result in a substantial lessening of competition. Within that framework, the FNE only considers efficiencies if they are formally invoked and sufficiently substantiated by the parties, only in case there are competitive concerns arising from the merger. The FNE evaluates them to determine their level of accreditation and the extent to which they are capable of mitigating the identified concerns.

2.2. Assessment standard

8. The FNE has assessed efficiencies as part of its analysis in several mergers and acquisitions⁵. According to the standard established in the FNE's 2022 Horizontal Merger

³ From paragraphs 148 to 169. English version available at: <<https://www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-ingles.pdf>> [last viewed 30.05.2025].

⁴ Regarding the role played by the TDLC, it is important to note that in cases where the FNE orders the prohibition of a merger, such decision may be appealed before the TDLC. In those instances, the TDLC has applied an analytical framework for assessing efficiencies that is equivalent to that used by the FNE.

Cases in which the TDLC assessed efficiency claims are, among others: (i) Resolution No. 43/2012 (available in Spanish at: <https://www.tdlc.cl/wp-content/uploads/resoluciones/Resolucion_43_2012.pdf>); (ii) Judgement No. 54/2018 (available in Spanish at: <https://www.tdlc.cl/wp-content/uploads/resoluciones/Resoluci%C3%B3n_54_2018.pdf>); (iii) Judgement No. 166/2018, paragraphs 81, 82 and 83 (available in Spanish at: <https://www.tdlc.cl/wp-content/uploads/2023/12/Sentencia_166_2018.pdf>); and (iv) Sentence No. 182/2022, paragraphs 144, 145 and 146 (available in Spanish at: <https://www.fne.gob.cl/wp-content/uploads/2022/09/Sentencia_182.pdf>). [last viewed 30.05.2025].

⁵ (i) Case docket No. F90-2017, Ideal S.A. / Nutrabien S.A., Spanish version of the prohibition report available at: <https://www.fne.gob.cl/wp-content/uploads/2018/05/inpr_F90_2017.pdf> [last viewed 30.05.2025]; (ii) Case docket No. F178-2019, Clínica Iquique S.A. / Redinterclinica S.A., Spanish version of the prohibition report available at: <https://www.fne.gob.cl/wp-content/uploads/2019/12/inproh_F178_2019-1.pdf> [last viewed 30.05.2025]; (iii) Case docket No. F216-2019, Inmobiliaria y Administradora CGL Limitada / Compañía de Petróleos de Chile COPEC S.A., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F216_2019.pdf> [last viewed 30.05.2025]; (iv) Case docket No. F217-2019, Cornershop / Uber Technologies, Inc., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F217_2020.pdf> [last viewed 30.05.2025]; (v) Case docket No. F233-2020, Fiat Chrysler Automobiles N.V. / Peugeot S.A., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2021/02/inap2_F233_2020.pdf> [last viewed 30.05.2025]; (vi) Case docket No. F250-2020, OK Market S.A. / Cadena Comercial Andina SpA y Comercial Big John Limitada (Oxxo), Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2021/12/inap1_F250_2020.pdf> [last viewed 30.05.2025]; (vii) Case docket No.

Guidelines, the FNE analyzes efficiencies as a counteract to the potential anti-competitive effects identified as a consequence of a proposed merger. In that sense, efficiency claims are considered only after the FNE has determined that a merger may substantially lessen competition. The purpose of such assessment is to evaluate whether the claimed efficiencies can act as a counterweight of the competition concerns⁶.

9. Therefore, the FNE analyzes the efficiencies claimed by the merging parties only after identifying potential anticompetitive effects, and not as part of the initial competitive assessment. Therefore, firstly, the FNE performs a competitive analysis to determine whether the merger is likely to substantially lessen competition in Chilean markets. This involves a thorough examination of market structure, unilateral or coordinated effects, barriers to entry, buyer power, among others. Secondly, once the FNE identified anticompetitive effects arising from the merger, efficiencies are treated as a mitigating or countervailing factor, not as a core element of the theory of harm analysis. In this sense, the FNE's 2022 Horizontal Merger Guidelines state: *“Transactions may allow the merger parties to achieve various efficiencies. Whenever a Transaction, once consummated, could substantially lessen competition, the efficiencies derived therefrom could act as countervailing factors to the competition concerns associated to such Transaction”*⁷.

10. For an efficiency claim to be considered as a counterweight to a merger that may substantially lessen competition, it must meet the following three cumulative conditions: (i) efficiencies must be verifiable; (ii) efficiencies must be merger specific; and (iii) efficiencies must be sufficient, timely and effectively be passed onto consumers⁸.

11. The merging parties are required to provide sufficient evidence to support their claims regarding the efficiencies associated with the merger. This includes detailing the likelihood of their occurrence, the magnitude of the effects derived from them, and the timeframe in which their effects will take place⁹. The evidence provided by the parties must

F295-2021, Liberty Latin America Ltd. / América Móvil, S.A.B de C.V., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2022/10/inap2_F295_2021.pdf> [last viewed 30.05.2025]; and (viii) Case docket No. F340-2023, Entel S.A. / OnNet Fibra, Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2024/01/F340-2023-Informe-de-aprobacion-con-medidas_FNE.pdf> [last viewed 30.05.2025].

⁶ See FNE's 2022 Horizontal Merger Guidelines, paragraph 164.

⁷ FNE's 2022 Horizontal Merger Guidelines, paragraph 148, English version available at: <<https://www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-ingles.pdf>> [last viewed 30.05.2025].

⁸ FNE's 2022 Horizontal Merger Guidelines, paragraph 157.

⁹ This condition has been analyzed by the FNE in several cases. See as a reference: (i) Case docket No. F90-2017, Ideal S.A. / Nutrabien S.A., paragraphs 143-216, Spanish version of the prohibition report available at: <https://www.fne.gob.cl/wp-content/uploads/2018/05/inpr_F90_2017.pdf> [last viewed 30.05.2025]; (ii) Case docket No. F178-2019, Clínica Iquique S.A. / Redinterclinica S.A., paragraph 388, Spanish version of the prohibition report available at: <https://www.fne.gob.cl/wp-content/uploads/2019/12/inproh_F178_2019-1.pdf> [last viewed 30.05.2025]; and (ii) Case docket No. F233-2020, paragraphs 279-331, Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2021/02/inap2_F233_2020.pdf> [last viewed 30.05.2025].

Similar approach has been applied by the TDLC under Judgement No. 54/2018, paragraphs 222-256.

quantify the effects of the efficiencies in a way that allows the FNE to replicate the quantitative exercises¹⁰.

12. Furthermore, the merging parties must prove that their efficiencies alleged are inherent to the concentration. This means that the efficiencies must be a direct consequence of the merger and that they cannot be achieved by other less anticompetitive alternative means.

13. Finally, the merging parties must provide sufficient evidence that the efficiencies are able to mitigate the competition concerns arising from the merger. To achieve this, the magnitude of the efficiencies claimed must be apt to counterweigh the incentive of the merging parties to increase prices because of the possibly enhanced market power that would be obtained by the merger. At the same time, the efficiencies must be timely, meaning their effects should coincide with the timeframe in which the merger's competitive harms are likely to arise. Additionally, efficiencies must be passed on to consumers to be considered as offsetting the competition concerns identified. This implies that they must ultimately lead to lower prices, improved product quality, the introduction of new products, or improvements in other variables relevant to consumer welfare.

14. It must be pointed out that the FNE's assessment of efficiencies in merger control is grounded in a competition framework, rather than in broad public interest considerations. Therefore, the FNE does not formally incorporate broad public interest factors –such as regional development policies, environmental protection or national security– into its merger analysis¹¹.

2.3. Types of efficiencies

15. According to FNE's 2022 Horizontal Merger Guidelines, there are two main types of efficiencies: *productive efficiencies* and *dynamic efficiencies*.

16. *Productive efficiencies* can lead to cost savings in production or distribution, which may give the merging parties the incentive to lower prices. This type of efficiencies usually materializes in the form of productive synergies, economies of scale or density, among others. *Dynamic efficiencies* refer to the potential to leverage the strengths of the merging parties by exploiting complementarities, which may result in changes in the ability and/or incentives to introduce new or enhanced products or services¹². The FNE has reviewed dynamic efficiencies in several cases¹³.

¹⁰ See FNE's 2022 Horizontal Merger Guidelines, paragraph 161.

¹¹ Regarding the focus of the merger analysis conducted by the FNE, see the FNE's 2022 Horizontal Merger Guidelines, Opening Remarks: "Specifically, the merger control regime is not intended to correct potential market failures in which the operation takes place or has an impact, nor to improve their competitive structures. This is because the DL 211 provides for other legal and/or regulatory mechanisms to address such matters. Furthermore, the institutional design of this regime does not grant the FNE legal powers to rule, within the context of a merger, on legal matters other than the promotion and defense of competition in the markets [...]".

¹² FNE's 2022 Horizontal Merger Guidelines, paragraphs 150-156.

¹³ The following cases have had dynamic efficiencies invoked by the merging parties, and therefore were analyzed by the FNE: (i) Case docket No. F90-2017, Ideal S.A. / Nutrabien S.A., Spanish version of the prohibition report available at: <https://www.fne.gob.cl/wp-content/uploads/2018/05/inpr_F90_2017.pdf> [last viewed 30.05.2025]; (ii) Case docket No. F178-2019, Clínica Iquique S.A. / Redinterclinica S.A., Spanish version of the prohibition report available

17. Following the above distinction, the weight or value assigned to an efficiency claim will depend on the nature of the competitive concerns being analyzed. For markets with dynamic competition, the weight assigned to dynamic efficiencies is likely to be greater. Regarding mergers where the potential competition concerns are not linked to dynamic elements, productive efficiencies generally represent a greater counterweight to the anti-competitive effects arising from the merger¹⁴. In this regard, the TDLC has recognized that cost reductions can create incentives to unilaterally lower prices, especially in the case of marginal cost savings, excluding those that derive from the possible exercise of buying power¹⁵.

18. Finally, regarding out-of-market efficiencies (“**OOM**”), the current legal framework and the theoretical framework derived from the FNE’s 2022 Horizontal Merger Guidelines allows the merging parties to introduce OOM, but only under specific circumstances. Thus, in its assessment, the FNE analyzes OOM efficiencies only as indirect counteracts to the effects on competition and potential harm to consumers that a proposed transaction might otherwise have¹⁶. To substantiate these claims, the FNE requires the merging parties to demonstrate that the OOM efficiencies are merger-specific and that they are intrinsically linked to the markets where competition concerns arise¹⁷⁻¹⁸. On the contrary, when efficiency claims relate to the same markets where the competition concerns

at: <https://www.fne.gob.cl/wp-content/uploads/2019/12/inproh_F178_2019-1.pdf> [last viewed 30.05.2025]; (iii) Case docket No. F216-2019, Inmobiliaria y Administradora CGL Limitada / Compañía de Petróleos de Chile COPEC S.A., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F216_2019.pdf> [last viewed 30.05.2025]; (iv) Case docket No. F217-2019, Cornershop / Uber Technologies, Inc., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F217_2020.pdf> [last viewed 30.05.2025]; (v) Case docket No. F233-2020, Fiat Chrysler Automobiles N.V. / Peugeot S.A., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2021/02/inap2_F233_2020.pdf> [last viewed 30.05.2025]; and (vi) Case docket No. F295-2021, Liberty Latin America Ltd. / América Móvil, S.A.B de C.V., Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2022/10/inap2_F295_2021.pdf> [last viewed 30.05.2025].

¹⁴ Case docket No. F178-2019 Clínica Iquique S.A. / Redinterclinica S.A., paragraph 396. Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2019/12/inproh_F178_2019-1.pdf> [last viewed 30.05.2025].

¹⁵ TDLC Resolution No. 43/2012, paragraph 13.5 and 13.11.

¹⁶ See FNE’s 2022 Horizontal Merger Guidelines, paragraph 168.

¹⁷ This means that for the OOM efficiencies to be achieved, the transaction must materialize in the markets where potential anti-competitive effects were identified. See FNE’s 2022 Horizontal Merger Guidelines, paragraph 168: “The FNE will weigh the productive efficiencies that the parties invoke and prove, which occur in the same markets in which concerns stemming from the Transaction have been identified. Additionally, any efficiencies that the parties invoke and prove regarding products other than those in respect of which the concerns are generated, can be taken into account by the FNE when reviewing the Transaction, insofar as sufficient evidence is provided of their inherence to the Transaction and that the same are intrinsically related to the markets where the merger concerns occur”. Emphasis added.

¹⁸ TDLC, Judgement No. 54/2018, paragraph 104.

arise, they will be regarded as direct counteracts¹⁹. In any event, greater weight will be allocated to them, given their higher likelihood of being passed on to consumers²⁰.

3. Remedies and *ex-post* analysis

19. Under the current Chilean merger control regime, merging parties have the right to propose remedies if the FNE considers that a proposed transaction may result in a substantial lessening of competition. On the other hand, the FNE's assessment to determine the potential anti-competitive effects of a merger requires the consideration of any efficiency claims submitted by the merging parties. In this regard, when analyzing whether a given remedy fulfills the conditions to impede a merger leading to a substantial lessening of competition²¹, the FNE must consider the countervailing effect that proven efficiency claims introduced by the merging parties might have.

20. Thus, the FNE's analysis jointly considers (i) the efficiencies claimed by the parties; and (ii) the proposed remedies to ultimately assess whether the transaction may result in a substantial lessening of competition. In this regard, the TDLC has indicated that the assessment of the sufficiency of remedies proposed by the parties must consider the analysis of the efficiencies that a merger may produce, adding to this assessment the conditions of entry into the markets affected by the merger²². On the other hand, the TDLC has pointed out that in the event that the efficiencies alleged by the parties are rejected, the following step is to evaluate the remedies offered²³.

21. Based on the above, when assessing merger remedies, the FNE will consider whether efficiencies have played a significant role in evaluating the transaction's competitive effects. This approach is consistent with the FNE's 2022 Horizontal Merger Guidelines criteria, which stipulate that efficiencies must be verifiable, inherent to the transaction, capable of counteracting the increased market power, and effectively be passed on to consumers.

22. Finally, it should be noted that the FNE has only analyzed efficiency requests in a prospective analysis in the context of *ex ante* merger control. To date, no *ex-post* efficiencies have been considered for its evaluation in case of consummated mergers under investigations of transactions that fall below thresholds.

¹⁹ This is because the merging parties, despite gaining the ability to raise prices after the merger, will have lower incentives to do so due to the reduction in their costs. See FNE's 2022 Horizontal Merger Guidelines, paragraph 167.

²⁰ Efficiency claims must be able to compensate for the potential anti-competitive effects of a merger. This requires the parties to provide evidence to quantify the magnitude of the efficiencies, that they coincide in time with the anticompetitive concerns associated with the merger and that the benefits of the efficiencies can be passed on to consumers.

²¹ The general conditions for the analysis of remedies are laid out in the FNE's 2017 Remedies Guidelines. Spanish version available at: <<https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-remedios-.pdf>> [last viewed 30.05.2025].

²² TDLC, Judgement No. 54/2018, paragraph 131.

²³ TDLC, Judgement No. 182/2022, paragraph 158.