Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Chile

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This post highlights some of the most interesting competition law cases and issues discussed in Chile in 2023. Before examining each topic, however, it is important to understand how Chile´s competition system works.

The Chilean system involves the intervention of three authorities: *The Fiscalía Nacional Económica* ("FNE"), the *Tribunal de Defensa de la Libre Competenci*a ("Competition Tribunal" or "TDLC"), and the Supreme Court.

The FNE is the independent government competition agency. Its main functions are the enforcement of competition law, the issuing of technical reports and market studies, and competition advocacy. In addition, as of 2017, mergers exceeding certain thresholds must be notified to the FNE (although voluntary notification is also possible). The TDLC is an independent judicial body with exclusive jurisdiction to decide on competition law cases, including the resolution of adversarial matters (e.g., complaints of anti-competitive infringements filed by the FNE or private parties, and follow-on claims for anti-competitive damages) as well as non-adversarial matters. One of the unique features of the TDLC is its composition. It has five judges who are experts in competition law and industrial organization. Three of them are lawyers and the other two are economists. In addition, the decisions of the Competition Tribunal can be challenged before the Supreme Court.

Finally, with regard to sanctions, the Competition Act ("DL 211") provides for administrative fines for undertakings and natural persons responsible for a violation of competition law. In addition, criminal sanctions were introduced in 2016 only for the case of hardcore cartels.

Within this framework, we will review a selection of interesting developments in Chilean competition law that have taken place during the last 2023.

Institutional Developments

White-Collar Crime Law

On August 17th, 2023, Law No. 21,595 on Economic Crimes was published as part of the Anti-Abuse Agenda. Accordingly, this law allows for tougher prosecution of white-collar crimes and establishes stricter legal consequences for individuals and legal entities involved in collusion, insider trading or corruption. Law No. 21.595 is currently in effect for natural persons but will apply to legal entities as of September 1, 2024.

New head of the FNE

In May 2023, Jorge Grunberg was appointed by the President as the new head of the FNE. Jorge Grunberg is a Professor at the Department of Economic Law at Universidad de Chile Law School and a former partner in a private law firm specializing in competition law. He previously worked as an antitrust advisor in the Office of International Affairs of the US Federal Trade Commission, and in the Ministry of Economy during the discussion of the 2016 amendments to the Competition Law (the amendments established the criminalization of hardcore cartels and a mandatory merger control system).

As head of the FNE, he has announced his intention to strengthen enforcement against abuses of dominant position, both by filing injunctions and by performing out-of-court settlements. Another of his priorities is to improve the FNE's investigative work to ensure an effective criminal prosecution of collusive practices.

Sanctioning of competition law infringements

Cartel agreements

In 2023, the FNE did not file any new complaints regarding collusive behaviour. However, the Competition Tribunal and the Supreme Court issued four new decisions concerning cartel agreements, marking a significant development in Chilean jurisprudence.

Helicopters I: Executives may be jointly liable for undertakings' fines

In August, the TDLC issued a ruling on the FNE's collusion complaint against Pegasus South America Servicios Integrales de Aviación SpA ("Pegasus") and Inaer Helicopter Chile S.A. ("Inaer"). According to the TDLC, between 2006 and 2013, the two companies contacted each other directly through their key executives to influence bidding processes for helicopters. The TDLC ordered Pegasus, Inaer and their executives to pay a fine. In addition, the main novelty of this case is that one of the executives involved in the agreement was also held jointly and severally liable for the fine imposed on Inaer. The FNE, Pegasus and some of the executives challenged the TDLC's decision before the Supreme Court. No decision has yet been issued regarding the challenge.

Helicopters II: Evidence obtained from raids and inspections v. prescription

This case is significant due to the prosecution of the collusive behaviour, as it is the first time that the TDLC has decided to acquit companies and executives accused of collusion since the Competition Act was amended to give the FNE more investigative powers (2009). Indeed, this

decision was made regardless of the fact that the FNE had introduced into the case file relevant evidence obtained during its raids and inspections.

Specifically, the TDLC dismissed the FNE's injunction against Pegasus South America Servicios Integrales de Aviación SpA, Calquín Helicopters SpA and two executives for their participation in a bid-rigging agreement to influence a bidding process organized by the National Forest Service. Based on the evidence presented before it, the TDLC found that the collusive agreement existed and produced effects until December 10, 2014. However, given that the FNE's injunction was filed on August 19, 2020, the five-year statute of limitations for filing a lawsuit had expired, and the lawsuit was therefore time-barred. Consequently, it had to be dismissed. The FNE challenged the TDLC's judgment before the Supreme Court. It has not yet issued its decision on the subject matter.

***Buses*: Companies agreed through a protocol later approved by a transportation authority**

In June 2023, the Supreme Court unanimously upheld the TDLC's decision to sanction 11 public transport companies ("bus companies") for entering into an agreement to limit the number of buses each company could operate in a given area between 2003 and 2017. This practice impacted the frequency of the buses, which led to longer waiting times for passengers and affected the quality of the service.

The interesting issue in this case was the role played by the Regional Transport Authority, which approved the first public protocol used by the bus companies to implement their agreement. The authority endorsed the document believing that the initiative would help resolve the externalities generated by public transport. However, according to the TDLC´s decision, which was upheld by the Supreme Court, the agreement among the bus companies was reached before the opinion of the authority had been issued. Therefore, the agreement's approval by the Regional Transport Authority was not an excuse to exempt the undertaking from suffering the consequences of a finding of anti-competitive conduct, and it was only a consideration for reducing the fine.

Another highlight of this case was that the FNE, in a first-of-its-kind decision after the legal reform that introduced the criminalization of hardcore cartels, decided not to file a criminal case against the bus companies. The FNE found that the competition in the markets was not seriously compromised as a consequence of the conduct. Consequently, it would not be proportionate to hold criminal actions against them.

"The fire cartel": Information exchange reveals the intention to collude

The Supreme Court upheld the TDLC's decision to sanction Faasa Chile Servicios Aéreos and Martínez Ridao for participating in a cartel agreement to prevent, restrict or hinder competition in the market for aircraft used to fight and extinguish forest fires during the seasons between 2009 and 2015.

Of particular importance was the reasoning about the exchange of commercially sensitive information as evidence of a collusive agreement, as the Supreme Court stated that "*there is no reason for two competitors to exchange highly sensitive information such as the rates to be*

offered", and that "*the mere fact that this type of information is shared between economic agents that are part of the competition in the specific market in question, reveals the intention to collude*".

Furthermore, the Supreme Court modified the TDLC's ruling regarding the fines and applied the same fine to both aircraft companies, considering that they both participated in the implementation of the agreement.

Abuse of dominant position

FNE v. Banco Crédito e Inversiones: Favoring a related party

This case is an interesting example of an abuse of a dominant position carried out by a company to benefit a related firm.

The FNE filed a complaint against Banco de Crédito e Inversiones ("BCI Bank"), accusing it of arbitrarily excluding the lowest economic bid submitted by Rigel Seguros de Vida S.A. ("Rigel") in a bidding process. This exclusion was made by BCI seeking to award the bid to a company related to its subsidiary.

On October 11, 2023, the TDLC upheld the complaint filed by FNE. The Competition Tribunal ruled that BCI Bank had abused its dominant position in the bidding process for insurance policies for its mortgage customers. In particular, BCI Bank imposed a formal requirement on Rigel that was not set out in the bidding terms and conditions. As a result, Rigel was excluded from the bidding process and BCI Bank selected a more expensive economic offer from the related company. In addition, the TDLC found that BCI Bank's conduct caused harm to mortgage borrowers who had purchased the more expensive insurance that was awarded in the bidding process. Therefore, the TDLC ordered BCI Bank to pay a fine of approximately USD$ 970,176.

On October 24, 2023, BCI Bank challenged the TDLC decision, and the Supreme Court has not yet issued its ruling.

SURBTC SpA, CRYPTOMKT SpA and Orionx SpA v. Banks: The first cryptocurrency case in Chile

This case started with various complaints filed by cryptocurrency companies ("Plaintiffs") accusing several Chilean banks of a collective abuse of their dominant positions to prevent, restrict or limit the participation of cryptocurrency intermediaries in the market by closing their bank accounts or refusing to open them. Furthermore, Orionx SpA subsidiarily accused the banks of abuse of its individual dominant position.

On December 21, 2023, the TDLC rejected all the complaints. Regarding the relevant market, the TDLC, based on the definitions provided by the Chilean financial authorities, ruled that cryptocurrencies are not currently substitutes for traditional money or currencies. However, the TDLC highlighted that it is possible that cryptocurrency companies could be a potential competitor of banks in some services, such as currency exchange.

Regarding the conduct of collective abuse of dominant position, the TDLC pointed out that the

Chilean Competition Act includes the sanction of collective abuse of dominant position. However, in this case, although there was strategic interdependence among the banks in the provision of their accounts, two requirements of the conduct were not proven (there was no transparency in the relevant market allowing the banks to know each other's conduct, and there were no incentives to maintain the conduct over time). In addition, the TDLC concluded that each bank account is not an essential facility for cryptocurrency companies because there is more than one bank that would be able to open an account. Thus, plaintiffs would have the option to apply for an account at different banks.

Finally, the TDLC evaluated the evidence regarding each bank's conduct and rejected the allegations made by Orionx SpA because the decisions to not open an account taken by the defendants were justified.

On January 5, 2024, the plaintiffs challenged the TDLC's decision. The Supreme Court has not yet reached a decision.

FNE v. CCU: Infringements of a settlement agreement and its prohibition of exclusivity clauses in the beer market

The FNE has filed an injunction with the TDLC against Compañía Cervecerías Unidas S.A. ("CCU") for violating a settlement agreement signed in 2008 that prohibited CCU from entering into exclusivity and incentives agreements, and established requirements for advertising agreements ("Settlement"). The FNE is seeking a $5 billion fine and full enforcement of the Settlement, along with measures to preserve competition in the beer market.

According to the FNE, since 2019, CCU entered into sales exclusivity agreements and imposed restrictions on the distribution of third-party beers in restaurants and bars. These agreements have been made verbally or by imposition and have resulted in a restriction of the establishments' freedom of choice.

In October, the TDLC decided to consolidate this case with a complaint previously filed by Cervecería Chile S.A., in which it accused CCU of the following: (i) breach of the Settlement; (ii) abuse of dominance; and (iii) unfair competition.

In addition, the Chilean Independent Brewery Association and a craft brewery have recently joined as third parties. The case is currently in its early stages.

Compliance with a TDLC´s decision: is Covid-19 an excuse for failing to comply?

In March 2023, the FNE filed a complaint against Biosano S.A. ("Biosano"), accusing it of failing to comply with certain measures previously imposed by the TDLC (Docket No. 165-18). With this claim, the FNE stresses the need for compliance with TDLC measures, particularly compliance programmes.

This case is interesting not only because it deals with how companies comply with the TDLC's judgment, but also because Biosano raised an exception to explain its behaviour since it was the

only Chilean laboratory that produced the drugs needed to treat serious cases of Covid-19.

Ultimately, the FNE and Biosano reached a settlement. Under the terms of the agreement, Biosano agreed to comply with the TDLC decision and to pay USD$398,453. Therefore, we will have to wait for another case regarding Covid-19 and compliance to know whether this is an accepted excuse for not complying with a TDLC order.

Private Enforcement

The legal basis for a claim for anti-competitive damages is the existence of a prior decision of the TDLC or the Supreme Court, if appropriate, holding one or more parties responsible for an anti-competitive practice. Additionally, as of 2016 (Law No. 20.945), the TDLC has exclusive jurisdiction regarding follow-on claims for anti-competitive damages.

Papelera Cerrillos: TDLC's first decision on a claim for anticompetitive damages

In 2017, the TDLC fined CMPC Tissue S.A. ("CMPC") and SCA Chile S.A. ("SCA") for colluding to allocate market share and fix prices in the Chilean tissue and toilet paper market from 2000 to 2011 ("Tissue paper Case", Docket No. 160-17). This decision was upheld by the Supreme Court in 2020.

Pursuant to the Chilean follow-on action system, Papelera Cerrillos S.A. ("Papelera Cerrillos") filed a claim for anti-competitive damages against CMPC and SCA based on Docket No. 160-17. Specifically, Papelera Cerrillos sought damages arguing that its bankruptcy was a consequence of the illegal actions of the colluding companies, such as abrupt price reductions, incentives for retailers to select CMPC and SCA products, monopolization of sales areas or shelves, among others.

The TDLC rejected the claim because a relevant part of the facts to which Papelera Cerrillos attributed its poor financial results was not established in Docket No. 160-17. Indeed, neither the TDLC nor the Supreme Court found the existence of exclusionary practices conducted by CMPC and SCA with the intention of excluding Papelera Cerrillos or other competitors in the tissue and toilet paper market.

In addition, the TDLC ruled that the evidence presented in the proceedings showed that the bankruptcy of Papelera Cerrillos had an alternative explanation unrelated to the collusion sanctioned in the Tissue paper Case.

This is the first time that the TDLC has issued a final judgment in this matter since it has exclusive jurisdiction over follow-on actions for damages. As we describe in the following lines, typically, these sorts of cases are settled by the parties.

SMU- Sernac- Conadecus settlement: compensation based on the "cy-près" model

In 2019, the TDLC fined three supermarkets, Cencosud S.A. ("Ceconsud"), SMU S.A. ("SMU")

and Walmart Chile S.A. (“Walmart”) for participating in an agreement or concerted practice to fix prices through their suppliers in the Chilean poultry market, from at least 2008 to 2011 (“Supermarket Case”, Docket No. 167-19). This decision was upheld by the Supreme Court in 2020.

In 2021, the National Consumer Service (“SERNAC”) and the National Corporation of Consumers and Users of Chile (a consumer association, “Conadecus”) filed several claims for anticompetitive damages against Censocud, SMU and Walmart based on Docket No. 167-19. In this context, in November 2023, the TDLC approved a settlement reached by SERNAC, Conadecus and SMU.

Specifically, SMU agreed to pay approximately USD$2,7 million in compensation to consumers. However, in accordance with the general principles of pro-consumer, proportionality and hypervulnerability, as well as the compensation mechanism based on the cy-près model, the settlement stipulates that SMU will give priority to compensating, in the first place, the pensioners of the Basic Solidarity Disability Pension Found. For this purpose, the Social Security Institute will be responsible for managing the distribution of funds.

Out of Court settlements

The new economic prosecutor has surprisingly increased the use of out-of-court settlements to prevent, correct or strengthen competition in the markets. This year, five out-of-court settlements between the FNE and several companies have been approved by the TDLC, highlighting the effectiveness of this tool in resolving competition issues. We will describe the three most relevant out-of-court settlements.

Latam Airlines: New code-share agreements

In December 2023, the TDLC approved an out-of-court settlement between the FNE and LATAM Airlines Group S.A. (“Latam Airlines”). This settlement will authorize the airline to modify five code-share agreements that it had signed with Delta Air Lines. As per the new modification, LATAM Airlines will be allowed to designate specific routes on which the code-share agreements will be operational. This modification will apply to routes between the United States and Canada, between Brazil, Chile, Colombia, Paraguay, Peru, Ecuador, and Uruguay, and within or between any of the countries mentioned above.

Digital delivery platforms: Elimination of most favoured nation clauses

In December 2023, the TDLC approved three out-of-court agreements between the FNE and the digital delivery platforms Uber Eats, PedidosYa, and Rappi. As part of these agreements, each platform has committed to eliminating or modifying most-favoured-nation clauses and any other commercial terms that may limit the ability of restaurants to offer products at lower prices on other competing platforms or in their channels. In addition, the platforms must not include these clauses in the future and must inform restaurants that they are free to set their own prices. Finally, after 3 years of application of this agreement, each platform will be able to discuss a new agreement with

the FNE or initiate a procedure before the TDLC to review or eliminate these measures.

Chilehuevos: Exchange of information within the framework of a trade association

In September 2023, the TDLC approved an out-of-court settlement signed between the Chilean Egg Producers' Trade Association ("Chilehuevos AG") and the FNE. This settlement ended an investigation where the FNE had found that the industry players were involved in the exchange of commercially sensitive information through the trade association. Under the terms of the agreement, Chilehuevos AG accepted the FNE´s findings and agreed to pay approximately US $910,238 and to implement a compliance programme.

Procedural law

Two decisions of the TDLC on procedural issues are worth mentioning:

On April 19th, 2023, in Case C 386-2019, the TDLC for the first time established a **data room** in which the parties' legal counsel could review documents containing confidential information. According to the TDLC's decision, counsel may not remove documents from the data room or disclose the confidential information to which they have access. In addition, the data room was established under restrictive access conditions, such as confidentiality obligations, security measures, and appropriate oversight by the TDLC.

On November 7th, 2023, in Case NC 386-2022, the TDLC in a **non-adversarial proceeding** initiated by the FNE, the TDLC invited the parties to a **settlement** hearing at the request of one of the companies involved in the proceeding. This decision has set an important precedent for the future of non-adversarial proceedings in Chile, as it is the first time that the TDLC has initiated a settlement procedure in this type of proceeding.

Merger Control

During 2023, the FNE Merger Division completed 32 merger investigations: 24 were cleared without conditions, and 7 were cleared subject to remedies. No merger was prohibited in 2023. Some of the most important clearance decisions are summarized below.

Information exchange standards

On October 2, 2023, the FNE approved the acquisition of Farmacias Ahumada SpA ("Farmacias Ahumada") by Inversiones Da Vinci, controlled by ICC Inversiones ("ICC"), belonging to the former owner of another relevant pharmacy ("Cruz Verde"). The merger was cleared subject to a measure limiting the exchange of information between the parties.

In its assessment, the FNE highlighted some risks of information exchange between competitors in

the retail pharmacy market through store lease agreements. Therefore, the merger was cleared subject to ICC's obligation to implement a protocol to prevent exchanges of information from Cruz Verde to ICC (Farmacias Ahumada). Specifically, the protocol limited access to information to a few ICC departments and prohibited the exchange of such information with the rest of the company.

A structural remedy for fiber-optic network

In December, the FNE approved subject to structural remedies, the merger by which InfraCo SpA ("OnNet" a company dedicated to the provision of wholesale fiber-optic network) will acquire from Empresa Nacional de Telecomunicaciones S.A. ("Entel", a telecommunications company) the assets corresponding to Entel's fiber-optic network.

According to the FNE, this merger involved two companies whose fiber-optic network overlapped significantly in two areas that were relevant for internet providers. In order to mitigate the risks identified by the FNE, OnNet and Entel offered a divestment of their assets as a remedy. In particular, they committed to divest to a third party one of Entel's fiber-optic networks in the relevant area of overlap. They also offered to enter into an agreement with the third party to provide wholesale access to Entel's fiber network in the areas affected by the remedy.

Additionally, OnNet and Entel agreed to reduce the duration of (i) a contract´s exclusivity clause from 15 to 5 years; (ii) a non-competition clause in the wholesale market from 15 to 2 years, and to eliminate the right of first offer, right to match and non-competition clauses in the retail market.

Non-compete and non-solicitation clauses

It is worth noting that the FNE has challenged the use of non-compete and non-solicitation clauses in contractual agreements in various merger control proceedings during 2023 (v.eg. Rol FNE F348-2023; Rol FNE F360-2023; Rol FNE F368-2023). According to the FNE, the examination and assessment of the ancillary clauses in the context of merger control is part of its work to promote and defend competition in the market, including, in the case of non-solicitation clauses, in the labour markets. The FNE has required the parties involved in the transactions to reduce the clause's duration (allowing clauses for a maximum of two years).

Infringements related to the merger process

Oxxo Chile/Ok Market case: Provision of false information and failure to comply with mitigation measures.

In 2022, the FNE approved the merger between two convenience stores, Cadena Comercial Andina ("CCA" owner of Oxxo Chile) and Ok Market S.A., through which the former acquired the latter. However, a few months after the merger was cleared, the FNE filed a complaint against CCA.

Specifically, the FNE found that CCA had provided false information since it had failed to provide

certain reports, which affected the FNE's ability to determine and evaluate the merger´s relevant market and identify customers. According to the FNE, CCA also failed to comply with a remedy imposed by the merger clearance decision.

The FNE and CCA reached a partial settlement, which was approved by the TDLC in July 2023. This settlement covered only the allegation of failure to comply with a merger measure. As a result, CCA agreed to pay US$430,000 and to comply with the merger´s remedy.

With respect to the allegation of providing false information, the TDLC is proceeding with the trial of this matter, in which the FNE is seeking a fine of approximately US$5,9 million.

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