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Antitrust Litigation 2024

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Chile: Law and Practice & Trends and Developments
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Estudio Lizana

CHILE

Law and Practice

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1. Introduction

1.1 Current Framework for Private Antitrust Litigation

Private Antitrust Litigation Framework

Private litigation has been a cornerstone of antitrust enforcement in Chile, complementing the work of the Chilean Competition Agency (*Fiscalía Nacional Económica*, FNE).

Chilean law allows private litigation without limitations, granting individuals and legal entities the power to file antitrust claims with the Chilean Competition Court (*Tribunal de Defensa de la Libre Competencia*, TDLC) for any anti-competitive conduct that may affect them, including, but not limited to, collusion, abuse of dominant position, predatory practices, unfair competition and interlocking (provided that such claims meet the necessary legal requirements for them to be considered admissible, as detailed in **2.1 Statutory Basis**). Accordingly, private individuals or entities are granted the opportunity to seek remedies, request the imposition of fines and pursue compensation for damages, thereby enhancing the overall effectiveness of antitrust enforcement in Chile.

Regarding the prosecution of cartels, while in theory private individuals have the power to file a complaint directly with the court, in practice this type of conduct is reported to the FNE. This is because the FNE has broad investigative powers, including the possibility of resorting to intrusive measures, which facilitates the collection of evidence and therefore increases the likelihood of success in cartel litigation.

Furthermore, affected individuals and consumer associations representing those harmed by anti-competitive conduct often join the proceedings initiated by the FNE as third-party interveners, aiming to influence the precise delineation of the anti-competitive behaviour, thereby facilitating a more accurate linkage to the damages sought in any subsequent compensation claims.

Additionally, private parties may also seek compensation for damages resulting from anti-competitive conduct. Since 2016, following a reform of the Chilean Competition Act (Decree Law 211, "DL 211"), follow-on actions for damages resulting from anti-competitive conduct must be filed with the TDLC. Article 30 of DL 211 establishes that, after the TDLC issues a final decision finding an individual or legal entity guilty of anti-competitive behaviour, the same court has jurisdiction to evaluate and potentially award damages to the plaintiffs in a subsequent trial. The TDLC must rule on the lawsuit for compensation for damages on the basis of the facts that it has established in the previous antitrust judgment that serves as a precedent to the claim, without being able to alter those facts in any way.

Moreover, Law No 19,496 on Protection of Consumer Rights ("Consumer Protection Act") allows parties to request compensation for damages arising from anti-competitive conduct through class actions, based on the impact on the "collective or diffuse interest" of consumers. This action is also processed before the TDLC, but is subject to a different procedure, regulated by the Consumer Protection Act.

Consequently, the ability of private parties to initiate antitrust litigation is a crucial component of the Chilean competition law system. It ensures the protection of the interests of both competitors and consumers and facilitates the potential compensation for damages suffered.

Antitrust Cases in Chile

Copesa against Google

One of the most recent lawsuits initiated by private parties was filed by Copesa, a Chilean media conglomerate that accused Google of engaging in anti-competitive practices in the markets for news publishing and advertising technology ("Adtech"). Specifically, Copesa claimed that Google's search engine uses content produced by news outlets without proper licensing, summarising and presenting this content to users in Google's "Knowledge Panels" and "News" sections. This practice allegedly dissuades users from visiting the original links, thereby depriving news outlets of potential revenue from page visits.

Varifarma against Pfizer

Another recent case of private litigation before the TDLC involves a lawsuit filed by Varifarma against Pfizer, accusing the latter of exclusionary practices and unfair competition in the market for the drug Tofacitinib, which is used to treat rheumatoid arthritis. Varifarma alleges that Pfizer attempted to exclude it from a public bidding process by invoking an unjustified invention patent for the compound in question. This action has stalled the bidding process and, according to the plaintiff, could result in maintaining substantially higher prices than those that would prevail in a competitive market.

1.2 Recent Developments

Recently, the case Papelera Cerrillos S.A. ("Cerrillos") against CMPC Tissue S.A. (CMPC) and SCA S.A. (SCA) became the very first damage claim brought before the TDLC to have come to an end, which shed some valuable light on the criteria followed by the TDLC in these cases, primarily regarding damages assessment.

The TDLC granted in 2017 a claim filed by the FNE against SCA and CMPC for having participated in a cartel, allocating market shares and setting sales prices in the tissue paper market. The TDLC found both companies guilty, although it exempted CMPC from fines for having applied to the FNE's leniency programme. The TDLC's ruling was later modified by the Supreme Court, only in that it rejected CMPC's request for leniency and fined it.

Subsequently, in 2020, Cerrillos filed a claim for compensation for damages against CMPC and SCA, due to the damages it would have suffered due to the unlawful acts sanctioned in the previous TDLC judgment, since these companies would have adopted various measures, as part of their illegal agreement, to the detriment of their competitors, with the purpose of controlling the entire market.

In summary, the TDLC dismissed the follow-on claim filed by Cerrillos, pointing out that the financial crisis suffered by the plaintiff was not a direct result of the anti-competitive conduct penalised by the TDLC's prior decision, and therefore the damages alleged in the lawsuit could not be subject to compensation.

Specifically, the TDLC concluded that the alleged damages were inconsistent with the cartel being penalised in the infringement proceeding, and that the financial crisis of the plaintiff was caused by multiple factors such as increased costs due to rising energy prices, unfortunate business operations, poor management of the production area, a decrease in demand for the services provided and products offered, problems related to machinery, and embezzlement of the company's funds.

Cerrillos appealed the TDLC's decision to the Supreme Court, and, as the case has not yet been resolved, it is not known whether the TDLC's criteria in this matter will be confirmed.

2. Private Antitrust Claims: Basis and Procedure

2.1 Statutory Basis

Chilean antitrust legal regulation is codified in DL 211. Article 20 of this Law sets forth the procedure for filing claims concerning acts or behaviours that undermine competition and allows not only the FNE but also any private individual or legal entity to bring a case before the TDLC. The Law provides, however, that if a claim is brought by a private party, it must be immediately notified to the FNE in order to grant the latter the opportunity to take part in the TDLC proceeding. Because the FNE has a duty to represent the general interest of the community in antitrust matters, it will take part in proceedings in which it considers that said interest may be compromised.

As a requirement, private individuals or legal entities must demonstrate a "legitimate interest" to file a complaint before the TDLC. Chilean case law has established that this "legitimate interest" includes those who are or could reasonably be affected by the alleged anti-competitive conduct. It has also provided that this includes all persons that participate in the markets impacted by the conduct in question – whether as competitors, suppliers or customers – or those who could potentially participate in these markets were it not for the alleged anti-competitive conduct.

Moreover, to be considered valid, a claim must present a comprehensive and detailed account of the facts, actions or agreements that constitute a violation of DL 211, and must specify the market or markets affected by the alleged anti-competitive behaviour.

Lastly, claims must also comply with the general requirements for all lawsuits established by the Civil Procedure Code, including:

- designation of the court before which the claim is filed;
- the name, address and profession or occupation of the plaintiff and their representatives, the nature of the representation, and an electronic means of notification for the attorney and judicial representative if not previously designated;
- the name, address and profession or occupation of the defendant;
- a clear exposition of the facts and legal grounds supporting the claim; and
- a precise and clear statement of the relief sought from the court.

Thus, a private litigation may be initiated for any type of anti-competitive act or conduct, eg, abuse of dominance, predatory or unfair competitive practices and interlocking.

Follow-on actions entail an additional requirement. Specifically, Article 30 of DL 211 states that such claims must be based on a prior decision by the TDLC or the Supreme Court (in the event of an appeal) that finds one or more parties liable for engaging in anti-competitive conduct.

There are additional requirements in the case of class actions, as outlined in **4.1 Statutory Basis.**

2.2 Courts

Specialised Courts

In Chile, antitrust cases fall under the exclusive jurisdiction of the TDLC. This is a specialised court responsible for hearing and resolving cases that may constitute violations of DL 211. It is a collegial court with jurisdiction over the entire territory of the Republic. The TDLC is composed of five members: three lawyers and two economists who are experts in competition matters. The president and two members are appointed by the President of the Republic, while the remaining two are appointed by the Council of the Central Bank.

The Supreme Court of Chile – specifically, the Third Chamber, composed of five magistrates – serves as the superior authority over the TDLC and has the power to resolve appeals filed on antitrust cases, as well as to revoke or modify the TDLC's decisions.

As noted in **1.1 Current Framework for Private Antitrust Litigation**, since 2016, follow-on actions claiming damages must also be filed before the TDLC as a subsequent procedure after a conviction for an anti-competitive infringement.

2.3 Impact of Competition Authorities

Binding Nature of National Competition Authorities' Decisions

The FNE is the national competition authority responsible for defending and promoting competition in Chile. In this capacity, the FNE represents the national public interest, investigating and prosecuting any anti-competitive behaviour, and seeking to sanction the responsible entities. As public prosecutor (enforcement agency) the FNE lacks the authority to adjudicate its own disputes; rather, it must pursue enforcement actions before the TDLC. Hence, the decisions of the FNE are not binding on the courts. Furthermore, any antitrust investigation or litigation concluded by out-of-court settlements agreed by the FNE must receive approval from the TDLC, as mandated by Article 39(n) of DL 211. This ensures that such settlements adhere to the principles of free competition.

Regarding decisions issued by the TDLC in antitrust infringement cases, these have full res judicata effect. Once a decision is final (either because there are no further appeals against it or because the appeals have already been resolved by the Supreme Court), the same facts cannot be revisited, under the principle of non bis in idem.

Decisions by the TDLC convicting antitrust infringements serve as the foundation for subsequent damage claims pursued as follow-on procedures. It is crucial to note that such follow-on litigation does not entail a re-examination of the factual basis established in the antitrust decision, but rather focuses exclusively on the assessment of damages.

Consequently, the TDLC must base its ruling on the facts established in the judgment that has already convicted the defendant for the antitrust infringement.

Therefore, the TDLC's antitrust decision is binding both on the parties and on itself, precluding contradictions with established facts and laying the factual basis for damages that may be awarded.

Decisions by foreign national competition authorities have no binding effect in Chile; however, the TDLC does consider comparative case law when making its decisions, especially those of jurisdictions with an advanced development in

competition matters, such as the United States and the European Union.

Role of Civil Courts

In Chile, antitrust proceedings cannot be brought before civil courts, because they are of the exclusive jurisdiction of the TDLC. The only exception are actions for acts of unfair competition, which can be brought before the civil courts, unless it is alleged that such acts are intended to achieve, maintain or increase a dominant position, in which case they fall under the TDLC's jurisdiction. In these proceedings before civil courts for unfair competition claims, the FNE and the TDLC play no role.

2.4 Proof

The Burden of Proof Allocation

The fundamental rule is that the burden of proving the alleged infringement rests with the plaintiff, be it the FNE or a private party.

The plaintiff shall demonstrate different elements depending on the type of infringement involved. For instance, in cases involving hard-core cartels, following a 2016 reform, the plaintiff must only prove the existence of the infringement, eg, an agreement to fix prices between competitors, but not its anti-competitive effects (although the effects may be relevant for other aspects, such as the determination of the fine).

In turn, other types of antitrust cases additionally require the plaintiff to demonstrate not only the conduct itself but also the anti-competitive effects arising from it and/or the market power of the alleged infringer.

Conversely, the defendant will aim to provide evidence that counteracts the plaintiff's allegations, focusing primarily on demonstrating the absence of any alleged wrongdoing, challenging the plaintiff's standing, claiming that the conduct is justified and/or asserting the expiration of the right to bring a claim.

Lastly, regarding follow-on damage claims before the TDLC, it has been ruled that the plaintiff only needs to prove the damages suffered and their causal connection to the anti-competitive conduct, as all facts related to this conduct are already established in the prior decision that serves as the basis for the damages claim.

Standard of Proof

In accordance with established national case law, the standard of proof in Chilean competition law is "clear and convincing evidence". This standard represents an intermediate threshold between the standards of "preponderance of the evidence" and "beyond any reasonable doubt". Doctrine has understood that this standard requires a level of conviction around 60-65% probability, indicating that the evidence presented must be highly and substantially more likely to be true than untrue.

By contrast, with regard to damage claims, the relevant standard of proof established by case law is that of "reasonable probability" or "preponderance of evidence", which is based on a rational decision made by a court that a particular hypothesis has a higher probability of occurring than other scenarios.

Legal Presumptions

There are no legal presumptions applicable to antitrust cases. However, some legal scholars propose that the "per se" rule outlined in Article 3, letter a) of DL 211, which defines conduct deemed to constitute "hard-core cartels" (ie, concerted agreements or practices among competitors, and those which consist of fixing sale or purchase prices, limiting output, assignment of

market zones or quotas, affecting the outcome of tender processes), effectively operates as a presumption. This is because it assumes the anti-competitive effects of such conduct without requiring them to be demonstrated in court.

2.5 Pass-On Defence

Regarding damage claims, the "pass-on" defence is not explicitly provided by Chilean law. Still, nothing prevents defendants from raising it when disputing the causal link between the anti-competitive conduct and the alleged damages. This is justified by the fact that, in Chile, unjust enrichment is not protected, so the plaintiff can only claim compensation for the damages actually and directly suffered by them.

As regards the burden of proof, in Chile there is no presumption of damage resulting from cartels or other anti-competitive conduct, so it is always the plaintiff who must prove the existence of the damage and the causal link between the anti-competitive agreement previously sanctioned by the TDLC and such damage (usually price surcharges). On the other hand (and assuming that the plaintiff has provided sufficient evidence of the damage and causal link), if the defendant raises the pass-on defence, in theory, they should provide evidence to substantiate it. This is because the defendant carries the burden of proof regarding any facts that modify or extinguish the plaintiff's right to compensation. Consequently, to establish a pass-on defence, the accused cartelist should demonstrate that the plaintiff did not pay any price surcharges as a result of the cartel activity because such plaintiff passed on such surcharges to their own customers.

However, there is still no TDLC case law on this defence, for only since the amendment introduced to DL 211 in 2016, the TDLC is competent to hear claims for compensation for damages caused by anticompetitive conduct, so all the above criteria remain to be confirmed.

3. Limitation Periods and the Duration of Litigation

3.1 Statute of Limitations

Limitation Periods

DL 211 establishes a three-year statute of limitations from the date of the anti-competitive conduct on which the actions are based. This limitation period is interrupted by any lawsuit filed by the FNE or a private party with the TDLC, legally served on the defendant. In the case of cartels, the statute of limitations is extended to five years counting from the date on which the effects of the cartel ceased.

For subsequent damage claims (follow-on actions) before the TDLC, there is a four-year statute of limitations, commencing from the date of the final TDLC or Supreme Court decision, as applicable, condemning the accused party for the respective anti-competitive conduct.

3.2 Typical Length of Private Antitrust Litigation

The duration of antitrust litigation varies from case to case, but on average, and assuming the TDLC's decision is appealed, it lasts approximately three years from the filing of the claim to the issuance of a final judgment. According to the TDLC's 2023 statistics, the average length of an antitrust proceeding was 1,023 days.

In the event of a subsequent damages claim, the duration can be extended by an additional three-year period or more. Currently, there are only two finished follow-on action cases before the TDLC: one lasted two years and eight months

until a final decision was issued, with an appeal before the Supreme Court still pending; the other concluded with a settlement after two years of litigation.

4. Class and Collective Actions

4.1 Statutory Basis

Class Actions for Damages

Article 51 of the Consumer Protection Law permits the filing of class or collective actions for damages before the TDLC in accordance with the provisions of Article 30 of DL 211, which requires a prior decision by the TDLC or the Supreme Court (in the event of an appeal) that finds one or more parties liable for engaging in anti-competitive conduct.

According to the same provision of the Consumer Protection Act, class actions may only be initiated by one of the following entities or groups.

- The National Consumer Service (*Servicio Nacional del Consumidor*, SERNAC): SERNAC is empowered to protect and advocate for consumer rights, including initiating class actions on behalf of affected consumers.
- Consumer associations: these must be legally recognised and have been established for at least six months prior to filing the class action. The association's board of directors must formally authorise the action. This requirement ensures that only established and credible organisations can represent the class interests of consumers in legal proceedings.
- Groups of consumers: a group of no fewer than 50 individuals, each sharing a common grievance and concern arising from the same anti-competitive conduct. Each member of the group must be duly identified, ensuring accountability and legitimacy in representing the affected consumer base.

4.2 Opting In or Out

The Chilean class action system considers both an opt-out and an opt-in mechanism, depending on the stage of the proceedings.

In accordance with Article 53 of the Consumer Protection Act, once the class action has been filed and declared admissible, and certain publicity formalities have been completed, no other person may initiate another class action lawsuit against the defendant based on the same facts. Nevertheless, consumers who may consider themselves affected are granted a 20-day period to appear in court, to reserve the right to file their own claim, in which case the results of the class action will not affect them. In this sense, class actions in Chile can be considered opt-out actions.

Within the same 20-day period, consumers can alternatively appear in court to become a party to the trial. However, becoming a party only has the effect of allowing the consumer to assert their own claims at trial and of precluding the consumer's right to take legal action on the basis of their individual interest, but is not required for the consumer to be considered a member of the class. Instead, pursuant to the Consumer Protection Act, an enforceable judgment declaring the liability of the defendant has an erga omnes effect, which means that it benefits all those who belong to the group of consumers harmed by the same facts, even if they have not yet appeared in court.

Only after the judgment that grants the class action has been issued, an opt-in mechanism operates, in which all those harmed by the events in question can claim the collection of

compensation or the fulfilment of the corresponding relieves. For this purpose, the court must order the publication of at least two notices in newspapers and may also use other publicity mechanisms to ensure that the ruling is made known to all those who benefit from it. Consumers are granted a 90-day period counting from the last notice to appear in court and request compensation or reserve the right to request a higher compensation in a new proceeding, in which case it will not be possible for the defendant to dispute the existence of the infringement already declared.

4.3 Direct/Indirect Purchasers

Article 50 of the Consumer Protection Act distinguishes between three types of interests that aim to be guarded by the legal actions contemplated in such legislative body: individual, collective and diffuse.

- Individual interest – complaints or actions brought exclusively in defence of the rights of a single affected consumer.
- Collective interest – class actions brought in defence of rights common to a determined or determinable group of consumers, linked to a supplier by a contractual relationship. To bring forth this action, the contractual relationship between the consumers and the infringer or infringers must be proved.
- Diffuse interest – class actions brought in defence of an undetermined group of consumers whose rights are affected.

There is a significant part of Chilean doctrine that considers that the diffuse interest of consumers is not compensable, precisely because, by definition, the consumers who form part of a diffuse interest are indeterminate and undeterminable, it is legally impossible to establish whether or not they suffered damage; that is, it is not feasible to determine who would have the right to be compensated. Therefore, other types of consumer protection actions could be based on the safeguard of diffuse interest, but not class actions for damages.

As regards class actions based on the impact of anti-competitive conduct on the collective interest of consumers, the question arises as to whether compensation is appropriate when the infringer does not sell its products or services directly to final consumers. This is because, as mentioned, the definition of “collective interest” requires the existence of a group of consumers related to the supplier by a contractual link. Therefore, if the infringer participates in the supply chain, but does not offer its products or services to the final consumer, then there is no contractual relationship between the former and the latter. This would therefore exclude indirect purchasers as subjects of compensation through a class action. This criterion has recently been confirmed by the Supreme Court in a case brought under the old law, which gave jurisdiction to civil courts to resolve such cases (SERNAC v SCA).

However, some scholars assert that indirect consumers should indeed be compensated for damages arising from violations of competition laws. In this sense, it is argued that the principle of full reparation inherently includes the duty to compensate indirect consumers, and that DL 211 provides that compensation for damages shall include “all damages” caused during the period in which the infringement lasted. Therefore, those injured consumers who are indirect purchasers should be able to file not only individual but also class actions.

It remains to be seen how the TDLC will resolve the class actions requesting compensation for

indirect purchasers currently being processed, since there has been no ruling from this court on the matter, and whether the Supreme Court will agree with the TDLC decision or not.

4.4 Class Certification

Under Chilean law, there is no specific procedure for class certification in class actions. Instead, claims are subject to an admissibility test, where they are evaluated to ensure they meet legal requirements. These requirements include being filed by parties with legal standing – such as SERNAC, consumer associations, or a group of at least 50 consumers – and adhering to the formal requirements applicable to all lawsuits.

At the end of the trial, the court must include in its judgment the identification of the group of affected consumers (all those who are affected in the same way by the damage caused), whether it is divided into subgroups, and the manner and period in which the interested parties must exercise their rights.

5. Choice of Jurisdiction

5.1 Rules on Jurisdiction and Applicable Law

The TDLC holds nationwide jurisdiction over antitrust matters. Therefore, if any anti-competitive act is conducted within or has effects in Chile, the TDLC will have the authority to address and adjudicate the issue, applying Chilean law accordingly.

6. Disclosure/Discovery

6.1 Disclosure/Discovery Procedure

Under Chilean law, private parties are not mandated to disclose all documents related to the case at a specific stage, and there is no formal discovery process akin to those found in other jurisdictions. Instead, Article 349 of the Civil Procedure Code provides that parties may request the "production of documents" as an evidentiary measure. Such requests can be made for documents held by the opposing party or third parties, provided that the documents are directly relevant to the issue in dispute.

The TDLC will admit such requests "with notice" if they meet the specified criteria. The party affected by the request has three days to object to the disclosure, citing reasons such as that the document is not in their possession or that it is not relevant to the contested matter.

If the request for document production is granted, a hearing will be scheduled to allow the parties to present the content of the disclosed documents, demonstrate their compliance with the request, and indicate if certain documents are not in their possession.

During this hearing, parties may also request that documents containing commercially sensitive information be kept confidential to protect the competitive position of the disclosing party. If the court grants this confidentiality request, the requesting party must provide redacted versions of such documents to the other parties.

Additionally, parties may seek the production of documents even before the commencement of the trial as a preliminary evidentiary measure.

If the party required to produce documents fails to comply with the court's order without just cause, the court may impose fines or arrests, without prejudice to repeating the order and warning. In addition, the defaulting party shall lose the right to assert at trial the documents that

they did not produce in a timely manner (unless the other party also asserts them in support of their defence, or if it is justified that they were unable to produce them earlier, or if they relate to facts other than those that motivated the request for production).

In addition, Article 51 of the Consumer Protection Act stipulates that, in class actions, if the defendant supplier refuses to provide documents and the court determines that this refusal is unfounded, the judge may consider that the opposing party's claims about the content of these documents is proven for all legal effects.

6.2 Legal Professional Privilege

The legal professional privilege is recognised and protected under Chilean legislation. Specifically, in relation to antitrust litigation, Article 39(n) of DL 211 mandates that the FNE, in use of its investigative powers, "may not intercept communications between the investigated subject and those persons who, by their status, profession, or legal function, such as a lawyer, doctor, or confessor, have the duty to maintain the confidentiality of the secrets entrusted to them". Additionally, the FNE has acknowledged that this protection is not only applicable to the interception of communications but also extends to the seizure of documents.

Recently, the FNE has argued that in order for a communication to be protected by this privilege, three conditions must be fulfilled:

- the intervention of a lawyer, both in the organic sense (holding that status) and functional sense (acting in that capacity concerning the accused);
- the confidential nature of the communication and its maintenance as such; and
- the communication aims to seek legal advice in the context of defence.

The TDLC has also recognised this protection even in cartel cases if the documents have been produced by outside counsel, thus excluding inhouse counsel (TDLC decision in case C-386-2019 FNE v Biomar).

6.3 Leniency and Settlement Agreements

Leniency Applications

In Chile, there are not formal leniency agreements, but rather the agreement is formed by a leniency application and an FNE resolution accepting the application. It is important to note that Chilean law only provides for leniency applications in cartel cases.

These applications are typically kept confidential, being declared as such by the FNE during the cartel investigation. Then, during the trial, the TDLC will maintain the declared confidentiality, but may order the FNE to prepare a public version of the leniency application, with redactions to safeguard information that could significantly impact the competitive position of the leniency applicant.

Settlement Agreements

The FNE is authorised to enter into out-of-court settlement agreements with the investigated parties, which must be disclosed in a public court proceeding, to request the TDLC's approval.

Accordingly, regarding these agreements, the principle of transparency applies. This principle ensures that both the existence of the settlement and the associated procedural actions – including the resolution calling for the TDLC hearing, the hearing itself, and the resolution approving or rejecting the settlement – are public. Any legiti-

mately interested party is entitled to access this information and even take part in the hearing.

The aforementioned transparency is, however, subject to the protection of confidential information as stipulated in paragraph 3 of Article 39(a) of DL 211. This provision authorises the FNE to, either ex officio or upon request by an interested party, declare certain parts of the case documents as confidential if their disclosure could substantially impact the competitive position of the document's owner or compromise the effectiveness of the FNE's investigations. In this case, the TDLC will request the FNE to produce a public version of the documents, where all confidential information will be redacted.

7. Witness and Expert Opinions

7.1 Witness Procedure

During the trial, witness evidence must be presented orally. To present oral testimony, the parties must submit a list of witnesses within the first five days of the evidentiary stage, after which the TDLC will summon a hearing. Witnesses are compelled to attend, under penalty of arrest or fine if they fail to attend the second time that they are legally summoned.

At the hearing, witnesses will be questioned and cross-examined about the specific point of proof for which they were summoned to testify. Additionally, the judge may also ask questions.

In theory, a witness's statement could be submitted in writing as documentary evidence, but this is not usual practice, because oral testimony has greater power of conviction, as the witness can be questioned about their impartiality and cross-examination is possible.

7.2 Expert Witness Role and Procedure

The parties may present expert witness evidence by submitting expert reports or requesting a hearing for their verbal testimony. However, the common practice in antitrust litigation is that the parties submit technical or economic reports prepared by experts in certain subjects, such as the structure and characteristics of the relevant market, the assessment of damages.

Once the report has been submitted, the TDLC, at the request of the party that submitted the report or ex officio, may set a special hearing for the experts to testify about the content of the report. At the hearing, the parties and the judge may also ask questions, which must refer to points addressed in the report.

The decision of the TDLC to set a hearing or not is discretionary, but it has been the common practice in recent cases.

If a hearing is scheduled, it is not necessary for experts to state their position in advance on the matters discussed in the trial or in the report.

8. Damages

8.1 Damages: Assessment, Passing on and Interest

Assessment of Damages

Although Article 30 of DL 211 establishes the procedural rules to be followed in damages claims, it does not address the issue of damages assessment. However, it is an established practice to calculate damages based on a counterfactual scenario, comparing certain competitive conditions (eg, prices, quality of the goods and services, and production rates and capacity) in the market involved in the anti-competitive conduct, during the period when it took place,

with an alternative scenario not affected by that conduct (eg, a different period or the same period but for different products/services), while also taking in consideration external factors that may have affected competition in the market (eg, public policies, new regulations and economic situation of the country).

Concerning the type of damages that may be claimed for compensation, Chilean legislation refers to "all the damages caused", which involves both economic and non-economic damages. In the case of class actions, as of 2018, the law explicitly provides for the possibility of claiming collective moral damages.

On the one hand, economic damages include actual damage, which refers to the economic losses actually suffered by the parties (ie, the costs in which they had to incur to fix the damages caused). On the other hand, economic damages also include the loss of profits, which refers to the income that the affected parties stopped receiving because of the anti-competitive conduct, including interest. In order to be compensated, all damages must be a direct consequence of the anti-competitive conduct penalised by the TDLC's decision in the infringement proceeding.

Punitive Damages

DL 211 does not contemplate the possibility of a conviction for punitive damages in addition to compensatory damages. Therefore, in this matter, the general principle of prohibition of unjust enrichment should apply, meaning that the value of the compensation is limited by the amount of the effective damage caused and cannot be transformed into an object of profit or gain for the indemnified party. Additionally, the deterrent effect sought by punitive damages is already protected by the sanctions applied by the TDLC in the previous infringement procedure.

Notwithstanding the above, part of the national doctrine maintains that Article 53 (B)(c) of the Consumer Protection Act establishes a special rule regarding punitive damages for class action lawsuits. Specifically, Article 53(B)(c) states that, in the decision that upholds a damage claim in a procedure for the protection of collective or diffuse interests of consumers (ie, a class action), courts have the authority to increase the amount of damages by 25%, based on certain aggravating circumstances.

The circumstances to be considered are:

- previous sanctions for the same infraction by the offender;
- the severity of the economic damage caused to consumers;
- the severity of the damage caused to the physical or moral integrity of consumers; and
- the impact on the safety of consumers or the community even if no damage has occurred.

It is unclear, however, whether courts with jurisdiction over antitrust matters, ie, the TDLC and the Supreme Court following an appeal, will apply this rule in proceedings for class actions arising from anticompetitive conduct.

Passing-On Defences

Regarding class actions for damages of collective interest, the "pass-on" or "pass-through" defence may be raised by the defendants when disputing the causal link between the anti-competitive conduct and the alleged damages. Please refer to **2.5 Pass-On Defences**.

9. Liability and Contribution

9.1 Joint and Several Liability

Joint and Several Liability

Concerning the fines imposed on legal entities convicted of anti-competitive conduct, Article 26 of DL 211 expressly allows for the imposition of joint and several liability on their directors, managers and other individuals who benefited from the act in question, provided that they participated in its commission.

As for claims for damages, Article 2317 of the Civil Code establishes joint and several liability for any harm resulting from a tort or quasi-delict committed by two or more persons.

For both cases, once the debt is paid by any of the co-debtors, the obligation is extinguished for all the others as well.

Liability Limitation of Immunity Applicants

As noted in **6.3 Leniency and Settlement Agreements**, DL 211 provides for leniency exclusively for cartel cases, granting full exemption from fines to the first leniency applicant and a reduction of up to 50% for the second applicant that provides additional information.

Accordingly, first applicants are exempt from liability, whereas second applicants will benefit from a reduction and remain jointly liable for the remaining balance of the fine.

If the applicant is a legal person, then, in addition to the applicant itself, the legal persons that belong to the same business group, as well as their current and former officers, employees, advisors and/or agents will also benefit from the leniency.

Furthermore, with respect to the procedure for seeking compensation for damages caused by anti-competitive conduct, the Chilean legal system does not provide for rules that mitigate the civil liability of immunity applicants, nor is there a limitation that exempts them from joint liability for such damages.

9.2 Contribution

Having established the presence of joint and several liability for the payment of fines and damages, it is important to note that the Civil Code stipulates that a defendant who has paid either the full amount or a substantial portion of the debt is entitled to initiate a civil action seeking reimbursement from the other joint debtors for their respective shares. The prevailing legal doctrine suggests that the most appropriate method for determining each debtor's contribution is to allocate it according to their respective degrees of fault and causal contribution to the damage.

10. Other Remedies

10.1 Injunctions

Injunctions or precautionary measures in competition law are governed by Article 25 of DL 211, which provides that the TDLC, either ex officio or upon request from a party, and at any stage of the proceedings – including prejudicial stages – may order any precautionary measures deemed necessary to prevent the negative effects of the conduct brought to its attention and to safeguard the public interest.

These measures are inherently provisional, remaining in effect only as long as there is a risk of adverse consequences if they are not upheld. As such, they may be amended or revoked at any stage of the proceedings. Additionally, these measures must be proportional, restricted to

what is strictly necessary to safeguard the interests involved.

To request a precautionary measure, the petitioner must submit a request to the court, providing arguments as to why the measure is essential to prevent the negative effects of the anti-competitive behaviour. For the request to be deemed admissible, the law provides that it must include “evidence that establishes, at least a serious presumption of the right asserted, or the facts alleged.”

Moreover, when deemed necessary, the TDLC may require a bond to secure against any potential unjustified harm that the precautionary measure might cause.

Upon submission of the precautionary measure request, the court may either reject or approve it “with notice”, meaning the measure will take effect after a period of three days, unless the opposing party files an objection within that time frame. If an objection is raised, a separate procedure, known as an “incident”, will be initiated to address the admissibility of the precautionary measure. This incident will be processed separately from the main proceedings and will not suspend it.

In exceptional cases, the TDLC may order the precautionary measures to be implemented without notice to the affected party, only if there are sufficient grounds for doing so. If the measure is granted under these circumstances, the applicant is required to give notice to the affected party within five days of the court’s decision; failure to do so will render the measures void. The TDLC may extend this period if deemed necessary for a reasonable cause.

If the case warrants urgency, because the effects of the act being prevented would be very serious or irreversible, the court will resolve the precautionary measure request rather quickly (eg, the day after its submission).

10.2 Alternative Dispute Resolution

Article 21 of DL 211 authorises the TDLC to invite the parties to seek a settlement once the deadline for responding to the complaint has elapsed. Furthermore, the TDLC may initiate settlement proceedings as many times as it deems necessary throughout the litigation process. Additionally, the parties may agree to a settlement outside the proceedings and submit it to the court for its review and approval to end the trial.

Lastly, under Chilean law, arbitration is permissible as long as it is not expressly prohibited by law and all the parties involved agree to it.

11. Funding and Costs

11.1 Litigation Funding

While Chile does not have a specific prohibition against litigation funding, the practice has not been commonly adopted in the context of competition law or antitrust cases.

11.2 Costs

Under Article 144 of the Code of Civil Procedure, the party that is fully defeated in a trial or incidental matter shall be liable for the payment of all legal costs. However, the same Article provides that the court may exempt the party from such costs if it determines that the party had plausible grounds for initiating the litigation.

Additionally, an injunctive relief may be enforced though a guarantee or other reasonable measures to secure the payment of legal costs.

12. Appeals

12.1 Basis of Appeal

In antitrust proceedings before the TDLC, parties have the right to appeal the final judgment through a specialised appeal mechanism known as r *ecurso de reclamación* (appeal). This appeal, specifically designed for administrative proceedings, is applicable to both cases of anti-competitive infringements and subsequent damage claims. The appeal must be filed with the TDLC within ten business days from the notice of the final judgment. The TDLC will then process the appeal and forward it to the Third Chamber of the Supreme Court for review, where the latter may confirm, revise or annul the TDLC's judgment.

The general condition for the TDLC to declare the appeal admissible and refer it to the Supreme Court is that the judgment causes a grievance regarding the appellant's claims.

The appeal is not only limited to points of law, but also to points of fact. Historically, since the Supreme Court is not a specialised court in economic and competition matters, it used to limit its review to legal errors. However, the highest court in Chile now asserts its jurisdiction to review even the economic analysis conducted by the TDLC, adopting a non-deferential stance in significant cases regarding the TDLC's analyses.

13. Looking Forward

13.1 Legislative Trends and Other Developments

Statistics and Expected Developments

According to the TDLC's 2023 statistics, 73% of the total antitrust litigations for this period involved allegations of abuse of dominant position. This prevalence is explained primarily because private parties frequently resort to this category in antitrust litigation.

It is anticipated that private parties will continue to focus on this type of anti-competitive conduct in the coming years. However, follow-on damage claims based on this offence have not developed at the same rate. Of the nine damage claims filed to date, only two have been based on abuse of dominant position, with the remainder involving cartel cases (five) and the establishment of entry barriers (two).

This disparity is attributable to the challenges faced by private parties in gathering the necessary evidence to secure a conviction for abuse of dominant position, resulting in a relatively low success rate for these proceedings. To address this issue, some professors – and even a bill submitted in 2021 – have proposed amending DL 211 to establish a rebuttable presumption of the existence of a dominant position for companies with a market share equal to or greater than 50%. This would ease the evidentiary burden for plaintiffs.

Regarding the markets most represented in litigation before the TDLC, although the telecommunications sector has historically been predominant, recent years have seen a shift towards greater prominence of the financial, transport and electronics sectors. This trend is expected to continue shifting, as digital markets have become a focal point of interest for competition authorities and private parties alike, as evidenced by the case of Copesa v Google.

In particular, comparative experience and legitimate competitive concerns within certain digital markets will likely make this an area requiring

substantial doctrinal, jurisprudential and regulatory development. Key issues may include barriers to entry that may arise in markets with significant personal data accumulation, as shown by the case law in other jurisdictions.

Artificial Intelligence (AI)

In this context, the proliferation of cases related to AI technology seems inevitable. As a globally significant issue, AI merits extensive regulatory and legal consideration, particularly given its recognised potential role as a facilitator of collusion and other anti-competitive behaviours.

For instance, the Federal Trade Commission issued guidance in June 2023 identifying the main potential anti-competitive conduct it is monitoring, including leveraging control over key inputs and adjacent markets to establish and maintain monopoly power, engaging in anti-competitive bundling and tying strategies, and maintaining an anti-competitive policy of self-preferencing. It is likely that the FNE will issue similar guidance in the near future, as it usually takes into account the developments of other relevant authorities in antitrust matters.

Follow-On Damage Claims Before the TDLC

Lastly, with the conclusion of two damage claims processed before the TDLC, it is anticipated that four other cases initiated around the same time (2020 and 2021) will soon be adjudicated. These forthcoming decisions are expected to establish consistent case law regarding the criteria the TDLC will use to award damages, potentially leading to an increase in the number and success rate of such proceedings.

Trends and Developments

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Estudio Lizana is a boutique law firm headquartered in Santiago, Chile, specialised in competition, regulatory and compliance matters, as well as corporate law. The team is made up of three partners, three associates and one paralegal. It has comprehensive expertise in competition law matters, including merger control, investigations by the Fiscalía Nacional Económica (FNE) on cartels, abuse of dominance, and unfair competition, as well as litigation before the Chilean Competition Court (TDLC) and the Supreme Court. Recent relevant work includes advising both Brink's Chile and Indura (Air Products) in their defences in ongoing cartel litigations (historical cases due to the high fines requested); Mastercard in a TDLC proceeding regarding the issuance of regulations for the payment cards industry and ongoing litigation against several payment facilitators; Minerva Foods in the merger control review of an acquisition of assets from Marfrig; and a large technological company in an ongoing antitrust investigation.

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ABOGADOS

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Introduction

In Chile, antitrust litigation has several decades of history, but it has acquired increasing importance since the creation of the Chilean Competition Court (*Tribunal de Defensa de la Libre Competencia*, TDLC) in 2003. The TDLC is a specialised court mainly responsible for hearing and judging legal conflicts arising from anticompetitive conduct, maintaining a total separation of functions with the Chilean Competition Agency (*Fiscalía Nacional Económica*, FNE), which is in charge of investigating such conduct and accusing those who carry them out. Also, unlike other jurisdictions, in Chile, not only the FNE may file antitrust lawsuits before the TDLC, but also private entities and individuals.

In the 20-year history of the TDLC, it has been possible to observe a significant increase in the number of cases heard by the court. For example, between January 2005 and December 2010, only eight new cases were brought before the court, while between January 2023 and 1 August 2024 (ie, in less than two years), 97 new cases have been initiated.

Many of these cases, however, are not litigation, but non-contentious proceedings, in which the TDLC is consulted on whether a certain act or contract may infringe competition law. Although the law confers on the TDLC the power to resolve this type of consultation, there is a general perception that, in recent times, there has been a certain abuse in the use of the power to request the initiation of non-contentious proceedings. This is because, on many occasions, these are cases that contain a "hidden" contentious claim, and that are only distinguished from a contentious proceeding in that the party submitting the consultation does not require the imposition of fines, which allows it to submit its claim to a procedure that has fewer procedural steps and is therefore less time-consuming. The proliferation of these non-contentious initiatives partly explains the visible increase in the burden on the court.

Another factor that may account for the increase in litigation in competition matters is the granting, through successive legal reforms, of more powers and tools to the FNE to investigate cartels, which has led this authority to intensify its activity in the enforcement of this type of conduct. This, together with a more frequent use of the leniency programme (introduced in 2009), as well as a greater demand for condemnation of citizens in the face of the most newsworthy cases, has increased the number of court proceedings for cartel cases, and although these are still not rare, they are by far the most complex to process. Individuals, for their part, have not been left behind, increasingly attempting antitrust actions for both unilateral conduct and unfair competition.

At the same time, the level of complexity of antitrust litigation before the TDLC has been increasing, with highly technical proceedings that require studying and processing large volumes of data and evidence, which has represented a relevant challenge in the evolution of the system.

Considering all the above, it is not surprising that TDLC proceedings, which can then continue before the Supreme Court in the event of appeals, are usually lengthy, even taking several years. The challenge remains therefore to find mechanisms to speed up the processing of these cases, in order to guarantee timely access to justice in antitrust matters.

Notwithstanding these problems of delays in processing, in general, there is consensus among

legal practitioners that the Chilean legal system for the protection of competition is reasonably consolidated, after long institutional efforts to build and strengthen it, and stands as an example within the region of the high technical quality of the specialised bodies in charge of it.

The following summarises some of the most relevant developments in antitrust litigation in Chile in recent times.

Judicial Review of Leniency Benefits

Leniency programme in Chile

The leniency programme in Chile was introduced by a law that modified the Chilean Competition Act (Decree Law 211, "DL 211") in November 2009. Since then, nine of the 24 lawsuits filed by the FNE for cartel cases have been preceded by a leniency application.

According to the FNE Guidelines on Leniency, provided that it complies with all the legal requirements, the first leniency applicant (which can be a legal or natural person) will be granted an exemption benefit, which means that it will not be subject to:

- the penalty of dissolution of the legal entity;
- all fines that would have been otherwise applicable; and
- criminal liability ("Exemption Benefit").

To receive the Exemption Benefit, the first applicant is required to:

- provide precise, truthful and verifiable information, which represents an effective contribution to the establishment of sufficient evidence to substantiate a cartel complaint;
- refrain from disclosing the leniency application until the FNE files a complaint or closes the investigation, unless the FNE authorises such disclosure; and
- immediately put an end to its involvement in the illegal agreement.

Judicial review

Although the original bill included the possibility for the TDLC to assess the granting of the Exemption Benefit, this provision was ultimately ruled out, giving the FNE the exclusive power to determine if the requirements for the benefit were met.

However, Article 39 bis of DL 211 does provide for one case in which the TDLC may revoke the benefit granted by the FNE, ie, whenever it is proven that the leniency applicant was the organiser of the cartel and coerced the other members to take part in it.

The Concept of Coercion in the Tissue Paper Case

Ruling of the Chilean Competition Court

In December 2017, the TDLC upheld the FNE's lawsuit against the companies CMPC Tissue (CMPC) and SCA Chile (SCA), for taking part in a cartel in the tissue paper market. SCA was condemned to pay a fine of UTA20,000 (approximately USD16.7 million), while CMPC was exempted from all fines since the FNE had granted it the Exemption Benefit.

During the trial, SCA claimed that CMPC had been the organiser of the cartel and coerced SCA, by threatening to exclude it from the market if SCA did not participate in the agreement. Based on this argument, SCA requested the TDLC to revoke the benefit granted to CMPC and, instead, consider SCA as the first applicant, thereby exempting it from the applicable sanctions.

The TDLC stated that, although the evidence was not conclusive, it "seemed" that CMPC was the organiser of the agreement, but that there was no coercion on their part. Therefore, it was not possible to revoke the Exemption Benefit.

In its reasoning, the TDLC adopted a restrictive interpretation of the term "coercion", excluding economic threats, as claimed by SCA. Thus, according to the TDLC, "coercion" is equivalent to "irresistible violence", which completely annuls or vitiates the will of the coerced person to adopt a course of action different from that demanded by the coercer.

Ruling of the Supreme Court

SCA challenged the TDLC's decision before the Supreme Court, arguing that the ruling had misinterpreted the term coercion and that CMPC should not have been granted the Exemption Benefit.

The Supreme Court argued that the TDLC's restrictive interpretation was mistaken, because for a cartel to exist it requires the participants' consent, excluding the notion of irresistible violence. Therefore, it stated that the concept of "coercion" in DL 211 corresponds to the imposition of moral or psychological force, which vitiates one of the wills involved in the cartel due to the undue pressure experienced by one of the participants.

Regarding the specific requirements, the Court established that the threats made to exert coercion needed to be "unfair, significant, and determinant", and that CMPC's threats met that criterion.

Subsequently, the Supreme Court decided to partially uphold the appeal, and, for the first time, revoked the Exemption Benefit granted by the FNE, condemning CMPC to pay the same fine as SCA. However, it did not grant the request to consider SCA as the first applicant, because it considered that, in the face of such serious facts, SCA should have reported CMCP to the authorities, but instead, it decided to adapt its economic guidelines to the collusive agreement, maintaining the market share that the latter allowed it for almost 11 years.

This Supreme Court ruling has caused some concern among litigants in antitrust matters, as it casts a shadow over the necessary legal certainty required for the effectiveness of the leniency programme. Importantly, in this case, the existence of coercion was particularly doubtful since the cartel had lasted over 11 years, making it hard to believe that SCA could have been credibly threatened for that long, without taking any actions to put an end to the alleged threat (the ruling has a dissenting vote that is based precisely on this reasoning).

Beyond the above discussion, this ruling represents a precedent that could affect the incentives of companies or individuals to apply for leniency, because it raises some doubts about how protected the applicant is against possible "surprise" decisions of the courts. It would therefore be expected that the FNE pays particular attention in future cases to possible allegations of coercion by the other members of the cartel before granting the Exemption Benefit, in order to ensure that it will not be revoked later.

Interlocking Litigation

Interlocking in Chile

In Chile, the prohibition of horizontal interlocking directorates has been in force since 2017. Specifically, Article 3(d) of DL 211 penalises the simultaneous participation of the same person as a director or key executive in two or more

competing companies, provided that the annual revenues of the corporate group to which each of the competing companies belongs exceed UF100,000 (approximately USD3.9 million) in the previous calendar year.

Although there is consensus that Article 3(d) prohibits horizontal direct interlocking – ie, when the same person serves as key executive or director in companies that compete directly, the question remains for cases of indirect interlocking, particularly (i) when interlocking occurs between the parent companies of two competitors, or (ii) when there is interlocking between a company and its competitor's parent company.

Lawsuits filed by the Chilean Competition Agency

Since the prohibition entered into force, the FNE has filed two lawsuits for interlocking (cases FNE v Hernán Büchi, Consorcio, Falabella, and Banco de Chile; and FNE v Juan José Hurtado, Consorcio, and Larraín Vial). Both lawsuits, filed in December 2021 with the TDLC, arose as a result of an ex officio investigation instructed by the FNE in September 2019.

Discussion before the Chilean Competition Court

In both cases, the final hearings were recently held before the TDLC. To this date (1 August 2024), the TDLC's rulings are still pending.

Although many interesting matters were brought up by the parties during the trials, the following topics should be highlighted.

Scope of Article 3(d): the concept of "competing companies"

The FNE claimed that, although the accused executives participated in parent companies that did not compete directly with each other, their subsidiaries did, which was prohibited under Article 3(d). Thus, according to the FNE, cases of indirect interlocking are covered by this provision.

The FNE argued that the concept of "company" does not refer solely to the legal entity involved in a particular market, but to all entities that are part of the same "economic unit." Therefore, if a company defines or can influence the competitive behaviour of its subsidiaries, and takes part in the commercial decision-making process, all of them shall be considered as a single competing company.

Furthermore, the concept of company should not be identified with that of a corporation or legal entity, but rather must consider functional aspects of how competition takes place in the markets, making it possible for a company to be made up of a group of entities that represent a single competitive force.

On the other hand, the defendants argued that Article 3(d) makes a clear distinction between the notions of "competing companies" and the "business groups" to which they belong, in order to prohibit only cases of direct interlocking. In particular, they pointed out that the phrasing of Article 3(d) explicitly refers to the concept of business groups to account for annual revenues, but not to establish which companies must be considered as competitors.

In this context, it would not be appropriate to make extensive interpretations or analogies of matters that are of strict law, such as per se prohibitions like the one established by Article 3(d).

Liability of legal entities

According to the FNE, both natural and legal persons may infringe Article 3(d) of DL 211.

Concerning legal entities, their liability would arise from acting in accordance with the illegal conduct, accepting that the person serving as a director or key executive retains their position while holding an equivalent one in the competing company. Thus, the economic agents' involvement is evidenced by allowing or tolerating this situation, especially because firms can take measures to comply with the law and put an end to the infraction.

Moreover, Article 26 of DL 211 states that fines for anti-competitive conduct may be imposed on the legal entity, its directors, administrators and any person involved in the illegal conduct, which would confirm the FNE's interpretation.

Furthermore, the FNE argued that Chilean case law has acknowledged "economic agents" as the main active subjects in competition law because they are the ones who will ultimately benefit from anti-competitive conduct.

In turn, the defendant companies argued that they cannot be accused of interlocking, because directors are appointed by the shareholders' meetings and not by them. Thus, it would not be true that companies have any influence in establishing or maintaining the interlocking situation as was stated by the FNE.

Likewise, the firms pointed out that condemning a company under Article 3(d) for an alleged omission – not avoiding the appointment of a director or key executive – would infringe the principle of legality, which requires that the laws provide an intelligible determination of the infraction, penalty and correlation between the two.

Although the court rulings are still pending, the litigation phase has ended in both cases, so the TDLC should make a final decision soon, thereby shedding some light on all the above matters.

Cryptocurrency Exchanges/Chilean Banks: Collective Abuse of Dominant Position

Lawsuits filed by Buda, CRYPTOMKT and Orionx

Between April and June of 2018, three cryptocurrency exchanges filed lawsuits against ten major banks in Chile.

The plaintiffs claimed that the accused banks infringed Article 3(b) of DL 211 for abusing their "collective dominant position" through the unjustified closure of banking accounts and/or the refusal to open them. Since, in their view, cryptocurrency exchanges would compete with banks in the downstream markets for remittance services, foreign exchange and payment methods, the defendants' conduct would have amounted to an exclusionary practice. In particular, by closing bank accounts or declining to open them, they would have created artificial barriers to entry and engaged in arbitrary discrimination, as well as a refusal to deal.

The importance of this case is that there had not been any previous lawsuits claiming an abuse of a "collective" dominant position. Therefore, this was the first opportunity in which the TDLC directly addressed this concept and its conditions, as explained below.

Ruling of the Chilean Competition Court

In December 2023, the TDLC dismissed the lawsuits, acquitting the banks and ordering the plaintiffs to pay the procedural costs for having been completely defeated and lacking reasonable grounds to pursue litigation.

Regarding the relevant markets identified by the plaintiffs, the TDLC stated that there was no

evidence indicating that banks and exchanges competed at the time of the events in the downstream markets. However, cryptocurrency exchanges were potential competitors of banks for certain services. Therefore, the TDLC proceeded to examine the accused conducts.

The analysis of the TDLC focused primarily on the alleged collective abuse of a dominant position in the upstream market of banking accounts. As mentioned above, this is the first case in which the TDLC addressed this conduct.

The TDLC defined the collective abuse of dominant position as a behaviour adopted individually by various competitors in a market (none of which necessarily has a dominant position of its own), which, in a scenario of strategic interdependence, know that the result of their collective conduct will grant them the ability and incentives to create an anti-competitive effect caused by the abuse, such as creating a barrier to entry, but without an explicit or implicit agreement nor a concerted practice between them (which is what makes it different from a collusive arrangement).

Specifically, the TDLC's ruling, basically reflecting the assumptions developed by European case law, established that collective dominance requires:

- strategic interdependence between the economic agents;
- transparency in the relevant market, ie, that competitors can be aware of the simultaneous behaviour of their rivals to check whether they are adopting the collective behaviour in question; and
- sustainability of the internal and external conduct, which corresponds to the incentives not to deviate from it.

In addition, the infraction also demands a behavioural element, which consists of a concrete abuse capable of producing anti-competitive effects.

After examining all these conditions, the TDLC ruled that there was no evidence of a collective abuse of a dominant position in this case. Therefore, the other accused conducts were also dismissed, since they were grounded on the same facts.

The plaintiffs challenged the TDLC's ruling before the Supreme Court, whose final judgment is still pending to this date (1 August 2024). It therefore remains to be seen whether this court will rule and confirm the requirements for abuse of a collective dominant position outlined by the TDLC.

FNE/Helicopter Companies: Statute of Limitations in Bid-Rigging Agreements

The accusation of the Chilean Competition Agency

In August 2020, the FNE filed a lawsuit against FAASA, Calquín and their executives, for colluding in a contracting process called by the National Forestry Corporation (CONAF) during the year 2014 – which was conducted through two bidding processes – to provide helicopter transportation and firefighting services for the prevention and combat of fires.

In general terms, the FNE's accusation was grounded on the fact that proposals submitted by both companies did not overlap, suggesting a co-ordinated behaviour between them.

Statute of limitations defence raised by the defendants

Among the allegations of the defendants, they raised the statute of limitations defence, claiming that its calculation required to define the date

when the effects of the agreement ceased in the market. According to the defendants, this date would be the same as the closing date for the receipt of proposals.

While the FNE considered the two bidding processes as a single market, the defendants argued that there were two relevant markets, each corresponding to one of the bidding processes ("Tender 1" and "Tender 2"). Consequently, the case involved two different accusations that had to be proven and ruled upon separately.

Subsequently, for Tender 1, the date on which the effects ceased would have been 24 September 2014, while for Tender 2, it would have been 17 November 2014. Therefore, regarding both tenders, more than five years had elapsed before the FNE served its lawsuit, which was the period required by the applicable law (Article 20 of DL 211).

Ruling of the Chilean Competition Court

In November 2023, the TDLC dismissed the lawsuit. It is worth noting that, before this ruling, the TDLC had not rejected an FNE claim for a cartel case in 11 years.

Regarding the relevant market, the TDLC determined that Tender 1 and Tender 2 were independent of each other and constituted two different markets, following the definition supported by the defendants.

Concerning Tender 2, the TDLC established that there was no evidence indicating that the parties had agreed on a joint strategy for this process and that, although there were no overlaps in their offers, the FNE had not provided any communications to demonstrate any type of co-ordination between them.

As for Tender 1, the TDLC concluded that the defendants entered into a collusive agreement. However, the TDLC also indicated that it had not been proven that the agreement covered all the operational bases included in the bidding, since none of them had been awarded to FAASA, and those assigned to Calquín were not under the scope of the parties' common strategy.

Therefore, the TDLC asserted that, due to external circumstances, the agreement did not have the effects expected by the parties. Although this does not affect the illegality of the conduct, it is relevant for the calculation of the statute of limitations, because this is determined by the date in which the effects of the agreement cease in the market.

Subsequently, when addressing the statute of limitations defence, the TDLC analysed if the effects of the demonstrated behaviour (ie, the agreement regarding Tender 1) lasted until 19 August 2015 (five years before the service of the claim, which interrupted the statute of limitations under the applicable law).

On the one hand, regarding the cases of operational bases that were not awarded to any tenderer, the TDLC stated that the effects in the market ceased when the bases were re-tendered under competitive conditions. Thus, since Tender 2 was considered a competitive process, the date for calculating the statute of limitations would be the date Tender 2 was awarded (10 December 2014).

On the other hand, concerning the cases where operational bases were awarded to other tenderers, the TDLC concluded that prices originally planned were identical to those finally offered by FAASA and, even if Calquín had presented an offer, it could not have won them because two

of its three helicopters were allocated to another region. Consequently, the agreement did not have any effects in these situations.

Because of the above, the TDLC upheld the statute of limitations exceptions raised by the defendants and fully dismissed the lawsuit.

The FNE challenged the TDLC's ruling before the Supreme Court, but its judgment has not been issued to this date (1 August 2024).

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