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**Intergovernmental Group of Experts on  
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**Cross-Border Anticompetitive Practices  
By  
Chile**

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## **I. Cross-Border Mergers**

### **i. Legal framework**

1. The Chilean Competition Act ("the Act") does not address mergers or acquisitions directly. However, several sections of the Act provide the substantive basis for merger control by both the Fiscalía Nacional Económica ("FNE") and the Competition Tribunal (Tribunal de Defensa de la Libre Competencia or "TDLC") under two procedures.
2. The first procedure is voluntary and non-adversarial. There is no general pre-merger notification requirement of the proposed merger to the FNE. But either the merging parties or the FNE may request the TDLC to review the transaction. In this case, and provided that the request is lodged before consummation, the merger cannot be completed before the approval of the Competition Tribunal. Mergers that may raise antitrust concerns are increasingly being voluntarily submitted to the TDLC by the parties involved. In this case, the FNE's role is to submit a report on its opinion. The report is not binding for the TDLC, but is considered an important input. The transaction can be cleared, blocked or subject to conditions for approval. The TDLC's final decision may be challenged before the Supreme Court. The Court generally acts with deference, mainly reviewing the measures and conditions imposed by the TDLC.
3. The second procedure is adversarial and only takes place when the merging parties do not request the review of the transaction to the Competition Tribunal. Under Art. 3 of the Act, a merger or acquisition (pending or completed) may be considered an infringement if it prevents, restricts or hinders "free competition" or tends to produce such effects.

### **ii. Cross Border Mergers addressed by the TDLC**

- **Telefónica Móviles S.A, BellSouth Comunicaciones S.A. and BellSouth Inversiones S.A.**

4. In 2005, the TDLC reviewed a takeover by the Spanish company Telefónica Móviles S.A. (Telefonica) of the Chilean companies BellSouth Comunicaciones S.A. and BellSouth

Inversiones S.A. (the latter, the parent and controller company of BellSouth Chile S.A., an actor in the international and domestic long distance telecommunications industry). The acquisition was part of a broader purchase agreement between Telefonica and the U.S. company BellSouth Corporation ("BellSouth") dated March 2004. According to the agreement, BellSouth agreed to sell to Telefonica a number of business units operating in the telecommunications industry in several countries of Central and South America.

5. The transnational dimension of the transaction was not considered in the market definition. The market was locally defined as the analogue and digital mobile services supplied under radio electric spectrum concessions within Chilean geographic borders. International interconnection or roaming services, as a broader element for market definition, was discarded in the TDLC's decision and the call traffic taken into account in the analysis was not considered to be significant.
6. During the preparation of its report, that has to be requested by the Competition Tribunal, the FNE asked the merging parties to inform on the stage of the merger control proceedings carried out in other jurisdictions, with the aim to avoid potential conflicts. In the TDLC's decision the remedies imposed to the transaction were not determined by the transnational dimension of the deal.

- **Indirect Acquisition by the Chilean Company Copec of assets in the Colombian Terpel**

7. In June 2010, Compañía de Petróleos de Chile Copec S.A. ("Copec"), a leading Chilean fuel distributor, requested the TDLC to review the acquisition of significant capital interests in the Colombian gasoline group Organización Terpel S.A. ("Terpel"). This transaction -which was the result of the acquisition of Colombian Investments Ltd and AEI Colombian Holdings- resulted in the indirect partial acquisition of the Chilean subsidiary of Terpel, Terpel Chile, a competitor of Copec in the Chilean market

8. The company requested the review of the Competition Tribunal on the effects the acquisition would have in the Chilean market and stated in its request its intention to sell its capital interest in Terpel Chile as soon as possible. For the meantime, Copec confirmed that it had implemented a series of mitigation measures to assure that the two companies behaved as two independent competitors in the Chilean market, during the proceeding.
9. Though the initial acquisition was on an international level, the concerns for competitive effects were limited to the Chilean market. The Chilean Competition Tribunal, after careful consideration of all statements and reports, ruled that the mitigation measures implemented during the transition period, though on the right path and reasonable, were not sufficient to ensure competition in the market of distribution and commercialization of liquid fuel and requested a series of additional measures that would be in place for as long as Copec owned assets of Terpel Chile.

- **Integration of Lan and Tam airlines**

10. In August 2010, the FNE launched an investigation on the merger between two airlines: the Chilean Lan and the Brazilian Tam. According to the agreement, Lan will acquire 100% of Tam's shares, and its shareholders receive Lan stocks in exchange. In order to comply with Brazilian regulations regarding caps to foreign capital in airline ownership, Lan would acquire only a 20% of voting rights in Tam, leaving the remaining 80% in hands of the current Tam controllers. Once the merger is completed Lan would become "Latam". Both the controllers of Lan and Tam will sit in Latam's board. A shareholder agreement between Latam and Tam's controllers will regulate the corporate governance of the merging entity.
11. Being both publicly traded companies, the parties had already reported the planned transaction to the securities regulators in Chile, Brazil and the U.S. before the FNE launched its investigation. The parties also submitted the transaction for merger review to the Brazilian competition authorities in October 2010.

12. The FNE identified very high concentration levels in some of the routes as well as significant barriers to entry mainly related to access to infrastructure. These elements were considered to pose significant risks both for unilateral and coordinated effects. Thus, the FNE proposed a series of mitigation measures.
13. In September 2011, the Competition Tribunal approved the merger conditioning it to 14 measures, the majority of which were requested as such in the FNE's report to the TDLC. LAN decided to challenge 3 of the proposed measures before the Supreme Court. The ruling is expected for March 2012.
14. In December 2011, CADE, the competition authority of Brazil, also approved the merger, subject to four remedies aiming to safeguard Brazilian consumers.

**iii. Cooperation among competition authorities**

15. In the past we have dealt with some cross border mergers that among them differed in size and the number of jurisdictions they had an effect on. In general the FNE is obliged to review any merger that can potentially affect consumer in the Chilean territory, irrespective of them being investigated elsewhere as well. As a result there have been cases of parallel investigations with other jurisdictions, however, we always follow with our own investigation.
16. One important reason for carrying out parallel investigations is that even though the companies involved are the same, market characteristics in two different jurisdictions can vary significantly. One example of this is the merger between LAN and TAM airlines. The Chilean air transport market both for passengers and cargo is highly concentrated. On the other hand, the Brazilian market presents a higher number of agents. This is partly the reason why the Chilean Competition Tribunal imposed 14 mitigations measures<sup>1</sup> whilst CADE, the Brazilian competition authority imposed just 4.

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<sup>1</sup> It is worth mentioning that to a great extent the measures proposed by the FNE and implemented by the TDLC were the result of contacts with a number of competition authorities with experience on cross border

17. Furthermore, comparing the remedies that were imposed by CADE and the Chilean Competition Tribunal, though not conflicting, they were set for the protection of each party's consumers. This is understandable considering that each competition authority is set to safeguard consumers in its territory, without imposing unnecessary barriers to business activity. However in the case of cross border mergers, especially in cases such as international air transport where markets overlap, careful consideration of decisions taken by the other competition authorities and clarity on the remedies seem to be of great importance.
18. The need for cooperation among competition authorities assessing the remedies for cross-border mergers is well illustrated in the case of LAN and TAM. One of the remedies imposed by the Competition Tribunal was that the new company Latam would offer 4 slots in some highly concentrated routes to any flight operator that would be interested to schedule flights on these routes. Necessarily, since arrival or departure of the flights will be in Brazilian territory, the Chilean remedies do to an extent affect Brazil.
19. Furthermore, the current setting considers the monitoring of the correct enforcement on the remedies with the help of an external consultant that will be hired by Latam and will be chosen and supervised by the FNE.
20. Chile has signed a number of Free Trade Agreements (FTAs) -that include competition clauses- and Memorandums of Understandings (MOUs). However direct informal cooperation with foreign agencies has been used more frequently and is considered a useful tool in cross

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mergers on air transport operators. Our officials reviewing the merger had extensive talks with counterparts in foreign authorities on methodologies and tools they can use to estimate effects and potential risks and most importantly with respect to remedies that have worked in similar cases and those that should be avoided.

border mergers, because it provides access to best practices in investigations of risks and effects as well as in the choice of remedies.

## **II. International Cartels**

### **i. Legal Framework**

21. Cartels in Chile are prosecuted under Article 3 a) of DL 211, 1973, which states that “Express or tacit agreements between competitors, or concerted practices between them, which confer to them market power and which consist of fixing sale prices, purchase prices, or other commercial terms and conditions, restricting output, allocating territories or market quotas, excluding competitors, or affecting the results of tender processes (bid rigging)” should be considered as acts, agreements or conventions that hinder, restrict or impede free competition.
22. The Competition Act underwent a series of amendments in 2009. These amendments, among others, significantly changed the cartel investigation process. The FNE obtained the powers to: enter public or private premises; search and seize all type of object or devices; wiretap telephone communications; and obtain copies and records of communications. To exercise these powers an authorization of the Competition Tribunal as well as an order by a judge of the Court of Appeal is required.
23. Further, with the 2009 amendments a leniency program was introduced. This program provides for exemption or reduction from fine when providing information that can lead to proving collusive conducts or to identify responsible parties. To apply for the leniency program the party must provide precise, true and verifiable information that represent an effective contribution to the investigation; abstain from disclosing the request of these benefits; and immediately end its participation in the conduct.

24. Finally, the amendments increased the maximum fines to around US\$30 million from US\$20 million and increased the statute of limitation for cartel cases to 5 years.

**ii. Cross Border Cartels addressed by the TDLC: Whirlpool and Tecumseh Cartel**

25. In July 2010, the FNE filed a complaint against the main suppliers of low power hermetic compressors for the manufacturing of refrigerators, Whirlpool S.A. and Tecumseh Do Brasil Ltda., for an illicit agreement to artificially increase prices. The cartel which affected a series of markets started in 2004 and was in effect until the beginning of 2009.
26. The case was investigated in a series of jurisdictions. In Brazil, the United States, Canada, European Union and New Zealand the competition authorities reached agreements with the defendants. In some other jurisdictions such as South Africa and Mexico, the case is still under investigation. In some of the aforementioned countries a number of additional compressor manufacturers were involved in the cartel.
27. In Chile, Tecumseh applied for the leniency program. The FNE in its complaint before the TDLC argued that the two companies had annual meetings during which they were agreeing price rises. Communications between the two companies were presented as evidence and an executive as a witness.
28. As a result of the collusive agreement local manufacturers of refrigerators, which were supplied with compressors almost exclusively by the aforementioned companies experienced significant increases which in cases led to the deterioration in the quality of the final product.
29. The FNE requested from the Competition Tribunal that Tecumseh be exempted from fine for supplying true information and abiding to the conditions required by law and that Whirlpool be sentenced to a fine of approximately US\$15 million. The case is currently awaiting the final decision of the TDLC.

**iii. Main Challenges**

30. Until now, Chile has prosecuted just one international cartel case, which is currently pending sentence. For this case, one of the first issues we had to resolve was whether the Chilean Competition Tribunal had jurisdiction to prosecute two foreign companies with no presence in the national territory that were exporting their products to Chile.
31. In addition through the leniency program we acquired evidence of an agreement that included a range of Latin American countries. Some of the other countries included within the same group reached agreements with the defendants. This raised the question of whether we could investigate and prosecute an illicit behavior that had already been subject to enforcement elsewhere.
32. In this case we found international experience to be of great value. We discussed jurisdictional issues with several other authorities. From these discussions we learned how foreign authorities had dealt with similar issues and gathered information on the type of defense that the companies were following on the current case in other jurisdictions. This exercise made us realize that to a great extent the same criteria applied in all jurisdictions, and arrived to the common conclusion that each country could prosecute the cartel individually provided that it caused adverse effects within its territory.
33. We also tried to build strong foundations for our arguments by presenting legal reports on jurisdictional issues and produced an economic report that confirmed that the Chilean market, namely customers and final consumers were significantly affected by the price increases that came as direct result of the cartel.

34. The use of the leniency program and the production of an executive as witness that testified with respect to the explicit inclusion of Chile in the collusive agreement helped us present the case with strong arguments.
35. One final impediment in our case was that the parties involved had no physical presence in Chile. At one instance we had to notify one of the companies established in Brazil, which requires a formal request to the Brazilian authorities. In general, such processes are time consuming and for a jurisdiction such as Chile, where the statute of limitation is short, this implies the significant risk of the charges being dismissed.

### **III. International Agreements on Cooperation**

36. It should be mentioned that Chile has a number of bilateral agreements that consider international cooperation in competition issues. In terms of Free Trade Agreements (FTAs), those most frequently include positive and negative comity<sup>2</sup>; notification<sup>3</sup>; consultation<sup>4</sup>; coordination in law enforcement<sup>5</sup>; and information sharing<sup>6</sup>.

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<sup>2</sup> According to *Positive Comity*, a country should give full and sympathetic consideration to another country's request; that is, open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests. *Negative Comity* or principle of abstention encourages countries that are conducting law enforcement activities to consider how they might conduct them so as to avoid or minimize harm to the other countries. OECD (1999) CLP Report on Positive Comity DAFNE/CLP(99)19.

<sup>3</sup> A country should notify or communicate its law enforcement and investigation activities to the other when such activities may affect substantially the other party's relevant interests; when the enforcement or investigation activities concern restraints to competition that may have direct and significant effects in the other party's territory; and, when anticompetitive conducts have taken place mainly in the other party's territory.

<sup>4</sup> A country may submit consultations to the competition authority of the other party when relevant interests of the requesting country are negatively affected in the other party's territory.

<sup>5</sup> A country may communicate to the competition authority of the other party that it pretends to coordinate law enforcement activities in relation to a specific case.

<sup>6</sup> The extension of this duty is broad and general and varies among agreements. It includes, among others, exchange of information regarding sanctions and remedies in cases affecting the other party's interests and the grounds for their imposition; general law enforcement activities; and, the enactment of exemptions.

37. The following chart summarizes the scope of rights and duties considered by chapters on Competition Policy included in several FTAs signed by Chile:

Country	Notification	Information sharing	Consultation	Comity	Coordination in enforcement
Peru	X	X	X	X	X
EU	X	X	X	X	X
Korea	X	X	X	X	X
EFTA	X	X	X	X	X
Mexico	X	X	X		
P4	X	X	X		
U.S.A.	X	X	X		
Australia	X	X	X	X	
Canada	X	X		X	X

38. In addition, the FNE has signed several MOUs<sup>7</sup> and other agency-to-agency agreements with foreign competition authorities aimed at building trust between agencies and at providing a more specific framework for operating when cooperation is needed.

39. These instruments consider similar provisions to the FTAs' chapters on competition, but in addition they provide for specific and detailed provisions on notifications, information sharing and coordination in law enforcement activities. If a formal proceeding for requesting cooperation is used, these agency-to-agency instruments should be invoked, using FTAs' competition chapters as a last resort.

<sup>7</sup> These MOUs are available in Spanish in this link: <http://www.fne.gob.cl/internacional/participacion-internacional/>

40. The following chart summarizes the scope of rights and duties considered by MOUs agreed by the FNE:

Agency/Country	Notification	Information sharing	Coordination in enforcement
CB/Canada – 2001	X	X	X
CFC/Mexico – 2004	X	X	X
CADE-SDE-SEAE /Brazil – 2008	X	X	X
SC/El Salvador – 2009		X	X
CNC/Spain – 2009		X	
DOJ-FTC/USA – 2011	X	X	X

41. The FNE participates in the International Competition Network (ICN) and also in regional networks of competition authorities such as the Interamerican Alliance and the Red Iberoamericana de Competencia. Even though these networks are useful for general exchange of views about current developments on competition policy and law in our countries, they have yet to play a role in the case of co-operation in law enforcement procedures and joint enforcement activities in the region. This is mostly because the latter usually occurs among smaller numbers of authorities (most frequently in a bilateral context) and when, in addition, specific characteristics of sectors investigated are common as well as when trust relationships between agencies are already built.

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