PUBLIC ISSUES
www.lyd.org
Nr 1199
March 27th, 2015
ISSN 0717-1528

FREE COMPETITION LAW: THE DISCUSSION COMMENCES

- A bill that modifies the free competition regulation was recently introduced at the Congress. The main measures include the reincorporation of penalties for collusion crimes, reformulation of fines and mandatory consultation for merger operations.

- Although several proposals have been previously analyzed and discussed, there is no consensus on some of them –penalties, for example- nor on the specific application of other ones. This deserves a serious technical analysis during the bill's procedure, which allows adequately improving the current regulation.

A bill that modifies the free competition regulation was recently introduced at the Congress.[i] This bill had been expected for a long time, since a large and transversal diagnosis existed regarding the need to introduce some improvements to the current legislation. In fact, most of the measures included were recommended in the middle of 2012 by the Presidential Consulting Commission for the Defense of Free Competition. This is the case for the application of ineligibilities for persons who have participated in collusive agreements, changes in deciding the fines, the establishment of penalties for obstructing the investigations, strengthening of the leniency system, mandatory control for mergers, among others. Therefore, the main innovation was the incorporation of penalties in case of collusion, a matter that had been discussed in the Commission and among other experts, without reaching consensus. Both the latter aspect and the actual application of the recommended measures should be a source of arduous debate during the bill's proceeding.

CONTENT OF THE BILL

The bill contains regulatory changes mainly in collusion, fines and merger control issues, in addition to some specific modifications.

In collusion matters; (i) penalties for collusion cases are reincorporated (derogated in 2003), with fines up to 10 years; (ii) 5-year ineligibilities are established for the exercise of public positions, director or manager in state-owned companies and openly held corporations, and positions in professional associations or societies; (iii) it stipulates that the investigation of the Public Ministry can only begin when the National Economic Prosecutor's Office (FNE, in Spanish) files a complaint before the competent tribunal; (iv) the exemption of criminal responsibility is extended to the

first person who resorts to the leniency system; (v) together with penalties for collusion, it is forbidden to contract for State Administration bodies up to 5 years; and (vi) it eliminates the requirement of conferring market power (anticompetitive effect) for penalizing a collusion offense.

Concerning the fees, the amounts applied for anticompetitive conducts are increased and made more flexible; it eliminates the fixed ceiling and replaces it by doubling the amount of the economic benefit obtained or, if it were unquantifiable, up to 30% of the sales during the infringement period.

As for mergers or concentration operations, the current voluntary control system is replaced by a "hybrid" character control, which compels to notify all concentration operations exceeding certain thresholds and allows the FNE to investigate non-notified operations up to one year after being perfected. The control process is composed of two stages in charge of the FNE: the first, to define, in a 25-day term, if the operation deserves or not to be investigated based on potential competitive risks: and the second, of 90 days, to evaluate the operation more deeply in order to approve it, approve it with conditions or reject it. In case of a resolution that forbids the operation, it stipulates the possibility of making an appeal for special review before the Tribunal for the Defense of Free Competition (TDLC, in Spanish). The interference of the Supreme Court is restricted to the remedy of complaint.

The bill defines the concept of concentration operations more precisely, eliminates the possibility for third parties to submit the operation to the control system and theoretically adds a substantive test to the control system (referred to the ability of each operation to "substantially reduce free competition"), although it is not expressed in the articles.

Finally, regarding what the bill calls institutional improvements; (a) new powers are given to the FNE in order to make market surveys (collect information); (b) powers to make recommendations for regulatory modifications are transferred from the TDLC to the FNE; (c) collective demands are allowed to claim for compensation for damages in case of infringement to the free competition; (d) those affected are allowed to have access to the investigations against them, except for the things classified as confidential ; (e) penalties are established for those obstructing the investigations of the FNE (information delivery and non-appearance), with prison penalties for those who deliver false information; and (f) exclusive commitment of the TDLC regular judges is required (today with preferential commitment).

PUBLIC ISSUES
www.lyd.org
Nr 1199
March 27th, 2015
ISSN 0717-1528

COLLUSION: MORE PENALTY, WITH LOWER EVIDENCE STANDARDS

One of the bill's most questionable issues is related to the penalty for collusive behaviors. Those who support its incorporation argue that it is a dissuasive element that is more efficient than the simple application of fines and ineligibilities; while those who reject it point to an institutional framework that has increased the fines and strengthened the work of the FNE, changes that are under a process of consolidation and operating properly.

Other legislations have undergone the same discussion, and in fact there is not a single recipe in the world. The United States legislation incorporates penalties, while the European Union does not. Meanwhile, the United Kingdom, who enacted a law in 2002, which criminalized cartel crimes, had to amend it and reformulate it in 2013, given its scarce effects.[ii] On the other hand, Chile abrogated penalties in Decree Law 211 of 2003, since the imposition of such high fines, together with the lack of specification for anticompetitive behaviors –which prevented from complying with the standards required by the Constitution-, ended up making them inapplicable.

Therefore, the convenience of reincorporating penalties in the Chilean free competition legislation seems at least questionable. Given the high level of current fines (which would additionally increase with the bill being discussed), applying a penalty could result in a disproportionate punishment for infringements of free competition.

Additionally, there is still a persistent imprecise typification of the crime. Experience shows that economic agents can imagine and put into practice virtually endless figures attempting against the market, so that with the application of the legality principle in criminal matters, established in article 19 Nr 3 of the Constitution, the system will always lag behind, inasmuch as behaviors should be expressly described in the law prior to the events configuring those behaviors. Furthermore, trade activities are not criminal per se, so the State's jurisdictional activity should tend to discourage the actions against free competition, for which the application of fines sufficiently high should be enough for the offender to be deprived from the economic benefits he might have obtained while attempting against free competition. Moreover, according to the bill, the application of penalties means to empower the Public Ministry and the criminal courts to take cognizance of matters of technical and economical complexity that are established in specialized organisms (FNE and TDLC), which could turn out to be inconvenient.

On the other hand, if we are talking about a dissuasive effect, the current legislation stipulates that "fines shall be imposed on the corresponding juridical person, his directors, administrators, and any person that might have been involved in committing the respective action. Fines applied to natural persons shall not be paid by the juridical person in which they performed functions nor by shareholders or partners of the same".[iii] These personal fines, which already exist for collusion

issues, have never been applied, and they would be a significant disincentive to commit this type of crimes, and does not require any legislative change whatsoever; just the willingness to apply them.

Another aspect which deserves attention in the bill is that the definition of collusive crime eliminates the fact of conferring market power, that is, of having an anticompetitive effect. Article 3 of DL 211 stipulates that the colluded practice should confer market power to the participating competitors,[iv] thus imposing on these procedures a high probatory requirement. In this manner, according to the current law, the TDLC is compelled to make a complete analysis of the relevant market and its anticompetitive effects in order to be able to penalize. The proposed modification means a substantial change concerning this matter, since in order to penalize these acts it should be enough, for example, to prove the existence of inappropriate communications, even if it had no effect on the market. In other words, the evidence standard is reduced, which is a contradiction to the reincorporation of penalties.

In relation to the criminal procedure, the bill proposes to introduce in the Criminal Code the new articles 286-bis to 286-quater, which stipulate the sentences and the exemption of criminal responsibility to the first person to resort to the leniency system. Additionally, the exercise of the criminal action is regulated, thereby disposing that it can only be initiated through a complaint filed by the FNE. The proposed procedure establishes that the FNE is exclusively responsible – together with its arbiter- for deciding in which cases of possible collusion, offenders should be pursued by infringement, the criminal way, or both together, so the initiative allows the FNE to simultaneously present a requirement before the TDLC against the companies accused of collusion and a criminal complaint against the natural persons that supposedly participated in it. This means that two parallel processes could be dealt with in different courts, whose different evidence standards may derive in contradictory sentences, with the consequent controversy in the public opinion. So, if there is a criminal prosecution, the case should proceed at the request of the FNE once it has been resolved in the TDLC. This situation could entail the application of more than one penalty for the same behavior or action, which would attempt against the legal criminal doctrine known as the" principle of "Non bis in idem.[v]

The above does not solve the substantial problem: the pressure and/or negotiation power that the FNE gets during the investigative process. Recent cases have proved that the judges' performance is inevitably influenced by public opinion, which makes it very difficult for the trial to follow strictly technical standards, thereby leaving the defense unprotected in a non-specialized court.

The exemption to be applied in criminal penalty matters for the first person who confesses allows strengthening this key tool to frustrate cartels. However, this should go along with some kind of sentence reduction or attenuating circumstances for those contributing with additional

PUBLIC ISSUES
www.lyd.org
Nr 1199
March 27th, 2015
ISSN 0717-1528

background (as in the penalties of the free competition law), so that the leniency system can operate integrally. Because if there are no mitigating circumstances for self-accusing persons, there would be no incentives to give new information to the TDLC, since those involved would be exposing themselves to a criminal conflict.

FINES AND BANKRUPCY RISK

Linking the value of the fine to the sales level obtained by the company that infringes the competition law is reasonable, since the company receives a fine that is consistent with the benefits obtained through its anticompetitive practice. Both this proposal and that of applying ineligibilities to natural persons are not only convenient from the dissuasive point of view, but they are also consistent with the regulation in other countries. It is well known that calculating the benefit obtained is highly complex, because it means to compare the situation of the market subject to anticompetitive practices with those that would have prevailed under a competitive balance. This practical difficulty, recognized by the own TDLC in its last sentences,[vi] allows foreseeing that the sales percentage will always be applied as a penalty.

The question then is if 30% of the sales during the infringement period is a reasonable or excessive amount. In this matter, several backgrounds should be considered. First, in Europe there is a maximum limit of 10% of the company's last year sales. The same percentage is recommended for Chile in a study published by one of the current regular judges of the TDLC, who suggests to change the current fixed amount system to one based on a percentage, with a 10% ceiling of the company's total net sales.[vii] Second, 30% of the sales during the entire period of the agreement (term that is directly proportional to the inefficacy of the controlling body) could be totally disproportionate, even leading to the bankruptcy of the companies involved. Third, the percentage cannot fall on the total sales amount, but on the sales corresponding to the investigated line of business, since it would be absurd to punish all activities performed by a specific holding due to crimes committed in only one of the markets in which they operate.

MERGER CONTROLS: EMPOWERMENT OF THE FNE

The mechanisms used around the world to prevent company mergers to derive in anticompetitive market structures are diverse. Some countries have leaned toward mandatory consultation mechanisms for operations exceeding certain thresholds (like the USA and the EU), others toward voluntary consultation (UK) and some of them toward semi-voluntary mechanisms (Australia and New Zealand). Chile has chosen a voluntary consultation system for merger operations, but its operation has presented some practical deficiencies (uncertainty, terms, etc.).

Both the Presidential Consulting Commission and a study by the OECD[viii] recommended implementing in Chile a mixed or hybrid system, where mergers exceeding certain threshold are compelled to notify the FNE, allowing the rest to opt for this voluntarily.

The proposal of a mixed consultation systems seems positive, inasmuch as it is reasonable to end with the uncertainty prevailing today in the market as to when a merger has to undergo consultation or not. However, there are some implementation issues that deserve greater analysis.

The definition of the thresholds that will trigger a mandatory consultation is a key factor, both in relation to its composition and degree. In economic terms, thresholds should be defined based on the merged company's share in the relevant market, but the practical problem of this evaluation leads to propose thresholds based on the scale of the merger operations. The trouble is that the bill defines very broadly both the market to be evaluated (it considers the sales in Chile) and the economic agents involved, which could mean that all operations of important economic conglomerates are subjected to review by the FNE. It would be more suitable to restrain the analysis to the business where the operation is taking place. Additionally, it is important that thresholds are not too restrictive, in order to avoid an excessive use of resources and unnecessary red tape, considering that, in a free market, most of the operations are not a threat to competition.

The bill proposes a review process in two stages. In the first, the FNE could approve operations that do not represent competitive risks, while more complex operations would pass to a second stage for a more detailed analysis by the same organism. There is some controversy regarding the fact that both stages are fixed in the FNE, which could be somehow resolved if the decision made in this second stage is subject to the consent of the TDLC. Nevertheless, the bill only establishes that the parties shall ask for a review from the TDLC when the operation has been rejected by the FNE; consequently, they would have no remedy of appeal when the FNE resolves to impose excessive or unfulfillable conditions to approve the operation. The latter should certainly be corrected in the bill's proceeding.

OTHER INSTITUTIONAL AND REGULATORY CHANGES: "MORE TEETH INTO IT"

The bill gives more powers to the FNE, among them, the possibility of studying the markets' competitive evolution, for which it can exercise the authority of asking public organisms and private companies for information, as well as requesting statements. This should be carefully analyzed to prevent intrusive behaviors from the supervising and prosecuting body.

On the other hand, the bill would transfer powers currently established in the TDLC to the FNE, such as revising merger operations and proposing the promulgation, modification or derogation of legal or regulatory rules. This change does not seem to be sufficiently justified, inasmuch as the FNE could make its proposals to the TDLC, which has the large and proper autonomy, and technical competence, to make those recommendations.

Finally, it proposes to incorporate in the Consumer Protection Law the possibility of claiming compensations for damages based on infringements to the free competition. This means to perpetuate the processes, since the same action will be judged in competition, criminal and civil courts. This also contributes to make the application of fines still more complex, because the company could turn out to be insolvent to comply with all penalties and compensations.

CONCLUSIONS

The free competition bill copes with a series of improvements that had been proposed quite a long time ago; however, as the popular idiom says "the devil is in the details". Consequently, a serious technical debate will be needed during the bill's proceeding at the Congress, since there is no consensus in substantial matters –as the reincorporation of penalties and the amount of the fines- and neither in some specific aspects.

---

[i] Bulletin 9950-03, introduced on March 19th, 2015.
[ii] Jones, A. and R. Williams (February 2014) "The UK Response to the Global Effort against Cartels: Is Criminalization Really the Solution?" Journal of Antitrust Enforcement, Vol. 2, Nr 1, pages 100-125.
[iii] Article 26 letter c) of DL 211.
[iv] Article 3 of DL 211 letter a) stipulates as a crime "the express or tacit agreements between competitors, or agreed practices among them, which confer them market power and which consist in fixing sale prices, purchase prices or other marketing conditions, limiting the production, allocating zones or market shares, excluding competitors or affecting the result of bidding procedures".
[v] In Latin: Not twice for the same.
[vi] Sentence Nr 139/2014 (the Chicken Case), Considering three hundred fifty three: "(…) this Court is conscious of the difficulty to estimate what would have happened in the poultry product market in Chile in the absence of collusion; or, in other words, of the impossibility of creating a satisfactory counterfactual scenario, since it is not possible to know with certainty in which way the required Poultry Companies would have competed without collusion".
[vii] Tapia, J. (Spring 2013), "*La aplicación de multas a agentes económicos en el derecho chileno de la libre competencia. Una propuesta metodológica*", Public Studies 132, pages 71-105
[viii] OECD (2014), "*Evaluación del régimen de control de concentraciones en Chile*".