The development of private enforcement regarding damages actions in Chile

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Private enforcement regarding damages actions originating from competition infringements, has slowly emerged in Chile during the last years. In this sense, high profile cartel cases filed by the National Economic Prosecutor Office (FNE) regarding pharmaceutical retail, poultry and toilet paper production, have led to the development of this area. Particularly, consumer protection has been at stake, causing awareness in a matter that prior to these events had little or no treatment in the Chilean system. Thus, it is a good moment to lay some considerations for future legislative modifications, in order to give the right incentives and to close the circle of competition protection in Chile.

Reviewing private enforcement status in Chile requires a brief understanding of some of the institutional framework in national regulation. In general, any party with a direct interest in a particular case may bring a law suit before the Chilean Competition Defense Tribunal (TDLC), where it can seek for injunctive relief, the application of fines or any other remedy established by Chilean Competition Law. While a large percentage of cases in Chile are brought to the TDLC by private parties — mainly related to unilateral conducts or abuse of dominance —, public enforcement focuses in cartel prosecution by the FNE, merger control and other matters regarding antitrust policy.

According to Article 30 of Decree Law N° 211 (Competition Act), private damage actions are pursued before civil courts as follow-on cases, only after the TDLC has decided the case brought by the same party or by the FNE in representation of the general interest. Even though it has been resolved that there is no need to be a party at the TDLC litigation by lower courts, most of the private parties usually participate in the process before the TDLC as a way to preserve their rights of a private course of action.

In these cases, the final decision by the TDLC is binding for the civil court where damages are under discussion. This means that a civil court may not change or challenge the facts and the qualification of those facts made by the TDLC, so the main purpose of the civil litigation is to prove the actual damages and causality between anticompetitive conduct and the damages claimed by plaintiffs (recognized by the Chilean Supreme Court in the *Philip Morris v. Chile Tabacos* Case).

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The possibility for stand-alone cases regarding competition law damages is not quite clear. There is a ruling made by the Court of Appeal of Santiago, stating that an action by Article 30 of the Competition Act has no ability to paralyze a case of damages brought by the ordinary (or residual) damages action contemplated on Chilean Civil Code. On the other hand, a ruling by a first instance civil court established that there is a need for the TDLC to establish that a conduct is anticompetitive for the purposes of a successful damage claim under competition law. There are no Supreme Court decisions on these matters, which leads to a practical issue that most of the plaintiffs should not jeopardize their action by trying a stand-alone case. Notwithstanding the above mentioned, there is a recent case known as the "Toilet Paper Cartel" in which a consumer association filed a class action before the TDLC has a decision on the case (there is not yet a resolution by the civil court regarding the admissibility of this action).

In other order of ideas, the Chilean system does not include in the Competition Law class actions, but they have been used under Consumer Protection Law, which works on a similar basis that opt-out class actions. A recent example is the damages class action as a follow-on case on the Drug Stores cartel. In that case, Consumer Protection Act was applicable as the cartel conduct was performed by the last chain of distribution having direct effect on consumers. As mentioned before, in the Toilet Paper Cartel a class action has been filed for recovery of damages. This action should face at least three issues: (i) The action was brought as a stand-alone case; (ii) the case involves consumers as indirect purchasers; and (iii) there is a question whether Consumer Protection Law applies since the anticompetitive conduct was performed upstream in the productive chain. This issue was addressed at the bill under discussion in the congress, which includes applying consumer protection class actions for the purpose of recovery of damages under Competition Law (it does not make clear yet if this is a follow-on case or a stand-alone action).

In sum, this system has been in force since 2003 and there have been some cases solved by the civil courts. The last case solved by a first instance court was in early 2015 in a case where Telefonica was condemned to pay an amount approximately equivalent to $20 million, on a case of refusal to deal, margin squeeze and price discrimination to the plaintiff, a company that was active on the business of converting landlines calls to cellular calls and calls on the net of one mobile operator to the net of other mobile operator having the effect of diminishing clients cost on access charges made by mobile companies.

However, there are still some issues that need further development. For instance, those related to the passing-on defense and indirect purchasers. There is no case law in Chilean jurisdiction, but there is an interesting discussion between authors in this regard. One of them (Banfi, 2014), is against passing-on defense and sustains an "Illinois Brick Doctrine" alike regarding indirect purchasers, based principally in causality matters. On the other hand, there are some authors that sustain that passing-on defense is available under Chilean Law and that indirect purchasers are legitimated to bring damages actions, based, upon other reasons, on causality matters and general principles of law as part of a whole system of interpretations (Fuchs and Vives, 2014; Lewin, 2009 and 2011). This academic discussion may come to an end after the Toilet Paper Cartel, as both cases involve indirect purchasers and the passing-on defense might be brought by defendants.

Regarding some other general issues in Chile, there are no punitive damages, while costs and fees are subject to general rules (losing party pays only if it was completely defeated). All defendants are jointly and severally liable and right of contribution is allowed under the general principles of torts of our Civil Code. There is no consideration to leniency programs when it comes to damages, being this one of the things that should be improved in order to give more incentives for potential applicants. Regarding the statute of limitation for the action of Article 30 of the Competition Act, is four years since the TDLC's decision is final. In case one party tries to go by a stand-alone case, this should be four years commencing on the perpetration of the conduct. It is very important to consider that there is the possibility that the action for remedies before the TDLC is extinguished by the statute of limitation of the Chilean Competition Law (for cartel cases five

years since the exhaustion of the effects of the cartel and for other conducts three years from the materialization of the conduct) but the general damages action is not. In this kind of cases, stand-alone actions are quite relevant as there is no possibility of filing a follow-on case.

Another issue that has not received considerable attention is related to discovery. In Chile, there is no such thing as the discovery in the United States. This leads to a problem for cases where the FNE is not willing to act (most cases where there is little or no public interest involved) and obtaining evidence of a conduct or market becomes difficult for filing a suit before the TDLC and the follow-on action afterwards. In cases where the FNE is involved, the agency uses its powers in order to obtain the evidence needed regarding the conduct and the markets involved.

Finally, it is necessary to highlight a recent amendment to the Competition Act that is currently under study in the Chilean Congress, regarding damages actions originated by anticompetitive infringements, and that is expected to be enforceable during 2016. This modification involves giving jurisdiction to the Competition Tribunal — instead of Civil Courts — to judge these cases. However, it is important to stress out that this legal change must take into consideration that — according to Chilean law — the objects of competition and damages are different and protect diverse legal interests. Also, it must consider that given the composition of the Competition Tribunal — that includes two economists — it differs from general damages regulation, which is known and ruled by Civil Courts, composed strictly by judges that are lawyers. In this sense, other jurisdictions that have similar competition institutional frame as Chile, like South Africa, have given Civil Courts the power to decide regarding these matters, as provided by Section 65 (6) "Civil Actions and jurisdiction" South African Competition Act 1998.

In conclusion, the Chilean damages actions originated in competition infractions are emerging in Chile. Yet, there are some amendments and corrections that are needed for the perfection of the system. Therefore, it is important to stay aware of future case law that will certainly illustrate the development of this matter.