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The Standard and the Burden of Proof in Competition Law Cases – Note by Chile

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1. Introduction

1. A standard of proof is a rule to determine when an explanation of the facts at issue in litigation could be deemed as proven or as the "truth". It is usually stated that the existence of a standard of proof is pertinent to the fact that the legal system can only aspire to an ex-post reconstruction of the facts of a case, that is mediated by the conflicting theories put forward by the parties. Therefore, the system needs a rule to select between one of those conflicting theories as the best explanation of the facts.

2. Over the last few years, particularly since 2017, an intense debate has developed in Chile regarding the applicable standard of proof in competition law cases. The concept of "standard of proof" is foreign to the Chilean legal system, being introduced in 2000 in the –then– new Criminal Procedure Code, which demanded a "beyond any reasonable doubt" standard for conviction in criminal cases (Criminal Procedural Code, Article 340).

3. In the Chilean legal system, the procedural discussion was based on the concepts of burden of proof, and value of evidence. On one side, the Civil Code of 1855 stated in article 1698 that the burden of proof falls on the person claiming the existence of an obligation or its extinction, a rule that applies to civil procedure. The burden of proof rule is deemed as the main substantive rule on evidence. On the other side, the Civil Procedure Code of 1902 established a complex system to assign ex-ante a certain value to different kinds of evidence, that focused on the probative value of each piece of evidence, that the judge would consider and then use to form her personal conviction. This was later replaced in newer procedures –such as the one applicable to competition law cases– for a *sana crítica* rule of value. The notion of *sana crítica* does not have a literal translation to English but could be defined as sound judicial discretion or criticism, stating that evidence should be valued according to the rules of logic and experience.

4. After its introduction in criminal cases in 2000, the idea of a standard of proof extended to other areas of law. A rationalist theory of evidence claimed that the existence of a standard forced the judge to approach the evidence in an objective way, avoiding any subjectivity in the process of adjudication. However, Chilean law has not yet defined standards of proof for civil or administrative cases. In the absence of rules, the courts and the doctrine have filled the gap.

2. Standard of proof in competition cases

5. The first mention of a standard of proof in competition law cases was made by the Supreme Court in the pharmaceutical chains cartel decision in 2012 (September 7th, 2012, Case Number 2.578-2012, known as the "*Farmacias*" case). In that ruling, the Court stated that to impose a fine in a cartel case it needed "clear and concluding" evidence. The justification for this standard was based solely on the nature of the sanction, without providing any additional reasons. The ruling also stated that economic evidence was a form of "indirect" or "circumstantial" evidence that refers to the behavior of the firms in the

market, which was not sufficient for conviction. The Supreme Court would confirm its decision in later cartel rulings, all referring to the same standard. After the *Farmacias* decision, the Chilean Competition Tribunal (in Spanish, *Tribunal de Defensa de la Libre Competencia* or "TDLC") has adopted the same standard in later rulings. Although there is no legal definition of what this "clear and concluding" standard means, a 2014 decision from the TDLC declared that requires more that the civil law "higher probability" but less that the criminal law "beyond any reasonable" doubt (May 8th, 2014, Ruling - e.g., in Chile, *Sentencia*- N.° 136/2014, *FNE v Pullman Bus Costa Central*).

6. Notwithstanding these first explicit mentions to a standard of proof by the Supreme Court and the TDLC, the referred standard can be traced to older precedents from both Courts.

7. In *FNE v Air Liquide and others*, the TDLC sanctioned four oxygen producers for bid rigging (September 7th, 2006, Ruling N.° 43/2006). There was no evidence of communications among them, but the TDLC found that the conduct of the firms during the bidding process was unreasonable in connection to their incentives, which, considering other circumstantial evidence, and the implausibility of alternative explanations, allowed the judges to infer the existence of an agreement. On appeal (e.g., in Chile, *recurso de reclamación*), the Supreme Court overturned the decision, arguing that the fact that one hypothesis is more plausible than others was insufficient to prove the existence of an agreement (January 22nd, 2007, Case Number 5.057-2006).

8. In *FNE v ING and others* (July 12th, 2007, Ruling N.° 57/2007) the prosecuting agency (in Spanish, Fiscalía Nacional Económica or "FNE") accused five health insurers –that concentrated more than 75% of the relevant market– of colluding to coordinate an increase of deductibles in their health plans. The accusation was based mainly on the parallel conduct of the insurers, which, according to the FNE, has no other explanation than an agreement. The FNE also provided econometric evidence of the supposed agreement to support its theory of the case. The TDLC, on a split decision (3-2), rejected the accusation, on the basis that oligopolist interdependence was also a plausible explanation of the observed conduct. The Supreme Court, also in a split decision, confirmed the acquittal stating that the evidence lacked "clarity and certainty" to prove a cartel (January 28th, 2008, Case Number 4.052-07).

9. In a later case, *FNE v MK Asfaltos Moldeables and others* (December 10th, 2008, Ruling N.° 79/2008), the TDLC rejected a bid rigging accusation because it was based on circumstantial and economic evidence and there were plausible explanations for the behavior of the accused firms. The Supreme Court confirmed this decision (April 9th, 2009, Case Number 96-09).

10. Those precedents were instrumental for the reform of Chilean law in 2009, which incorporated dawn raids and a leniency program precisely with the objective of giving the FNE the tools to obtain direct evidence of agreements to procure a conviction in a cartel case under the standard set by the Supreme Court. Since then, all agency actions in cartel cases have been based on evidence obtained through dawn raids or leniency applications and all of these have ended in conviction by the TDLC and the Supreme Court, except for one, rejected by the TDLC on the basis of the statute of limitations and currently pending before the Supreme Court since the FNE challenged the TDLC's decision.

11. Most of the Chilean doctrine has proposed a "clear and convincing" evidence as a standard for competition law on the basis that the objective of the procedure is to impose a sanction, which assumes a retributive justice goal. Nevertheless, there is no consensus among legal scholars on a definition of what that standard would be, but there seems to be no difference between "clear and concluding" and "clear and convincing" evidence.

12. A minority of doctrine and a dissenting vote in a cartel case proposed that the standard in competition cases should be the same as in civil cases. The dissent in the TDLC's *CMPC* ruling (December 28th, 2017, Ruling N.° 160/2017, *FNE v CMPC and SCA*) questioned that sanctions in competition law are retributive, claiming that they are like civil liability. Competition law was, in this sense, a form of regulation to ensure efficient interaction between market agents, so that infringement of its norms causes pecuniary liability. Only in severe infringements, such as criminal cartel cases, there would be a retributive sanction. The dissent argued that the objective of competition law is primarily maintain compliance or to regulate conduct. Therefore, the standard of proof should be the same as in civil litigation, that is, a balance of probabilities.

13. Another ruling in which the standard of proof was a contentious issue is *FNE v CCNI and others* (April 24th, 2019, Ruling Nº 171/2019), which accused a cartel between shipping companies in the car carrier business. The accusation comprised several agreements in different services from Asia, Europe and North America to Chile, but only some of them were deemed proven. The differences between the members of the TDLC were related to the standard of proof necessary for conviction. One of the judges argued that some agreements deemed proven by the majority had inconsistencies in the leniency application and in the circumstantial evidence of price correlation, which meant that the clear and convincing standard could not be met. On the contrary, a second dissent by two judges claimed that the conviction should have included more services, based on the higher plausibility of the accusation of an agreement compared to the evidence that sustained an alternative explanation. This dissent could be deemed as closer to a balance of probabilities standard. The decision was partially revoked by the Supreme Court, also in a split decision, expanding the conviction to additional shipping services, although not related to the standard of proof.

14. As stated before, the notion of standard of proof is based on the limitations of the evidence to obtain the truth in an epistemic sense. From there, it follows that there is a possibility of error in judgment, so that the legal system should distribute that possibility among the parties. A higher standard, such as beyond any reasonable doubt, assumes that an error that could lead to impose a sanction against an innocent is more severe than one that would let a guilty get away. In criminal cases, we can justify this conclusion because of the dire consequences of a criminal sanction. In civil cases, the question before the judge is one of adjudication of rights between (formally) equal parties, so there is no reason to prefer to err in favor of one or the other. Therefore, the standard is one of balance of probabilities, or preponderance of evidence.

15. In competition law, the definition of a standard should be based on the normative objective of the rules. The approach adopted by the courts in Chile, as stated, is that the aim of the procedure is to impose a sanction, which assumes a retributive justice goal. In that sense, the standard of proof is higher than in civil cases.

16. An argument to justify a higher standard of proof for competition law cases than for civil law cases, is to consider a false conviction as a more harmful event than a false innocence ruling. A conviction in competition law has a pecuniary effect that should not be taken lightly due to the level of fines, reputational damage and the risk of a subsequent damages civil action, that could significantly impact on the competitive ability of a firm. It could also have a chilling effect on disruptive business practices that challenge the status quo. Finally, recognizing that competition itself means that some agents will be harmed, the relevant standard of care demanded of firms is usually lower than the applicable in other business or commercial matters. Therefore, the distribution of error should not be symmetrical.

17. From a different perspective, it can be argued that, in any case, the standard of proof will always be higher than the one in civil matters, as a conviction in competition law means imposing a sanction (usually, fines). In this regard, a better explanation of the facts or a higher plausibility of a theory of the case is not enough to justify a conviction. The evidence should at least provide a complete explanation of the facts before the judge.

3. Economic evidence and standard of proof

18. As stated before, economic evidence in Chile has been deemed as "circumstantial evidence" in some judicial rulings by the Supreme Court. The reasoning is that economic analysis of conduct provides a reasonable explanation for an observed action by a firm in a competition case. However, it does not allow to prove "facts" regarding the alleged infringement. That is why some doctrine, and jurisprudence has called economic evidence "indirect" evidence.

19. The distinction between "direct" and "indirect" evidence is deeply entrenched in the Chilean judicial system. Direct evidence refers to the actual conduct that is the object of the proceeding, e.g., the existence of an agreement in a cartel case. In this sense, only documents where there are references to specific terms or recordings of conversations regarding the alleged agreement could be deemed "direct" proof, and only direct evidence by itself could be used to support a conviction. This perspective seems to be reminiscent of classic civil litigation, e.g., breach of contract cases or tort liability, which explains why it is usually referred to in cartel cases.

20. However, this approach is too limited for competition law. In cartel cases, the covert nature of the agreements and conducts makes "direct" evidence scarce. For abuse of dominance, direct evidence is not as relevant, because the main question is related to the effects of the conduct. In competition law, economic evidence can fill the gaps in the knowledge of the court, showing the incentives of the parties and the effects of the conduct on the market. In a sense, almost all evidence is "indirect", so there are no specific reasons to disregard economic evidence to support an infringement decision.

21. The main difficulty of economic evidence is its volatility. Courts in different jurisdictions usually face conflicting expert reports, most of them based on sound methodologies, with completely different results. Many courts will find it hard to consider one of them as objectively superior to others, as methodological preferences or limitations of the data could explain some differences, and several approaches to supersede those limitations were possible. That explains the distrust of some courts regarding economic evidence, when in the position of taking a decision with severe consequences.

22. In Chilean law, the unique characteristics of the TDLC and its mixed composition (three of its judges are lawyers and two of them are economists) put an additional burden on the Tribunal to review and analyze how sound the economic arguments are, if calculations and models can be replicated, and how complete are the sources of information used by the parties' experts. Lately, the TDLC has adopted as practice to hear the parties' experts and to be subject to examination by the Tribunal members. The fact that the TDLC –as a specialized and independent entity– can analyze by itself the economic evidence and does not have to rely on just the parties' activity is an additional reason to give more weight to this kind of evidence at the time of decision.

4. Burden of proof

23. The increasing difficulty for agencies to get relevant evidence of competition infringements has led some voices to argue for lowering the standard of proof in competition law. However, as explained above, the standard of proof is a rule which tries to appropriately distribute the risks of error. Hence, using this tool for different objectives could have unexpected effects. Lowering this standard with the aim of facilitating convictions has in itself the risk of increasing false positive errors by the system, disregarding the normative factors relevant to defining the standard in the first place.

24. The procedural system has several ways to decrease the chance of error in judgment. One of the main tools for this matter is the burden of proof rule. As stated, in competition law, as in the other areas, the basic rule is that the accusing party must prove all the elements of the accusation (e.g, Civil Code, article 1698), which has become difficult in the age of digital and encrypted communications.

25. The burden of proof rule can be altered by presumptions. Presumptions are means to infer an unknown fact from several pieces of evidence and could be established in law or created by the judiciary. The effect of the presumption is to put the burden of proof on the defendant, which could be a useful tool in cases where the defendant controls the relevant evidence, so it is in a better position –and with lower costs– to put it before the court.

26. Chilean competition law does not include legal presumptions, but the TDLC has used judicial presumptions on several occasions to address gaps in evidence.

5. Standard of proof applied in merger control, the scope of judicial review, and burden of proof

27. In August 2016, Law No. 20,945 introduced significant reforms to Chilean Competition Act (Decree Law No. 211 of 1973, "DL 211") establishing a mandatory notification regime overseen by the FNE. All mergers that exceed specific thresholds in terms of individual and joint sales in Chile must be notified to the FNE for its review and approval, before their closing.

28. When assessing mergers, the FNE operates under a substantive legal standard outlined in Articles 54 and 57 of DL 211. According to this standard, within 30 days of initiation of investigation the FNE must decide whether to approve the transaction pure and simple, or approve it subject to remedies, if it is convinced that the concentration does not substantially lessen competition, or extend the investigation by up to 90 days (which is known as Phase II investigation) if it deems that the merger has the potential to substantially lessen competition in the market. A merger can only be blocked after Phase II investigation if the FNE concludes that the proposed transaction substantially lessens competition, and that there are no remedies or other factors, such as efficiencies or failing firm defense, that could offset such outcome. Alternatively, during Phase II the FNE can approve the transaction pure and simple if after further investigation it is convinced that the merger is uncapable to substantially lessen competition in the market, or approve it subject to the remedies offered by the parties if these address its concerns.

29. Articles 54 and 57 of DL 211 regulate that the FNE must approve a concentration if it is convinced that the proposed transaction does not substantially lessen competition. According to FNE's Horizontal Merger Guidelines (May 2022), when analyzing whether a transaction may have the potential to substantially lessen competition, the FNE will carry

out a forward-looking analysis of the transaction to determine whether it is likely to produce anticompetitive effects. With this purpose, assess the information gathered by the parties and within its investigation, supplementing its qualitative analysis with quantitative tools. Regarding the evidentiary standard required to prove that a merger can lead to anti-competitive effects, the competition authority indicates that "[a]*s a general rule, the FNE will consider the quantitative predictions as indicative of the existence of incentives to behave in a certain way within the market, and of the likelihood that they may be substantially modified, examining their consistency with other qualitative information gathered during the investigation process*." Furthermore, in light of the existence of concerns, the FNE will also take into account possible counterfactors that could mitigate or counterbalance the market power that the transaction may create or enhance. At any point of the investigation, the parties can provide further evidence to support their view and counter argue the analysis of the FNE. In addition, parties of the merger can provide to the FNE persuasive evidence about eventual efficiencies, reasonably available to them, demonstrating the likelihood and magnitude of the claimed efficiencies as well as their specificity to the merger and their ability to compensate consumers for the increased market power obtained by the resulting entity.

30. Decisions by the FNE to block a merger transaction are subject to review by the TDLC, and exceptionally by the Supreme Court through an extraordinary appeal. The TDLC has asserted its authority to thoroughly review the FNE's analysis of a merger, evaluating both the merits and the validity of the FNE's decision to prohibit the transaction. In doing so, the TDLC may rely on the information contained in the FNE's investigation file, as well as any additional evidence it gathers independently, either on its own initiative or at the request of a party (See, TDLC, November 27th, 2018, Ruling No. 166/2018 *Acquisition of Nutrabien by Ideal*, and September 5th, 2022, Ruling No. 182/2022 *Acquisition of Colmena by Nueva MasVida*).

31. Article 31 bis of DL 211 does not mention a specific term to rule TDLC decisions, it only establishes "*Based on the background included in investigation file […] the Court shall issue a decision, confirming or revoking the appealed decision."* The assessment focuses on the likelihood that the transaction may harm competition, scrutinizing "*the factual, legal, and economic assumptions underlying the contested decision*" (Supreme Court, March 27th, 2023, Case Number 91,429-2022 *Acquisition of Colmena by Nueva MasVida*).

32. Merger review is different to infringement cases, as the analysis is always prospective and forward-looking and therefore effects cannot be proved with complete certainty. The TDLC and the Supreme Court have not formally mentioned which standard of proof is applicable to assess a merger. However, in reviewing the FNE's decisions, the TDLC has used an approach based on the analysis of potential structural changes that may encourage anti-competitive behavior by the merged companies and the probability of these changes of materializing (November 27th, 2018, Ruling N.° 166/2018 *Acquisition of Nutrabien by Ideal*; and, September 5th, 2022, Ruling N.° 182/2022 *Acquisition of Colmena by Nueva MasVida*).

33. Both the law and jurisprudence suggest that the most likely standard is the most practical for Chile's merger control regime. The FNE as a competition authority is not required to establish anti-competitive effects with absolute certainty. Similarly, a standard of beyond reasonable doubt is impractical for a prospective analysis. Regarding efficiencies and their accreditation, the TDLC has stated that the need to prove their occurrence with a high standard "*seems disproportionate and implies demonstrating an absolute certainty that exceeds the applicable standard*." (November 27th, 2018, Ruling N.° 166/2018 *Acquisition of Nutrabien by Ideal*).

34. In merger control, under DL 211, the FNE bears the burden of proving its conviction to approve a concentration, or its conclusion that a proposed transaction would significantly reduce competition in order to prohibit it. However, it is relevant to note that in a collaborative process such as merger control, the merging parties shall deliver all the relevant information that the authority needs for its competitive assessment.

6. Conclusion

35. Chilean practice has shown the relevance of the adoption of a standard of proof in competition cases. The jurisprudence and the dominant doctrine agree on the need of an intermediate standard, "clear and convincing evidence", that is in between the one applicable in civil cases and the "beyond any reasonable doubt" of criminal cases. Merger control provides an exception, since the standard applied by the FNE is in line with the "balance of probabilities" or "preponderance of evidence."

36. Economic evidence has been looked upon suspiciously by courts in many jurisdictions, as it could show very different paths for a decision in a competition case. The Chilean institutional design, with a specialized court with a mixed composition makes this kind of evidence more approachable, as it provides for an independent expert review that could be used to ascertain the proper weight of what it is presented by the parties.

37. A standard of proof is a mechanism to distribute the risk of error, not a tool to minimize errors. The difficulty of obtaining evidence for a conviction in competition law cases could be addressed by using the proper tools in procedural law, such as increasing the use of presumptions, altering the burden of proof to put that burden on the party that is in the best position to incorporate the relevant evidence.