Chile ±Accession Report on Competition Law and Policy
2010

This report on Competition Law, Policy and Enforcement was prepared in the OECD Competition Committee D V S D U W R I W K H S U R F H V V R I & K L O H ¶ V D The Committee was requested to examine the core competition features and to provide OECD Council with a formal opinion on the willingness and ability of Chile to assume the obligations of OECD membership. In doing so, the Competition Committee assessed the degree of coheren F H R I & K L O H µ V F R P S H W L W L R Q O D Z D Q G S R O countries. This report, prepared as part of OECD accession review, highlights some of the key challenges facing Chile in the field of competition policy. After completion of its internal procedures, Chile became an OECD member on 7 May 2010.

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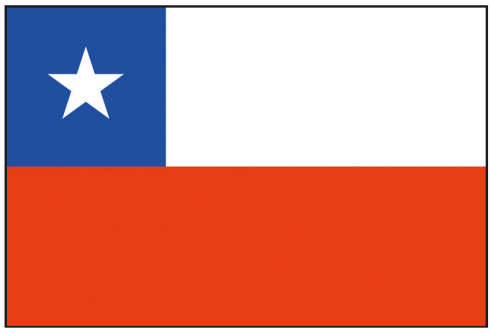
Competition Law and Policy in Chile

Accession Review



2010

COMPETITION LAW AND POLICY IN CHILE

-- 2010 --

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

This Review of Competition Law, Policy and Enforcement in Chile is part of a series of reviews of national policies undertaken for the OECD Competition Committee. It was prepared as part of the process of Chile's accession to OECD membership.

The OECD Council decided to open accession discussions with Chile on 16 May 2007 and an Accession Roadmap, setting out the terms, conditions and process for accession, was adopted on 30 November 2007. In the Roadmap, the OECD Council requested a number of OECD Committees to provide it with a formal opinion. In light of the formal opinions received from OECD Committees and other relevant information, the OECD Council decided to invite Chile to become a Member of the Organisation on 15 December 2009. After completion of its internal procedures, Chile became an OECD member on 7 May 2010.

The Competition Committee (the "Committee") was requested to examine Chile's position with respect to core competition features and to provide Council with a formal opinion on the willingness and ability of Chile to assume the obligations of OECD membership. In doing so, the Competition Committee assessed the degree of coherence of Chile's competition law and policy with that of OECD Member countries. This report, prepared as part of the Competition Committee's accession review, highlights some of the key challenges facing Chile in its implementation and enforcement of competition policy.

While Chile's competition law is simple and the substantive rules are more general than seen in other jurisdictions, the review found that it supports effective policy and enforcement against restrictive agreements and concerted actions, unilateral abuse of dominance, predatory exclusion and anticompetitive mergers. Important legislative changes occurred in 2003 with the creation of the Tribunal de Defensa de la Libre Competenica (TDLC), an independent body with both decision making and advocacy roles. Enforcement tasks are allocated to the Fiscalia Nacional Econmica (FNE), an independent investigative body.

Abuse of dominance remains the most important area of enforcement in Chile, and the TDLC have adopted an economic approach to its assessment in which conduct is not construed as abusive if it is economically efficient. The TDLC's flexible approach to economic assessment comes at cost of some uncertainty. According to the review, methods for defining markets, the legal standard for mergers, the treatment of predatory pricing and the evidentiary standard applied to hard core cartels could be clarified.

The review also noted that Cartel enforcement is becoming increasingly important in Chile, and in 2008 the Supreme Court levied the largest fine ever in the Flat Panel TV case. This positive development should be continued as well as the increased use of enforcement guidelines to clarify the scope and direction of competition policy in Chile.

The review of Competition Law and Policy in Chile was conducted on the basis of a comprehensive self assesment by the Chilean authorities and Chile's answers to a detailed questionnaire, supplemented by information gathered from a Secretariat fact-finding mission, interviews with public officials, market participants, academics and relevant literature. The draft report was discussed with Chilean representatives at the Competition Committee meeting in February 2009. This final version of the report reflects the situation as of June 2009. It is released on the responsibility of the Secretary General of the OECD.

The review was prepared by Dr de Leon, Michael Wise and Patricia Hériard-Dubreuil, under the overall supervision of Robert Ley of the Directorate for Enterprise and Financial Affairs.

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Executive Summary

Chile's competition law is unusually simple and general, but it nonetheless supports effective policy and enforcement against restrictive agreements and concerted actions, unilateral abusive dominance and predatory exclusion and anticompetitive mergers. Content is being supplied by case experience, which is increasingly based on the application of economic analysis.

Enforcement has increased dramatically since legislative changes in 2003 strengthened sanctions and made enforcement an adversarial procedure. The most important change in enforcement was the creation of the *Tribunal de Defensa de la Libre Competencia* (TDLC). The TDLC, which performs both the decision making and advocacy roles, has more independence, more qualified members, higher status, more power and a larger budget than the Commissions that it replaced, The structural changes made the system more transparent and more effective. The allocation of enforcement tasks between an independent investigative body, the *Fiscalía Nacional Económica* (FNE) and the separate, independent decision making authority, the TDLC, is working, so far.

Cartel enforcement is now getting more attention. In 2008, the largest fine ever applied was confirmed by the Supreme Court. In addition, the TDLC issued its most far-reaching decision rejecting a merger. Still, abusive dominance remains the most important area of enforcement. The TDLC applies an economic approach, and it will not construe as abusive conduct which is economically efficient.

The TDLC's flexible approach in applying economic principles comes at a cost, though, of unpredictability. In ruling against a major merger in retailing, for example, the TDLC departed from the traditional, more limited market definition approach of previous decisions and from the methodology of the FNE's Guides. Uncertainty is magnified by the inconsistency of the Supreme Court's directions. Methods for defining markets, the legal standard applicable to mergers, the treatment of predatory pricing and the evidentiary standard applied to hard core cartels remain unclear.

Enforcement guidelines could clarify the scope and direction of policy. FNE has issued guidelines about mergers, but the TDLC, as an independent judicial body, is not bound to follow such instruments. To be most useful to help businesses in Chile comply with the law, guides about interpretation and analysis should follow the decision practices of the TDLC, as well as rely on models and learning from the international competition community.

Introduction

This background report was submitted to assist the Competition Committee in its assessment of the willingness and ability of the Republic of Chile to assume the obligations of membership in the OECD concerning competition policy, as set out in the accession roadmap.[1] It is based on the initial submission by Chile of its position concerning the compatibility of its laws and policies with the roadmap principles, responses to the Secretariat's follow-up questionnaire and findings from the Secretariat's fact-finding missions and research. The first sections of the report describe the policy foundations, substantive law and enforcement experience, institutional structure, sectoral regulatory regimes and exclusions and treatment of competition issues in regulatory and legislative processes. The concluding section summarises these findings under the three themes that the Committee has prescribed for its assessment: (1) the current situation of competition policy and enforcement, (2) the magnitude and direction of change in competition policy over the last 5-10 years, and (3) the extent of conformity with the particular recommendations in the competition policy instruments that are referenced in the roadmap.

1. Foundations

Chile is a medium-sized economy among its Latin America neighbours, with GDP of $232.8 billion (2007 est.). Its population of 16 million people also makes it mid-sized in its region. Its geography, with mountains on one side and ocean on the other, would tend to isolate its markets and perhaps decrease competitive pressures. The population, and thus most economic activity, is concentrated in the middle of the country, mainly in the Central Valley. To compensate for factors of transport cost and scale economy that could lead to concentrated and less competitive domestic markets, Chile has become a very open economy, entering a number of free trade agreements over the last 35 years.[2]

Recent economic performance has been strong. Real GDP has grown at an average annual rate of 5.5% since 1990, while the proportion of the population living in poverty has halved. The Asian financial crisis in the late 1990s stopped growth and raised unemployment, but the economy remained stable and recovered quickly. Potential growth is estimated currently at 4-5%. Healthy performance is underpinned by sound economic policies and institutions. Chile's sovereign credit rating is the highest in South America. Perhaps because of its history of economic liberalisation and good economic performance, Chile is often seen by multinational firms as a springboard to enter South America, despite its modest size.

1.1. Development of basic competition law

The history of the competition system in Chile began in 1959, with the enactment of the first competition act (Law No. 13.305). The competition provisions were part of an economic and industrial statute that responded to policy recommendations made by an international mission of specialists, whose main purpose was to address macroeconomic instability issues. One of the statute's chapters created the Antimonopoly Commission, whose function was to punish harmful conduct and control industrial and commercial activities. In 1963, the position of the *Fiscalía Nacional Económica* (National Economic Prosecutor, or "FNE") was created to investigate and prosecute anticompetitive conduct. These institutions dealt with few cases. Between 1959 and 1973, most decisions were recommendations to prevent infringements in the future. When much of the economy was planned, many products and services were subject to price regulation and many firms were owned or managed by the government, competition policy and law did not play a significant role.

After the military *coup d'Etat* of 1973, changes in competition policy were part of a programme to roll back the previous government's steps towards a state-planned economy. The Competition Act (Decree Law No. 211 of 1973) created new institutions, the Competition Commission (also known as *Comisión Resolutiva*) and central and regional Consultative Commissions (the *Comisiones Preventivas*, central and regional). Members of the Competition Commission and the Consultative Commissions were unpaid and served part-time. These bodies could impose sanctions and issue injunctions and recommendations, while the FNE continued in its functions of investigation and prosecution.

In the first two decades of work (1973-1993), the Competition Commission tended to focus on market foreclosures such as vertical restraints. Its formal, legalistic approach was founded on the 1980 Constitution's protection of economic rights. Competition policy did not seek to promote consumer welfare, but rather to protect economic freedom. Enforcement resources were low. Competition policy was overshadowed by macroeconomic reforms. Competition law enforcement was a less important part of Chile's reform programme, which emphasised trade liberalisation, privatisation and deregulation.

After democracy was restored in 1989, Chile undertook a major pro-growth agenda, developed by the government and the private sector. This agenda stressed reform of regulation in telecoms and electricity and in areas such as capital markets that could also improve competition and efficiency. Making this kind of regulatory reform a priority created necessary conditions and prepared the way for invigorated competition enforcement. But the

predominantly consultative competition law system, implemented by institutions with limited enforcement powers, could not deal effectively with significant cases in Chile's increasingly developed economic conditions. The FNE's investigative powers had been increased some by a reform in 1999, but the institutional structure needed a more thorough overhaul.

The institutions were revamped in November 2003. The Competition Act of 2003 (Law No. 19.911) created the *Tribunal de Defensa de la Libre Competencia* ("TDLC") to replace the Competition Commission and the Consultative Commissions. Under the current system, the FNE submits complaints to the TDLC for adjudication and decision. The 2003 law also granted some new powers to the FNE. The judiciary-based nature of Chile's competition enforcement is unique among Latin American countries. The TDLC is a court, subject to the supervision of the Supreme Court of Justice, but its members include two economists as well as three lawyers. The TDLC has applied more sophisticated economic analysis, in contrast to the formal legal standards found in the administrative decisions of the old Commissions.

Enforcement has stepped up markedly since these changes. Notably, sanctions are dramatically higher. Since 2004, the average fine imposed by the TDLC has been about USD 840 000. By comparison, during the period 1974-2002, the average fine, after review by the Supreme Court, was about USD 13 500.

Amendments adopted in 2009 have strengthened enforcement further. Among other things, the changes authorise a leniency programme to detect and prevent cartels, add to the FNE's investigation powers and increase the penalties for infringement.

1.2. Policy goals: purpose, approach

Chile's government regards the principal goal of its competition law as being to promote economic efficiency, with the expectation that in the long run this maximises consumer welfare. The law does not express this goal, though, nor indeed other. The economic efficiency goal represents a shift from the early years of Chile's competition policy, which stressed the importance of economic freedom and the goal of preventing restrictions on firms' autonomy. Vertical restraints such as exclusive dealing and exclusive territories were perceived to be particularly threatening to competition because they prevent other firms from serving as distributors. There was no consideration of whether the restraints had efficiency justifications and so might benefit competition and consumers.

The Competition Act does not specify a particular objective. Article 1 states in general terms that the purpose of the law is "to promote and defend free market competition." The competition bill originally submitted before the Congress in 2002 had included a more detailed statement of purposes, which would have explicitly called for the promotion of efficiency and consumer welfare. After a long discussion, the final wording was changed to the more general statement. In effect, the generality of the statute leaves the choice of policy direction up to the decision practice of the TDLC, subject to the oversight of the Supreme Court. General language is also consistent with the Constitution's unqualified protection for economic rights (Article 19.21 of the 1980 Constitution), which does not specify any other, more particular social welfare purpose of standard.

But policy views are clearly evolving toward an emphasis on efficiency and consumer welfare. Some evidence about the intended direction can be found in Free Trade Agreement between Chile and the United States. Under its Chapter 16, "Competition Policy, Designate Monopolies, and State Enterprises", "Each Party shall adopt or maintain competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct".

Efficiency, in several forms, is an important consideration in the decisions of the TDLC. Harm to consumer welfare has been cited as a reason for condemning conduct.[3] Some cases have also considered protection of consumer surplus.[4] Effects on allocative efficiency were invoked as an argument for dismissing a refusal to supply claim in motion picture distribution.[5] And effects of dynamic efficiency and innovation were examined in the conditional approval of a merger, despite high concentration, in a high-tech industry showing signs of technological convergence.[6]

The pre-efficiency heritage of Chile's competition policy occasionally reappears, but at the fringes. Some decisions of the TDLC implicitly support non-efficiency objectives by enforcing compliance with orders by the former Commissions that are still in effect today.[7] Otherwise, though, TDLC decisions grant no special policy favour to small and medium enterprises. Several cases in the supermarket industry have rejected protection for small and medium sized enterprises, when there is no harm to competition in terms of economic efficiency.[8] In general, the Competition Act does not contain any provision for balancing competition goals against other interests.

The TDLC's interpretation of the goals of policy is evolving. The business community and the public may not yet be fully aware of the current

interpretation of the law's goals and legal standards. Notably, it is unclear how the TDLC construes the efficiency legal standard in practical terms. This issue was present in its decision about the proposed merger between D&S and Falabella.[9] (See Box No. 3, below)

2. Substantive issues: content of the competition law

Chile's Competition Act is notable for its coverage and simplicity. It follows the basic structure of substantive prohibitions conventionally found in competition statutes about agreements and unilateral practices. Its brevity has created some uncertainty. A single, general provision contains the basic substantive rules about conduct affecting competition. Any deed, act or agreement, including a contract, that "prevents, restricts or hinders free competition," or that tends to do so, is subject to sanctions under the law (Art. 3). Subsections provide illustrative detail about some of the usual categories of competition policy concern, namely explicit or tacit agreements (Art. 3.a), "abusive exploitation" of a dominant position (Art. 3.b) and "predatory or unfair" practices to attain or strengthen a dominant position (Art. 3.c). Case law has elaborated what these general terms mean.

Enforcement policy emphasises market power. Even in the case of horizontal restraints, enforcement action depends on market power. If market power is found, the TDLC examines potential efficiencies. Conversely, in the absence of market power, the TDLC will usually not inquire further about potential anticompetitive effects, unless the conduct itself is geared towards attaining market power.

As policy direction has shifted toward a focus on economics, case law has left some issues unclear. In the early years, agreements within the categories of Article 3 had been treated as essentially illegal *per se*. In taking a more economic approach, the TDLC now applies something like rule of reason treatment generally, albeit subject to certain caveats intended to make it easier to prove cases such as naked price fixing.[10] The "objective capacity" of an agreement to produce harm in the market is sufficient to condemn it, and it is not necessary to prove its actual effects. The TDLC has applied this approach to horizontal restraints in recent decisions (No. 74/2008; No. 79/2008). The TDLC is not bound by its prior decisions, but may examine and assess each case on its merits. In the absence of detailed rules and standards of evidence and proof in the Competition Act, it can be difficult to assess the consequences of business behaviour.

Rules for identifying and measuring factors of economics-based analysis are not found in the Competition Act. There is no general procedure for defining

markets. There is no market share presumption as an indicator of dominance, no threshold for evaluating market concentration, no reference to entry barriers and no indication of the scope of an efficiency defence. The FNE has issued guidelines to explain economic concepts, such as its *Internal Guide for the Analysis of Horizontal Concentration Operations*. The TDLC is not bound by these guidelines.

In Chilean law, a pure *per se* standard for collusion or a market share presumption for dominance, which would reverse the burden of proof against the defendant, would raise a constitutional issue. Thus actual or potential effects on competition must be proved case by case. In the opinion of some (Gonzalez, 2008), even collusion would be treated like exclusionary or monopolising practices. That is, in addition to proving the practice, the enforcer must demonstrate that it has led or would probably lead to competitive damage.

2.1. Horizontal agreements

Collusion is an anti-competitive practice under Art. 3. According to Article 3(a), "express or implied agreements" or "concerted practices" intended to fix prices of sale or purchase, limit production or allocate areas or market shares, and abusing the power that such agreements or practices confer, are violations. Thus the TDLC may punish competitors' agreements aiming at fixing prices, limiting output or dividing markets. The statute does not specify whether they are to be considered under a *per se* or a rule of reason standard.

To reduce the burden of proving hardcore horizontal violations, the TDLC has applied a standard of evidence which requires that the conduct have an "objective capacity" to potentially harm competition. This interpretation follows from the wording of Art. 3 of the Competition Act, which requires a conduct to have a "tendency to produce anticompetitive effects". The substantive standard for hard-core horizontal agreements, about fixing prices, dividing markets, excluding competitors and rigging bids, have has been made more explicit in the recent amendments to the law. Enforcement practice and case law apply quasi-*per se* treatment to hardcore horizontal restraints, that is, to agreements between competitors to fix prices, set quotas or allocate markets. Recent rulings of the TDLC have used market power as a proxy for showing anticompetitive effect. Firms engaging in collusion are to be condemned if they collectively possess market power, without the need to show that their actions led to competitive injury. The Supreme Court endorsed the TDLC's view, by confirming its decision against a group of doctors in the city of Punta Arenas.[11] Most of the Supreme Court's decisions so far, though, have dwelt on the quality of proof of agreement.

Significantly, the TDLC also considers market power in a defensive sense. That is, an agreement undertaken by parties who lack market power will be considered not to undermine competition. In the recent case, *FNE vs. Asfaltos Moldeables de Chile S.A. et al.*,[12] the TDLC rejected a claim brought by the FNE against several tar producers, for allegedly engaging in bid rigging. The TDLC found that the FNE did not show the existence of an agreement, and more importantly, that it could not have adversely affected market competition because the alleged bid riggers faced a competitive market.

There have been few successful prosecutions of collusion. Between 2006 and 2007 there were three rulings about horizontal collusive practices: *Agencias Navieras*[13], *Oxigeno*[14] and Health Insurance. All resulted in acquittals, either in the first instance by the TDLC or in the second instance by the Supreme Court. The critical issue was whether the circumstantial evidence was a sufficient demonstration that there was agreement between the players, explicit or implied (Gonzalez, 2008). These rulings impose a high burden of proof on the FNE for the use of indirect evidence. In the absence of enough evidence of an agreement, parallel behaviour seems insufficient to support a successful prosecution. The current standard seems to make it quite difficult to prove collusion without direct evidence.[15] There is some sign of change, though. The Supreme Court confirmed the TDLC's finding of an agreement in the Flat-Panel TV War case, which relied on circumstantial evidence, that is, the number of phone calls between the concerned parties, as opposed to the content of these calls. But it is too early to say whether this represents a new trend in case law concerning cartels. The FNE has maintained its pursuit. In December 2008 the FNE charged the three major drug stores with colluding about increases in the prices of several prescription drugs.

Sanctions and remedies against anticompetitive horizontal agreements can include fines against the companies and the executives that participated in the agreements, orders to amend or terminate acts or contracts and modification and even dissolution of corporations, or other corrective or restrictive measures to remedy the effects of the agreement.

Groups or associations are not subject to special rules. The general prohibitions apply to action taken in these settings. There have been several cases involving trade associations. For instance, in *FNE vs. AM Patagonia S.A. et al*. the TDLC imposed a sanction against 74 of the 84 doctors in the city of Punta Arenas for colluding to fix tariffs in the supply of various medical services through a joint company. The doctors were fined 15 tax units each, except for the manager of the agreement, who was fined 30 tax units.[16]

In relation to pro-competitive agreements among competitors, the TDLC approved a project for the construction of five hydroelectric power stations which was the result of a joint venture of the two main enterprises in electricity generation. Nevertheless, the approval was restricted by certain requirements in order to assure new entrants an open access to the transmission facility[17]. This matter was brought up in a consultative procedure. In these procedures, the remedies are injunctions or recommendations, to alleviate the risks of the agreement, similarly to the analysis of horizontal mergers.

A leniency programme has now been authorised, and the FNE has obtained the power to gather evidence through a "dawn raid". These additional powers, provided by the 2009 legislation, facilitate obtaining direct evidence to prove collusion.

2.2. Vertical agreements

Vertical agreements are also covered by the general principle of Article 3, that any act or contract that prevents, restrains or hinders free competition or tends to produce such effects may be subject to sanctions. The examples of prohibited agreements in Article 3(a) could include common vertical agreements about price and exclusive territories.

Historically, vertical restraints were condemned if they were perceived to undermine economic rights. Market power and economic efficiencies were not issues. Thus refusal to sell without a plausible justification was condemned. Price discrimination was considered illegal unless discounts or other favourable terms were available to all buyers according to "objective" criteria. Cost-justified volume discounts were always seen as objective, but price differences reflecting other cost differences were not always accepted.

Decisions now emphasise economic effects. The *Comisión Resolutiva*, the forerunner of the TDLC, upheld a number of covenants in exclusive distribution agreements about branded motor oil because they increased the number of importers and distributors and thus promoted long run efficiency.[18] The TDLC has applied similar standards to franchising or distribution agreements and claims about refusal to deal. In *Jorge Delgado Méndez vs. Copec S.A.* it stated that, in general, franchises are efficient contracts and thus not restrictive.[19] In general, the TDLC has not condemned covenants or practices in these settings, even if they are *prima facie* restraints, and it has noted the importance of long run efficiencies.[20]

A different approach has been applied to vertical restrictions used as instruments for market foreclosure or for competitors' co-ordination. Here the

analysis is in terms of exclusionary abuse[21] or horizontal agreement. Where aspects of vertical arrangements could entail lack of market transparency or could generate deterrents for staying in the market, the TDLC has issued transparency remedies aimed at restraining opportunistic behaviour.[22] In the case *AGIP A.G. vs. Supermercados Líder*, involving discrimination at the distribution and retail in supermarket chains, the TDLC held that the retail outlets should apply transparent conditions for the sale of the products they distribute and resell (See Box 1).[23]

Box 1. AGIP A.G. vs. *Supermercados Líder*

AGIP, the Association of Retailing Suppliers, asked the TDLC for a consultation about the tactics of *Líder*, a leading supermarket. A supplier, Nestle, had refused to participate in a *Líder* promotion. *Líder* retaliated by removing the products from its shelves; however, the products were still included on promotional posters.

In examining this dispute, the TDLC also looked at other common supplier complaints about the practices of chain retailers, such as marketing private label products, sales "below cost" and unilateral changes in terms with suppliers. The TDLC noted that conditions of sale and other aspects of the relationships with suppliers should be established objectively and in a non-discriminatory manner, and that the chains should not unilaterally alter prices or terms that had been negotiated.

The TDLC also ordered the two chains to notify it in advance of any proposed mergers or acquisitions, but the Supreme Court overturned this order.

2.3. Dominance-monopolisation

Abuse of dominance has been the most important area of antitrust enforcement. The prohibition in Art. 3(b) includes illustrations of behaviour that would be regarded as abuse of dominance: abusive prices, tying and dividing markets. Art. 3(c) prohibits "predatory or unfair competitive practices conducted in order to attain keep or increase a dominant position." The decisions of the TDLC have further elaborated what the law covers. Vertical agreements including clauses that foreclose the market, such as exclusive vertical agreements, pricing clauses, and other restraints, have been taken as instruments of abusive dominance. The notion of "abuse" and "abusive exploitation" is explicitly provided for in the Competition Act. Any contractual provision can be construed as "abusive" if it is aimed at raising unjustified entry barriers to create or strengthen a dominant position. Sham litigation filed to exclude competitors from the market could be considered abuse.

Dominance implies market power. Determination of market power usually depends on the lack of effective substitutes and other factors evidencing the capacity to act unilaterally. High market shares do not lead to a presumption of market power, although market share may be an element in an inference of market power. In general, the TDLC assesses whether market structure is competitive, for example, by assessing potential competitors, in order to determine whether a firm has the power to impose conditions unilaterally. The emphasis in the analysis varies. For example, in *Voissnet S.A. and FNE vs. CTC*,[24] the TDLC assessed dominance based on market shares, among other factors.[25] By contrast, in *GPS Chile S.A. vs. Entel PCS S.A.* the TDLC found that Entel lacked market power because there was a possibility of entry by other operators[26].

Conduct that is unfair but that does not impair competition in the market as a whole would not violate Art. 3, although it might give rise to a private claim for unfair competition. The TDLC will not construe as "abusive" conduct which is economically efficient.

Exploitation is a violation. An illustration is *FNE v. LAN Airlines S.A. and LAN Cargo S.A.* (2006),[27] involving air cargo and warehouse services provided by Fast Air. Until 2003, EPA had been the only provider of warehousing services in the city of Punta Arenas. EPA's facilities were 21 km away from the airport; but LAN had assumed the cost of inland transportation as part of the air cargo fees for services to Punta Arenas. Following the incorporation of Fast Air, a warehouse provider that was wholly controlled by LAN, LAN started charging the land transport costs separately, while the fees for FastAir's warehouse services were 400 percent higher than EPA's. The TDLC decided that LAN was exploiting importers, who had to choose between paying an additional fee to cover inland transportation to EPA's facilities or paying the high fees to use FastAir's warehouse services at the airport. The TDLC emphasised the evidence of lack of competition, in that the effective prices for air cargo had not declined after the entry of Fast Air. Violations were found in both the air cargo and customs warehousing markets. The national air carrier was fined USD 150 000 and ordered to restructure its pricing. The TDLC also proposed the adoption of regulatory changes and other steps to promote competition at airport customs warehouses.

Another illustration of exploitative abuse, in electric power, is the 2008 case *FNE v. Empresa Electrica de Magallanes, S.A.* EDELMAG increased tariffs for electric service in Puerto Williams above the pricing indexing formulas contained in its concession contract, without any change in the circumstances justifying the price increase. This was found to be an abuse, and

the company was fined 400 tax units, or CLP 173 million.[28] The TDLC also ordered EDELMAG to cease the behaviour.

Decisions about refusals to deal and price discrimination have often been concerned about the use of objective criteria. Thus, in a case involving motion pictures, defendants were ordered to adopt and implement a distribution system based on standard, general and objective criteria.[29] In the area of price discrimination the TDLC has ordered companies to use general criteria and in some instance it has also imposed fines. In *Demarco S.A. and FNE, vs. Coinca S.A. y la I. Municipalidad de San Bernardo*, the TDLC imposed a fine of CLP 145 million (Chilean pesos) on the owner of a waste disposal facility. The prices it charged to competing waste haulers were significantly higher than those in its bid that won the tender. The TDLC viewed the low bid as an attempt to prevent competition, and it ordered the defendant to strictly comply with a previous ruling which mandated to publicise prices on an objective and non-discriminatory basis.[30] Another case involved the alleged abusive conduct of Transbank, a credit card operator, which was found guilty of abusing its dominant position by charging discriminatory and unfair prices to businesses that accept cards bank credit, and by maintaining a tariff structure that was discriminatory to card issuers. The TDLC imposed a fine of CLP 35 million.[31]

In six exclusionary conduct cases, the TDLC has imposed fines and ordered companies to execute open tenders and to modify contracts imposing exclusivity clauses and other restraints. For example, in *Phillip Morris v. Chilena de Tabacos S.A. (Chiletabacos)* (2005)[32] the TDLC ruled that Chiletabacos had imposed artificial strategic barriers to entry against Phillip Morris, which were imposed on top of the structural ones. These barriers were contained in the exclusive contracts that Chiletabacos negotiated with independent outlets for the display and sale of cigarettes.

Exclusionary conduct led to the highest competition fine ever imposed in Chile, in *FNE vs. Almacenes Paris y Falabella* (the Flat Panel TV War case**).**[33] In this ruling, the Supreme Court affirmed a TDLC ruling against two big box retailers who boycotted a special promotional event launched by a bank, depriving consumers of the opportunity to get flat panel TVs at a premium price. (See Box 2).

Box 2. Flat-Panel TV War

Banco de Chile had contracted with two firms, Travel Club and Duty Free TC, to manage its premium dollars fund scheme and to run events, promotions and advertising campaigns for its credit cards. Duty Free organised a trade fair to take place several days at a convention centre, *Casa Piedra*. At the trade fair, *Banco de Chile*'s credit card users would have an opportunity to buy products under the premium dollars fund scheme and to earn up to 12 interest-free quotas. The effective consumer prices represented discounts of up to 30%. The organisers lined up distributors to supply the products, and *Banco de Chile* advertised the event to its clients.

The defendants, *Falabella* and Paris, are major retailers of home appliances and electronic products. Each accounts for approximately 50% of the sales of the distributors who had agreed to participate in the trade fair. The trade fair represented a threat to the defendants' businesses, both for retail sales of these products and for business-related credit cards. Under pressure from the defendants, the distributors withdrew from the trade fair.

Banco de Chile filed a suit at the TDLC, and the FNE presented a petition to the TDLC alleging abusive conduct and collusion. FNE argued that the boycott had a clear exclusionary purpose, aimed at preventing the entry of a new competitor. FNE pointed out the importance of the defendants' retail outlets for these distributors and their success at pressuring the distributors to withdraw from the trade fair.

To prove that the two firms agreed on the boycott, the FNE relied on phone records, e-mails and statements by executives of both defendants and of their suppliers. Collusion was evidenced by repeated communications between executives of the companies, followed by their co-ordinated pressure on their respective suppliers, to impede their participation at the fair trade. They also attempted to involve in the boycott a third department store.

The TDLC defined the relevant market as including both credit card service at retail stores for the purchase of home appliances and electronic goods and the distribution and retail sale of those goods. An important dimension of competition between retail stores in Chile is over the discounts and premiums given to customers who use the retailers' credit card systems. The TLCD found SACI *Falabella* and Paris S.A. to have colluded and to have abused their dominant position. It ordered SACI *Falabella* and Paris S.A. to pay fines of 8000 and 5000 annual tax units, respectively (USD 7 700 000 in total).

In the area of predatory pricing, the TDLC imposed a fine of CLP 58 million[34] against the parties to a price war in cable television.[35] In *FNE vs. Empresas de TV Cable Loncomilla S.A., Holding de Television S.A. y CMET* the defendants were found to have priced their services below operational costs. As TV Cable Loncomilla, the historic incumbent, and CMET competed to supply the cities of San Javier and Villa Alegre, a price war broke out, and each accused the other of predatory pricing. CMET alleged that its prices responded to Loncomilla's predatory prices, while its own prices were supported by the

excess income received in other regions of the country. Loncomilla alleged that it was cutting prices in order to attract new clients. The FNE charged both firms for predatory pricing, as they had both reduced their prices considerably without justification. Neither party contested the allegation of imposing predatory prices; on the contrary, CMET's tacitly admitted charging prices below operational costs, as it alleged that its prices were compensated with higher income received in other regions. Moreover, the prices charged by this firm in other cities were considerably higher than those it charged in the disputed market. The FNE argued that the prices were not time-limited and were neither used as a promotional device nor as a strategy to position them in the market. The court endorsed this view, finding that CMET intended to gain a dominant position and that Loncomilla intended to maintain an already dominant position, and that the firms were engaged in "reciprocal unfair competition", which in the long run could undermine or cause the exit of a competitor.

A 2006 Supreme Court ruling treats price predation as a nearly *per se* offence. In *Producción Química y Electrónica Quimel S.A., vs. James Hardie Fibrocementos Ltda.*, a divided court overturned a decision by the TDLC that had acquitted a company producing fibrocement sheets. The TDLC had found that the defendant was not a dominant player, since it had only 32.5% market share, while the leading firm, *Pizarreño Pudahuel*, had a share of 59.9%. The Supreme Court decided that a firm does not need market power or dominance to employ predatory pricing, since the purpose may be to acquire a dominant position. The two dissenting judges argued that the defendant could not manipulate prices, but instead it lowered its prices in response to the dominant player's tactics. The Supreme Court also disagreed with the TDLC about the cost reference for predatory pricing. The TDLC decided that there was no predatory intention because Hardie's prices were higher than its average variable cost. But the Supreme Court held that they were predatory because they were below its "costs", without specifying what measure of cost it considered relevant. The Supreme Court treated the extent of the defendant's investments as evidence of entry barriers, while the TDLC found that these investments did not create entry barriers and that they were investments that any firm looking to enter into the market must bear. The Supreme Court imposed a fine of CLP 470 million.[36]

The TDLC has applied the essential facilities doctrine to promote open, non-discriminatory access to key networks controlled by dominant firms, following an interpretation of Art. 3 (b) of the Competition Act. A merger between two cable operators was approved subject to the condition that access to broadband internet services would be on an open, non-discriminatory basis at competitive prices.[37] When the TDLC approved a petition of two electricity generating companies to jointly build and operate five hydroelectric central

stations, the authorisation set parameters for the new joint venture and consultants to use to determine the transfer price. The TDLC ordered that the transmission facilities pricing (or prices paid by third parties) should be based on objective, non-discriminatory criteria, and that contracts for the design of the transmission line should consider a minimal period to receive petitions about line transmission capacity from independent parties.[38] The doctrine has also been applied to draft regulations for tenders for solid waste collection, proposing separation of the disposal market (with the monopoly feature of the waste disposal land) from other services that may be offered on a competitive basis.[39] The TDLC fined a telephone company that denied wholesale clients the use of its broadband platform to render IP voice service, in order to protect its business. The TDLC also ordered the company to modify the restrictive clauses.[40]

Much of the law enforcement about dominance has involved infrastructure monopolies. It has been suggested that many South American countries erred in beginning with a North American model for competition law, because that model is not necessarily well suited for addressing fundamental problems that follow a history of state intervention in economic activity (De Leon, 2001). By concentrating on infrastructure monopoly, Chile appears to be an exception. The TDLC and FNE have a close working relationship with sector regulators. Non-competition factors such as the public interest in sector regulation may be relevant to the treatment of claims of abuse in regulated sectors. In a case involving a dominant internet-protocol telephone provider, the Supreme Court declared that the TDLC should not interfere with the non-competition goals of sector regulation.[41]

Sanctions against abuse of dominance are the same as for other violations. Divestiture powers are provided in the Competition Act, as well as the power to amend or dissolve corporations. The TDLC has never used these powers, though.

Some cases have targeted "unilateral" abuse by several firms. The legal basis for this enforcement may be clarified by an amendment that is now under discussion. It would add to Art. 3(b), the clause with examples of abusive exploitation, the concept of abusive conduct by a group of firms.

2.4. Mergers

The substantive law applied to mergers is also Article 3 of the Competition Act, which does not address mergers or acquisitions directly. A merger or acquisition can be considered an infringement of the Competition Act if it

prevents, restricts or hinders free competition or tends to produce such effects, in which case the parties could be penalised after they undertook the merger.

The FNE has tried to provide guidance about merger analysis in its non-binding "Internal Guide for the Analysis of Horizontal Concentration Operations." The FNE conducts its merger analysis with the aid of these guidelines. They state that merger analysis is aimed at preventing the risks of increased concentration in the relevant market as result of the merger, which may make anticompetitive conduct more likely. Anticompetitive risks include unilateral behaviour by the merging company and post-merger co-ordination in the market. The Guides balance these risks against pro-competitive efficiencies.

The methodology begins with the definition of the relevant market, following the SSNIP test. Concentration is assessed according to the Herfindahl-Hirschmann index.[42] Market shares are usually based on revenues; however, if necessary, market shares may be based on sales volume; production output; installed capacity or reserves (for example, in industries linked to the exploitation of natural resources).

In addition to market structure the Guide also takes into account other economically relevant features of the industry, particularly entry barriers. Firms that are below minimum efficient scale or that target only niche markets will be regarded as unlikely to discipline incumbents. In addition to legal barriers, the guides particularly emphasise sunk costs. Examples listed include start-up costs, such as collection of market information, development and testing of product design, installation of equipment, staff recruitment, establishment of distribution systems, and investment in specific assets, advertising and marketing, branding and after sales services, research and development, innovation and technology and facilities, infrastructure or essential inputs.

Ease of entry will depend on entry being likely, timely and sufficient. The FNE will take into consideration any delays or losses that potential entrants should expect in order to enter. Factors to be considered are costs of transforming the technology, costs of increasing productive capacity, costs of adapting their commercial practices, scale of operations (that is,. the size of plants, the costs of shifting production and the maturity of the market), the time needed to learn how to optimise specific assets and the development of a distribution network.

Strategic behaviour is another factor relevant to establishing the capacity of potential entrants to enter into the market. Examples include (over) investment in installed capacity, (over) investments in advertising, pricing policies such as limit pricing and regular price wars, proliferation of products

and brands to fill the market, political loyalty, business reputation, long-term contracts with automatically renewable exclusivity clauses and exclusionary conduct, as well as acts aimed at raising rivals' costs.

The Guide includes provisions dealing with failing firm situations and the analysis of overseas mergers with impact on the Chilean market.

The Guide represents a first step in the standardisation of competition rules for merger control. The draft Guide was presented for public comment in May 2006 and released in final form three months later. FNE's work in the preparation of the Guide received a government award for "Transparency, Access to Information and Probity in Public Administration" in 2007. The Guide is an internal working tool, providing useful information and orientation for firms and interested parties about how the FNE deals with a horizontal merger when it decides whether to challenge a merger or prepares its opinion for the TDLC. The Guide does not provide certainty, because it is not binding on the TDLC. In the *Falabella* case (see Box 3), the TDLC's market analysis considered elements that are not part of the Guide's usual market definition methods for horizontal mergers.

Process of notification and decision

There is no general pre-merger notification and review requirement. Mergers may be challenged and reviewed *ex-post* in an adversarial proceeding at the TDLC. Parties may also request a preliminary review of their proposed merger by the TDLC. In this non-adversarial proceeding, the FNE submits a report stating its opinion, which may or may not be followed by the TDLC.

Any interested person, as well as the FNE, can challenge a merger before the TDLC. The TDLC may issue an injunction to prohibit the closing of the transaction while the contested proceeding is ongoing. The maximum duration of that proceeding at the TDLC is not specified. The FNE Guide states that the applicable procedure and length will adapt to the TDLC's decision.

The non-adversarial proceeding has been playing a major role as a voluntary merger control tool. Mergers and acquisitions that may raise antitrust concerns are increasingly being voluntarily submitted to the TDLC by the parties involved. If a voluntary consultation is initiated, the transaction cannot be closed during the review period until the TDLC renders a favourable decision. In that review, the TDLC can decide to clear the transaction or set conditions for obtaining approval. Parties obtain several advantages from the preliminary review procedure. If the transaction is approved and the parties comply with the conditions that the TDLC sets, there will be no liability. After

an uncontested proceeding begins, a contested one may not be initiated, for example, by the FNE or a competitor or customer. The Supreme Court cannot modify a TDLC decision made in a non-adversarial proceeding, although it can review the measures and conditions imposed in the TDLC ruling. The procedure is regulated by the TDLC's Instruction 5-2004 ("*Auto Acordado* No. 5/2004") The TDLC is in the process of enacting an instruction about the information that must be provided in these proceedings. A draft was presented for public comment in December 2008. This draft is available in the TDLC website (*www.tdlc.cl*).

Mandatory pre-merger notification to the competition institutions is required only for transactions involving television and radio.[43] In such cases, a 30-day notice period is required. (Transactions involving newspapers must apparently be notified after the fact). Banks and some other financial institutions must notify the Bank Superintendency before merging, and the Superintendency could ask the competition institutions to review a matter. Concentrations in certain industries and economic activities, such as media, banking, and electricity require approval by other governmental agencies. Pursuant to a decision of the previous competition authority, there are specific restrictions in the port sector.[44] The TDLC has ordered mandatory pre-merger consultation for certain firms and markets, as remedies following its decisions about anticompetitive restraints[45]. The Supreme Court has overturned one of these orders.[46]

The TDLC has usually relied on behavioural remedies or divestiture requirements to resolve problems with mergers in the non-adversarial proceeding. The merger between the two main Chilean cable television operators (VTR-Metropolis) was approved under several conditions: the establishment of a standardised-price policy, a prohibition to acquire any interest in satellite or microwave television operating companies and a requirement to sell any interest the merged firm had in them, a prohibition to acquire any interest in companies established as dominant in the fixed-line telephone market and a mandatory freeze on retail prices for a three-year period, among others.[47] The TDLC imposed a divestiture order in the takeover of BellSouth, a mobile phone company, by *Telefonica Movil*. The order was to be implemented through an open tender of licenses up to a certain radio-electric spectrum (25MHz) in the 800MHz band and to the making of open wholesale offers of facilities to resell plans of retailers who lack nets, among other conditions.[48] The approval request of the subsidiary of an important radio conglomerate (*Prisa*) for the acquisition of a series of radio broadcast licenses was subject to the divestiture of two broadcasting concessions in the most affected local relevant markets. In addition, the TDLC ordered a limitation to a two-year period the non-competition clause established in the acquisition

operation, and imposed the obligation of previous approval by the TDLC of any radio broadcast license acquisition or renewal of those in current possession. The merger between two pension and retirement plan administrators (ING AFP *Santa Maria* and AFP *Bansander*), was conditioned on setting a standardised commission for all of its customers for two years, no higher than the commissions paid at the day of the filing, and also limiting the non-competition covenant to a two-year period.[49]

Only once has the TDLC blocked a merger for which the parties had petitioned its opinion. This was the proposed merger between one of the main Chilean retail companies, *Falabella*, and the most important supermarket chain, D&S (see Box 3).[50]

Box 3. The *Falabella* Case

One of the main Chilean retail companies, *Falabella*, and the most important supermarket chain, D&S, agreed in 2007 on a merger. A new entity would be formed, in which *Falabella* would own 77% of the shares and D&S would own 23%. The combination would become the second largest firm traded on the local stock market. With annual sales of approximately USD 8 billion, it would be the second largest retailer in Latin America, after Wal-Mart in Mexico.

The TDLC rejected the proposed merger, in a decision issued 31 January 2008. The TDLC held that the risks to competition could not be corrected by imposing conditions. In assessing these potential effects, the TDLC applied a concept of "integrated retail", involving a combination of retail stores, malls and consumer credit.

The TDLC found that the proposal would lead to a huge change in market structure, by creating a company that would be the dominant player in retailing, involved in virtually all segments and functions: department stores, home improvement stores, supermarkets, real estate and financing. It might extend that power into other retail areas in the future, while the effects of integration could create barriers to entry by others. Tracing the history of retailing, the TDLC noted the advantages of an "integrated retail" operation, in functions such as inventory management, transport, refrigeration and others. It would have greater access to capital and a larger base to cover fixed costs. It would have greater power to negotiate better terms from suppliers. It would have advantages in compiling information about consumers' consumption and credit. It could retain and expand its consumer client base through fidelity programmes and non-bank consumption cards.

The TDLC found that complementary services and sales would create market power and increase the minimum efficient scale of operations, making it more difficult for competitors to enter. Specific risks would include:

- Developing better commercial research on customers' consumption patterns and hence a competitive advantage in identifying market niches unavailable to smaller competitors.

- Using fidelity programmes to increase consumers' switching costs.
- Tied sales strategies among retail segments under their control.
- Economies of scale and scope from savings in complementary costs.

The TDLC described its conception of an "integrated retail market" as "dynamic" in contrast with the "static", segment-by-segment analysis that would have applied under the FNE's Guidelines on Operations of Horizontal Mergers. That analysis would have dealt separately with supermarkets, department stores, home improvement, real estate and financing. Nevertheless, the TDLC did examine each of these segments and concluded that post-merger market concentration would be high and that the advantages of integrating complementary services would raise entry barriers significantly.

The TDLC devoted particular attention to the use of non-bank credit card systems by retailing firms. It rejected evidence of increasing use of similar non-bank credit cards by other retailers. Rather, it contended that the brand value of the card issued by a dominant retailer would create a barrier to entry. The TDLC argued that bank credit cards would become effective competition only if there was rivalry in the retail market, but the combination would reduce that competition.

In effect, the TDLC regarded as sources of market power the same commercial advantages that the merging parties regarded as sources of long run efficiencies. It rejected the parties' claim of pro-competitive efficiencies because they did not show how they would be passed on to consumers.

2.5. Unfair competition

Unfair competition is now covered by a separate law. Article 3 of the Unfair Competition Act of 2007[51] defines unfair competition as any conduct contrary to good faith or morality, which is intended to take customers away from one market player through illegitimate means. This Act lists several examples of such practices: deception (by "passing off" and other means), misleading advertising, defamation of competitors, commercial bribery, misuse of trade secrets and sham litigation filed to exclude a competitor from the market. Claims of unfair competition are decided by general jurisdiction courts. The competition institutions have a subsidiary role. If the general court finds unfair competition practices, it will submit the files to the FNE, for further prosecution under the Competition Act, within the next two years.

Unfair competition is deemed to harm free competition, hence to be a competition infringement, if it aims at attaining, increasing or maintaining a dominant position. The principle was added to the Competition Act in 2003.[52] (There had been no reference to unfair competition in the competition law before, but a number of cases addressed claims about unfairness.) Decisions of

the TDLC[53] have applied this distinction, and unfair competition issues associated with dominance, notably in connection with intellectual property rights in trademarks, have been among the grounds of several of the TDLC's landmark decisions.[54] The TDLC has continued to play an educational role through its decisions on selected unfair competition cases that were dismissed because there were unlikely to be anti-competitive effects in the market. In these cases, despite the lack of anticompetitive effects, the TDLC has assessed whether the defendant's conduct met standards of fair competition.

An advertising case that the TDLC rejected illustrates the connection. In *Laboratorio Lafi Ltda., vs. Laboratorios Pfizer Chile S.A.*,[55] the Supreme Court affirmed the TDLC's denial of a challenge to an advertising campaign that tried to discredit a product. The TDLC found that a misleading advertising campaign aimed at comparing products could violate the competition law if its purpose or effect was to achieve, maintain or enhance a dominant position. But that requires defining a market that might be dominated. In this case, the information submitted on the size of the relevant market was insufficient. Even considering the smallest proposed product market, the defendant was found not to have a dominant position.

Private regulation of unfair competition by trade and professional associations has not been an issue in Chile. The Constitution prohibits demanding membership in an association in order to do business or to develop a profession. Associations thus lack the leverage to make anti-competitive self-regulation effective.

2.6. Consumer protection

Consumer protection policy is the responsibility of the SERNAC (*Servicio Nacional del Consumidor*). There is a close working partnership between the SERNAC and the FNE. The two agencies signed a Framework Agreement of Institutional Co-operation in 2006. This agreement is to provide the FNE with the necessary infrastructure of offices at provincial cities to hear complaints.

The SERNAC has not initiated any proceedings at the TDLC, but it has participated in cases brought by private parties or the FNE, including the recent *Falabella* merger case.

The consumer agency has also participated in cases about antitrust violations in the markets for private health insurance and debt information management.

Box 4. Consumer Views in the *Fallabella* Case

The SERNAC made a presentation to the TDLC in the *Falabella* merger case.[56] The SERNAC presentation focused on the effects that the merger would have on consumers. It presented an analysis of consumer opinion on the retail and credit markets and evidence of reported infringements on both markets, and it predicted that even higher concentration would lead to an increase in the number of complaints.

The presentation began with an overview of consumer opinions on the retail market, based on surveys that SERNAC prepared on a regular basis and on its statistics on the number and characteristics of complaints. It reported that only 25% of consumers surveyed believed that companies were interested in solving their problems, one out of five consumers claimed that department stores had made charges to their bills without their consent and 90% of consumers said department stores' bills could not be understood. SERNAC reported that 23% of complaints it received were related to department stores and supermarkets and estimated that the proposed new company would be the object of the second highest number of complaints in Chile. The presentation argued that the information given by retail companies about the credit conditions offered by their own cards is scarce and vague, and it pointed to large differences between the interest charged by different competitors, and indeed between the interest rates charged by the same department stores to different customers.

SERNAC explained that the information given by department stores and supermarkets about their credit conditions was extremely complicated. For instance, charges are divided into different items (*i.e.* interest rate, commissions, etc.) and these items are expressed in different formats (for instance percentages, indexed units, etc.). Regarding advertising, there were cases in which companies claimed that people could buy without paying interest yet they were charging high commissions for the use of their credit cards. Discounts were offered for purchases with store cards, yet after considering the costs of interest and commissions, the overall prices paid were much higher than for cash purchases.

SERNAC described the two companies' prior violations of consumer protection rules. The Chilean Supreme Court declared void a contract clause used by Falabella that had made consumers made responsible for transactions made with their stolen credit cards, and ordered the company to compensate the consumers with USD 50 000. Several abusive clauses were also found in credit card contracts of D&S, requiring them to contract for insurance and permitting the company to change terms unilaterally.

SERNAC argued that if concentration increased and competition declined further, consumers would be harmed not only by paying higher prices, but also by an increase in consumer harms like these.

Consumers can complain to the FNE or file claims directly with the TDLC. No explicit consumer class action is provided in the Competition Act, but any party that represents a legitimate interest can bring a case. This includes consumer associations, so associations could sue for infringements of

competition rules. A consumer NGO filed a case claiming that a group of banks had colluded to prevent consumers from obtaining better rate credit conditions.[57] Another consumer association case about credit cards complained about infringement of advertising rules that had been issued by the competition authority.[58] Two consumer associations joined the opposition to the *Falabella* merger proposal. They also participated in FNE's unsuccessful challenge to a monopoly granted by law in favour of the Santiago's Trade Association, for managing and operating official debt information system, which charged high tariffs for it.[59]

The number of NGOs devoted to the protection of consumer rights has increased. Public funds have been allocated to the development of such organisations.

3. Institutions: enforcement structure and practices

The 2003 Competition Act made important changes in law enforcement institutions. Enforcement has become more adversarial since the creation of a specialised decision-making tribunal, the *Tribunal de Defensa de la Libre Competencia* ("TDLC"), with the status of a court. Investigations are conducted by an enforcement agency, the National Economic Prosecutor *Fiscalía Nacional Económica*, or "FNE").

3.1. Competition policy institutions

The TDLC, which decides matters and orders remedies and sanctions, is an independent judicial body, subject to the supervision of the Supreme Court of Justice. The TDLC is headed by a Chief Judge or Chairman, and it has four expert members, or *Ministros*. All are appointed for six-year terms. The TDLC has two economists and three lawyers. The Chairman must be a professionally prominent lawyer with ten years experience in competition matters, economic or commercial law. The appointment of the Chairman is made by the President of the Republic from a list of five candidates proposed by the Supreme Court, selected through public examination of their qualifications. Two members are appointed by the Central Bank Council, and their qualifications are subject to public review. The remaining two members are appointed by the President of the Republic, from two lists of three candidates each list, proposed by the Central Bank Council, also selected through public review of their qualifications. Decisions are taken by the entire body, not by panels. Members of the TDLC serve nearly full time, although the post does not exclude other professional activity. They are called to attend meetings or hearings at least three times a week. By contrast, before the 2003 changes, the members of the Commission met one half day per week and served without pay. In addition to

the five judges, the TDLC has a staff of six professionals, lawyers and economists, headed by the Secretary of the Tribunal.

The National Economic Prosecutor heads the FNE, which investigates and brings enforcement cases. The Prosecutor, who must be a lawyer, is appointed by the President of Chile from a list of candidates chosen from a public review process, which is handled by the agency in charge of recruiting high level public officials (*Alta Dirección Pública*). The Prosecutor may be removed, but only subject to a prior motion at the Supreme Court. For budget purposes, the FNE is part of the Ministry of the Economy, but it is organisationally independent of the Ministry. The Prosecutor is "a decentralised public service, with legal status and own assets, independent from any other agency or service," subject to the supervision of the President through the Ministry of Economy, Development and Reconstruction, and is directed by law to "discharge its duties independently," to "defend the interests entrusted to him […] based on his own discretion," and to represent "the general economic interests of the community." (Art. 33)

Before the 2003 reforms replaced the three-tiered system with a two-tiered one, overlaps in the authority to open investigations and a complex set of rules about taking appeals from negative decisions created confusion and invited forum shopping. Simplification of roles has eliminated much of that confusion.

3.2. Enforcement processes and powers

The FNE must investigate all valid complaints. It may initiate an investigation *ex officio*, and it may undertake sectoral investigations of particular markets. No special regulations govern FNE investigations. General rules for administrative processes are set out in the Administrative Procedure Act and the General Basis for Fiscal Administration Act. The FNE also applies an internal manual of procedural guidelines.

In its investigations, the FNE has the power to compel the production of documents and the co-operation of public agencies, state owned entities, private firms and individuals, and the power to request information from any government agency. It can summon witnesses to testify, including the defendant's representatives, managers and advisors or anyone with potential knowledge of an infringement. It can inspect the premises of the investigated businesses on a voluntary basis. The 2009 law now gives it stronger powers of investigation, such as a "dawn raid" and wiretapping. These require authorisation from the TDLC and an order from a judge of the Court of Appeals.

When the FNE initiates an investigation it must provide notice to the target, unless the TDLC waives this requirement. Upon notice to the Chair of the TDLC, the FNE may declare an investigation confidential. This happens generally when notice may jeopardise the investigation.

Interference with an FNE investigation or refusing to submit information without cause is punishable by imprisonment for up to 15 days. Disputes over compliance with investigative demands are decided by the TDLC.

Confidentiality protection for information obtained during an FNE investigation is guaranteed in the Competition Act. The Competition Act requires that FNE's professionals keep confidential the information obtained in their official capacity (Art. 42). After a proceeding is initiated at the TDLC, the confidentiality or restricted nature of the information and documents is determined by the TDLC on a case by case basis. Upon request of a party or on its own initiative, the TDLC may decide to keep such data or information confidential if disclosure may cause harm to the party or to competitive conditions in the relevant market. The TDLC will order the affected party to file a non-confidential version of the data or information. The TDLC recently adopted rules about confidentiality of the information provided during its proceedings (*Auto Acordado* No. 11/2008). Public officials in possession of confidential information must preserve such confidentiality, except that the information may be used in enforcement activities and in proceedings before the TDLC.

The results of an FNE investigation be a filed report, which is an administrative decision, or a report to the TDLC in a proceeding (either adversarial or non adversarial) in which the TDLC asks for the FNE's opinion, or an *ex officio* charge or complaint ("*requerimiento*") seeking a fine or other remedy. All of these are a matter of public record.

An "adversarial" proceeding at the TDLC begins with a charge by the FNE or a complaint by a private party. A complaint must be answered within 15 working days; that deadline can be extended to 30 days. The TDLC will then summon the parties for conciliation. If conciliation fails, there is a 20-day "discovery" period. In the first five days of this period, interested parties may designate witnesses to testify. Other forms of evidence may be submitted throughout the period. Testimony is heard by a single judge, in sessions that are typically one half-day per week and per judge. Thus, despite the 20-day limitation, it may take several weeks to take all of the testimony. The testimony is transcribed and becomes part of the record of the case, together with the parties' documentary submissions and any evidence that the TDLC may directly request. At the end of the discovery period, the judge will convene the parties

for a hearing. This hearing consists of oral argument by counsel for the parties. The TDLC then issues a decision. The target for decision is 45 days, but this is sometimes extended.

A "consultative" or non-adversarial procedure before the TDLC is a way to determine the legality of contracts or practices. It can be initiated by private parties or by the FNE. One application of the consultative procedure is to review proposed mergers, but it can also be used to examine contracts or other conduct. A public notice in the Official Gazette invites participation of interested parties and others potentially interested in the competitive conditions of the relevant market. The TDLC will then hold a public hearing before reaching a decision. In a consultative proceeding, the TDLC may issue a mandatory order imposing conditions. The order might require partial divestiture, require parties to offer products or services under certain limitations or prevent the merged entity from participating in certain markets. The TDLC may block a merger outright, even in a consultative proceeding, if there is a serious threat to competition.

In adversarial cases, the TDLC can impose fines or behavioural or structural orders. Orders can amend or eliminate anticompetitive acts, contracts, agreements, schemes or arrangements in violation of the Competition Act. The TDLC can also order divestiture or dissolution of partnerships, corporations or business companies whose existence rests on the existence of anticompetitive arrangements. Administrative fines may be imposed upon the infringing legal entity and on its directors and managers and persons who participated in the infringement. The amount depends on the financial benefit received from the infringement, the severity of the breach and the offenders' recidivism. The maximum fine is 20.000 tax units (approx. USD 15 million). Failure to pay the fine is punishable by imprisonment up to 15 days or additional fines.

Sharply higher fines have increased public awareness of competition law and enforcement. Between 1974 and 2002, total annual sanctions imposed averaged about USD 13 500 (after Supreme Court review), and the penalty in a monopolisation case was about USD 6 000. In contrast, between 2004 and March 2008 the annual total averaged about USD 840 000, or 62 times greater, while the typical penalty imposed was about USD 180 000, or 30 times greater. The most dramatic step was the fine in the flat panel TV war, where the sanctions totalled USD 10 million. That amount is ten times greater than all of sanctions imposed during the 28 years from 1974 to 2002.

There is now a leniency programme. The Competition Act provides for an anticipated reduction of administrative fines or full immunity from antitrust prosecution in exchange for collaboration in cartel investigation and detection.

Under the legislation adopted in July 2009 and effective in October, the first party in a cartel to come forward with information about it can obtain total immunity to, provided that the information is precise and truthful, subject to verification and sufficient to back FNE's claim or *requerimiento*. In addition, the party must refrain from disclosing any information until the FNE files its claim before the TDLC or dismisses the case altogether, and it must refrain from engaging in the agreement any further, unless the FNE deems such involvement is necessary for attaining the objectives of the investigation. Other members of the cartel could receive a reduction in fine, up to 50%, if they co-operate with the FNE with new information useful for the prosecution.

The 2009 law has also given the FNE the power to obtain evidence through a dawn raid and the power to impound documents and to intercept communications with an express authorisation issued by a special judge of the Court of Appeals. Under the 2003 Competition Act, the FNE could open a procedure to challenge mergers except through an adversarial procedure. The amendment allows the FNE to initiate a non-adversarial procedure, which could be used as a way to challenge future mergers. It also increased the maximum fine from 20 000 tax units (USD 15 million) to 30 000 tax units (USD 22 million).

Proceedings are faster than they were before 2004, when the members of the Commission only served part-time. However, there can be long periods between the designation of witnesses and the taking of testimony, between the taking of testimony and the hearing, and between the hearing and the final decision. Even cases brought by the FNE are sometimes subject to long delays. Once the FNE has decided to bring an adversarial case before the TDLC, it can take between six and eighteen months before a decision is reached.

Decisions are publicly available, including ones in older cases. A private firm has published the Competition Commission's decisions up to 2000. The FNE has prepared a database containing summaries of 736 Competition Commission rulings and 1287 Preventative Commission rulings, which is available on its website. A database is also available on the FNE website of all decisions involving competition matters rendered by the Supreme Court since 2004.

3.3. Judicial review

The Supreme Court decides appeals from final TDLC decisions by a special appeal ("*recurso de reclamación*"). Another procedure at the Supreme Court, a special disciplinary motion ("*recurso de queja*"), has never been used for a TDLC decision. The scope of Supreme Court review is broad. The

Supreme Court decides questions of interpretation of law ("*casación"*) and also reviews the substantive merits. The Supreme Court's involvement in competition matters has increased since 2003, in part because the TDLC has issued more decisions. Subjects of the Supreme Court's decisions have included the standing of parties to request review, the scope of the TDLC's powers, the merits of the TDLC's fact analysis and the evidence submitted by the parties, the interpretation of substantive law and the sufficiency of sanctions and other remedies.

The Supreme Court is a non-specialised tribunal. Competition cases are heard by the Third Chamber on Constitutional Matters. Competition cases represent a very small share of this chamber's work load, though; rather, the bulk of it is cases involving administrative law. The Supreme Court is aware of the importance of incorporating economic analysis; however, it lacks expertise and technical capacity, as well as the power to request the opinion of specialised economists. About 95% of the TDLC's cases appealed before the Supreme Court have been upheld. This success rate may be due to the solid foundations of the TDLC's decisions, or it may be due to limits on the Supreme Court's capacity to make a full review of the substantive economic merits.

Divergence between the enforcement bodies and the Supreme Court has created some uncertainty and instability. The treatment of predatory pricing in *Producción Química y Electrónica Quimel S.A., vs. James Hardie Fibrocementos Ltda.* highlights the conflicting economic views between the Supreme Court and the TDLC. In cartel cases, Supreme Court decisions have erected a high standard of proof for cases based on circumstantial evidence.

3.4. Other means of applying competition law

Private parties can seek relief by filing a complaint at the TLDC. The TDLC must notify the FNE about the suit. The TDLC can issue an order to correct or cease conduct, but it cannot award damages.

Damages caused by a violation of the Competition Act can be recovered through a suit filed in a lower district court, but only after a decision by the TDLC finding the violation. Making the civil suit depend on the TDLC decision is an innovation introduced in 2003. Now, the only issues in the civil trial are the amount of damages and the link between the damage and the violation. The plaintiff does not need to prove the breach of the competition law, because that is established by the TDLC decision. So far, there have been no decisions involving the award of damages following a TDLC decision. Under the old law, there had been some private litigation about competition matters in the 1990s.

The 2003 Competition Act eliminated criminal prosecution, while increasing the maximum administrative fine substantially, from 10 000 monthly tax units to 20 000 annual tax units, or a factor of 24.

3.5. International issues and enforcement co-operation

The Competition Act does not explicitly address the issue of extraterritoriality. Decisions under the previous competition law declined to extend liability to firms legally incorporated abroad whose actions had an impact in the Chilean economy.[60] There have been few cases in which extraterritorial application could have been an issue. This principle is currently being considered in a claim brought by the FNE about a merger transaction.[61] The TDLC has not issued a ruling yet.

Free trade agreements with several countries include a chapter on competition policy that promotes co-operation between competition agencies. Co-operation is achieved through memoranda of understanding or co-operation agreements. The FNE has signed agreements with Canada, Costa Rica, Mexico, Brazil and El Salvador, and it is considering initiating negotiations for the adoption of new agreements with several other countries. These agreements all include provisions about technical assistance, and most of them also have provisions about co-operation and information exchanges for enforcement.

The FNE must comply with domestic rules limiting the extent of information exchanges. There are legal constraints imposed on government agencies against the full disclosure of information which may be regarded essential for the protection of private parties' privacy. These rules are set forth under the Constitution (Arts. 5 sub-sections 2, 8, 19 No. 4, 19 No. 12), the Competition Act and the Law 19.653 of 2001. Under the Constitution, all information is public unless it is expressly declared confidential under special law, because it affects the rights of individuals (Art. 8 of the Constitution). Art. 42 of the Competition Act guarantees the protection of confidential information obtained in an FNE investigation, requiring FNE professionals not to disclose information obtained in their official capacity. Art. 13 of the Law 19.653 of 2001 establishes the administrative procedure by which information which is in the hands of government agencies will be disclosed. A private party that considers that such disclosure may impair its rights can challenge the disclosure, under a special judicial procedure set forth under Art. 14. Thus, confidential information obtained from a private party could not be exchanged without giving the party this opportunity to contest.

The FNE and foreign competition agencies often have informal contact during investigations. Both the FNE and the TDLC have made information

requests in connection with specific cases at the TDLC, although the experiences have been few.[62]

Foreign entities receive the same treatment as national entities in competition enforcement. The principle of non-discrimination is supported by several aspects of the Chilean legal system, extending back to the Civil Code enacted in 1855. The 1980 Constitution provides for specific actions against discriminatory treatment by public authorities. This obligation exists in many international agreements signed by Chile particularly in the field of foreign investments.

Trade policy and effects are considered in competition decisions. Access to foreign supply is usually incorporated in competition analysis, in the definition of markets on the supply side. The FNE Guides on horizontal mergers consider the effects of operations overseas that have an impact on the Chilean economy. No significant difference is made between suppliers whose production facilities are located in Chile and those located abroad. Tariffs and other foreign trade regulations are taken into account in the analysis of market entry. Recent investigations conducted by the FNE in the steel sector and in the yeast and cement industries have taken these elements into consideration. Barriers to international trade are key elements of market measurement under the FNE's Guide for horizontal merger analysis. Some cases decided by the TDLC have explicitly discussed questions of international trade barriers. For example, in a case involving the shoe industry, the TDLC stated that in view of the lack of significant trade barriers, it is unlikely that the defendants may attain a dominant position in the market, either at present or in the future.[63]

Barriers imposed by trade measures such as antidumping or countervailing duties are also taken into consideration as a source of anticompetitive restraints in the domestic economy. Potential conflicts between trade and competition policies are mediated through an institutional overlap. The National Economic Prosecutor presides over the commission that handles international trade disputes. This commission makes recommendations to the President of the Republic for the adoption or removal of trade remedies. The Prosecutor's key role in this commission could ensure consideration of how trade remedies could affect competition in the domestic economy. To be sure, the Prosecutor's discretion is limited by the law governing this commission.

3.6. Resources and priorities

Since 2004, the staff level at the FNE has increased from about 50 over 80 people, while the budget has increase by about 30%. With more resources and capacity, it has taken more actions and gained in public visibility. In 1999,

salaries were raised in order to retain qualified personnel and compete more effectively with the higher salaries in the private sector. The FNE is also hiring more experts as economic or legal consultants.

The FNE has two main enforcement departments. The Legal Department is responsible for conducting investigations. The Economics Department has fifteen economists, who work with lawyers on investigations. In addition the Research Department, with a staff of nine, provides analytical support, does market studies and research and deals with regulatory issues, competition advocacy and international relations. Also, there is an Administrative Department in charge of human resources and a Public Relations or Institutional Department.

Table 1. Resources, TDLC

	Person-years	Budget (USD thousands)
2007	20	1 243
2006	20	1 173
2005	19	943
2004	18	408

Source : FNE, 2008

Table 2. Resources, FNE

	Person-years	Budget (USD thousands)
2009	84	5 189
2008	84	4 520
2007	63	3 684
2006	59	3 246
2005	54	2 790
2004	52	2 824
2003	56	2 100

Source : FNE, 2008

The TDLC has remained about the same size, but its budget has tripled, as it has improved its technical capacity. The TDLC invests significantly in human resource development for its staff of industrial organisation and competition law professionals. Applicants for a position at the TDLC must speak English fluently. Having this capacity increasing international exposure, compared to its predecessor, the Competition Commission.

FNE officials increasingly participate in training programmes, both national and international. A specialised library has been opened, in competition related matters. The FNE has developed a new website, informing the public

about its activities. In general, there has been a substantial improvement on both the physical infrastructure and human resources development.

The FNE has adopted performance standards about timing and the preparation of its presentations to the TDLC. Its agenda for strengthening enforcement further includes studies for increasing the effectiveness of penalties imposed, studies about techniques for challenging cartel behaviour, examination of bid rigging problems, a project to improve the data processing system, studies about the convenience of adopting guidelines in specific matters and improvement of horizontal merger guidelines.

Table 3. Trends in Competition Policy Actions

	Horizontal agreements	Vertical agreements	Abuse of dominance	Mergers	Unfair competition
2007: Matters opened	10	3	66		
Sanctions or orders sought	3	2	6		
Orders or sanctions imposed	1		3	2	2
Total sanctions imposed			USD 630K		
2006: Matters opened	5	4	43	12	4
Sanctions or orders sought	1		12	4	
Orders or sanctions imposed	2	1	4		1
Total sanctions imposed	USD 2 689K		USD 1 474K		
2005: Matters opened	3		36	6	5
Sanctions or orders sought	2		6	1	1
Orders or sanctions imposed			5	1	5
Total sanctions imposed			USD 685K		USD 42K
2004: Matters opened	7	2	36	3	6
Sanctions or orders sought	2	6	6	2	3
Orders or sanctions imposed			3	1	1
Total sanctions imposed			USD 76K		USD 10K
2003: Matters opened	5	1	25		8
Sanctions or orders sought					
Orders or sanctions imposed					
Total sanctions imposed			USD 381K		

Source : FNE, 2008

Despite recent efforts to make cartel enforcement more important, the proportion of abuse of dominance cases remains high. Improvement of anti-cartel policy was a performance goal for 2008. This emphasis is reflected in several initiatives such as the set up of a cartel task force within the FNE, implementation of a programme aimed at challenging bid rigging in procurement processes and support for the legislative proposals strengthen investigative powers and sanctions and authorise a leniency programme.

The FNE is also considering the adoption of stricter policies on the admissibility of claims that parties submit, in an attempt to adopt a policy of early dismissal of cases that do not raise serious competition issues.

4. Sectoral regimes and exclusions

The scope of application of the Competition Act is broad. In general, it contains no exclusions or exemptions from its coverage, nor are general exemptions authorised under other regulation. Before the 2003 amendments, the executive branch could grant monopolies on national interest grounds, after the approval of the Competition Commission. The TDLC no longer has such a power to approve or disapprove a monopoly grant, while the Competition Act forbids the government from granting concessions or authorisations that could create a monopoly, unless the specific grant is authorised by law (Art. 4).

State-owned or managed enterprises receive the same treatment as private parties, and their conduct is subject to the Competition Act and enforcement. Entrepreneurial activities by non-profit government or state entities may also be examined by the TDLC. Many cases challenging restraints or abuses by government-connected entities have been taken to the TDLC. Most have been dismissed on the merits, as the TDLC found no violation, while upholding the principle that these operations were subject to the Competition Act. If the State violates restrictions on its entrepreneurial activities, private parties affected can obtain redress in the courts, through constitutional appeals. Some specialists have argued that the TDLC should also apply these constitutional principles. One recent decision might support this approach: a government agency engaged in controlling forest fires was enjoined from unfair competition with a private company that leased helicopters for that purpose, but the TDLC dismissed the claim that its activity was predatory.[64]

The Competition Act provides no special treatment to small and medium sized enterprises. In dealing with complaints about "buyer power," the TDLC has emphasised that the goal of competition law is efficiency.[65] As small business concerns have become less significant in competition law enforcement, other institutions have moved to support SMEs. The Ministry of Economic

Affairs is responsible for SME promotion and for co-ordinating programmes to support SMEs. The relation between SMEs and competition policy has been the subject of two Ministry studies. The first one reviews economic theory and law about on vertical restraints and discrimination in the down-stream relation between large enterprises and SMEs. The second one analyses the regulatory framework and instruments to protect SMEs from commercial abuses.

4.1. Sectoral issues and special regimes

General observations

Sector regulations use familiar tools to correct resource misallocation created by natural monopolies such as network facilities in public utilities. Price regulations apply in the electricity sector.[66] Entry restrictions apply to water supply and to radio spectrum concessions. Market structure regulation limits vertical integration among public service companies, and the recommendation of competition authorities led to separation of local and long distance telecom services into different companies.[67] Mandatory interconnection applies where control of essential facilities by a dominant carrier or network operator may affect whether downstream or upstream firms can compete effectively, as for electricity generation and distribution and fixed telephone services. Regulation allocates resources, such the radio electric spectrum or the use of water rights for generating electricity. Quotas allocate property rights to prevent the over exploitation of resources, such as the auctions for tradable fishing rights. With less justification, regulation also controls entry into the taxi market: a 2005 statute froze the number of taxis until 2010.

Competition authorities and sector regulators in Chile have a history of co-operation. There are no set arrangements or formalities governing institutional co-ordination, and co-operation is not mandatory, except for a few situations. The TDLC occasionally hears cases involving jurisdictional conflicts with sector regulators. Where sector regulations impose legal barriers on entry or exit, the FNE or the TDLC may examine the regulations to ensure they do not create unnecessary restraints upon competition. The FNE and the TDLC may ask the regulator to re-examine the regulations if they would threaten competition unnecessarily. If the regulator rejects the FNE's petition, the FNE may bring a formal request before the TDLC, and the TDLC can issue recommendations to amend or eliminate the regulations. In *FNE vs. the City of Curico*,[68] the FNE requested elimination of measures restricting competition in a tender for collection services, transport and garbage disposal. The TDLC ordered the City of Curico to pay a symbolic penalty of five tax units. A conflict between the FNE and the air transport regulator motivated a suit which ended in

the condemnation by the TDLC of practices concerning the public tender of airline routes between Santiago and Lima, Peru.[69]

The sectors that will be examined in this section are those where regulatory changes have taken place either in the regulatory framework affecting competition, or where important decisions issued by the TDLC have created new rules governing competition.

Electric power

The Electricity Law was enacted in 1982.[70] It envisages industry unbundling, competition in power generation, a mechanism to co-ordinate load dispatch and the regulation of distribution tariffs and transmission fees. The market is regulated by the National Energy Commission and the Superintendency of Electricity and Fuels, acting under a 1998 regulation that sought to increase transparency and competition.

Electricity regulation has been revised since 2004, largely to clear up some problems that might have discouraged investment in transmission or generation and to create new mechanisms for dispute resolution. The most important modifications were Law 19.940, known as *Ley Corta* (Short Law), and Law 20.018, known as *Ley Corta II* (Short Law II). The main purpose was to clarify how investors in transmission assets could obtain a return on their investment.

Generating companies sell energy to "unregulated clients" through an entity comprised of the main operators, the *Centro de Despacho Económico de Carga* ("CDEC"). This entity schedules delivery in favour of the most efficient production process. A spot market was set up to enable generators to freely contract with other generators for physical deliveries ordered by the CDEC. Long term contracts between generators and distributors are allowed because they promote investments and decrease potential entry barriers.

Price regulation at the consumer level is done in accordance with the so-called hypothetical efficient company model. Consumer tariffs are reset every four years for all the distribution companies. Tariffs are calculated on the basis of the replacement value of "model companies," which are constructed on the basis that services are provided efficiently in the market by companies that earn a 10 percent rate of return. Consultants hired by the regulator and the companies prepare cost studies. Their results are averaged, with two-thirds weight given to the study for the regulator and one-third weight to the study for the companies. A "profitability check" is done to ensure that the new tariffs would yield an actual rate of return of from 6–14% for the companies taken together. If not, the

final tariffs are proportionally adjusted so that the actual rates of return fall within this range.

Transmission fees, prior to the 2004 amendments, had to be agreed between the owner of the transmission facilities and the company interested in interconnecting to them. The law established the technical and economic criteria and the procedures that had to be used by the two parties to determine the transmission fees, which had to be renegotiated each five years. This model sets a binding wholesale price, which is recalculated every six months, based upon mid-term marginal cost estimates, whereas the electricity transmission charge encourages the efficient location of the generation plants. If an agreement was not reached, any of the parties could request that a panel of experts be created to resolve the dispute. The performance of these panels has varied because the regulations were unclear.

The principal issue of interest remains the vertical integration of the industry. ENERSIS controls CHILECTRA, the electricity distributor in the Santiago metropolitan area, and it also owns 60% of the stock of ENDESA, which operates on the national level in generation, and previously also in transmission, through the ownership of TRANSELEC. After several unsuccessful attempts to break up this combination, the FNE obtained in 1999 improved general instructions and an order from the Competition Commission that ENDESA and CHILECTRA could not merge or have interlocking directorates and must be audited by different firms.[71]

The latest statement about competition standards in this industry came from the TDLC. In 2007, the TDLC approved the petition of two electricity generating companies to jointly build and operate five hydroelectric power plants in the south of Chile. The authorisation set parameters for consultants and the new joint venture to determine the transfer price. It ordered that the transmission facilities pricing (or prices paid by third parties) should be based on objective and non-discriminatory criteria. And it ordered that all contracts for the transmission line design should consider a minimal period to receive petitions about line transmission capacity from independent parties.[72]

Telecommunications

The Telecommunications Law was enacted in 1982. Tariff regulations were introduced in 1987. Tariffs are set freely in the market except when access charges are involved or when the TDLC states that specific tariffs have to be regulated. The TDLC has ruled that consumer tariffs only should be regulated in the case of dominant fixed-line telephone companies, that is, Telefonica CTC in most of the country and Telsur and Telcoy in some southern areas. The agency

in charge of reviewing tariffs and access charges is the Undersecretariat of Telecommunications (SUBTEL).

Reviews of regulated tariffs and access charges are done every five years on the basis of the "model company approach," that is, estimating the costs that an efficient company would require to provide the services. The specific criteria and assumptions used in the tariff study are defined in the terms of reference set by the regulator based on a proposal filed by the regulated company. If the company disagrees with the terms of reference set by the regulator, it can request the opinion of a panel of experts on the subject. The final decision is made by the Undersecretary of Telecommunications.

In the initial years following the privatisation of the industry, the key competition issue was whether competition would be impaired if local telephone companies were permitted to offer long distance service. This problem had emerged intermittently since the privatisation of the industry took place, in 1988, mainly due to the attempts of Telefonica, owner of Compañia de Téléfonos ("CTC"), (the local telephony services provider), to gain control of *Empresa Nacional de Telecommunicación* ("ENTEL), (the domestic and international long distance service provider). By 1993, the Supreme Court had concluded that local and long distance should not be separated, because doing so would be difficult and developing technology seemed likely to eliminate the rationale for such separation. It ruled, however, that entry into a new market must be by a separate corporate subsidiary.[73] A later amendment to the law added the Commission's principles, beginning with the obligation of the local service provider to establish a "multicarrier system" so that the user could choose his or her long distance provider. In 1998, the Competition Commission concluded that national and international long distance service no longer needed price controls. Later (2001 and 2008), the competition institutions also determined how the telecom regulator allocates spectrum in the mobile telephony market. In this capacity, the Competition Commission further ordered that the regulator use an auction to decide which firms should obtain rights to the spectrum.

The most important issue under discussion is the possible deregulation of fixed line telephone services. Competition problems arising since 2004 have primarily dealt with interconnection. A TDLC decision in 2004 concerned the approval of a merger between two cable operators. The proposal was subject to the condition of the merger offering open, non-discriminatory access to broadband internet services, at competitive prices.[74] The TDLC also fined a telephone company for abuse of dominance. In this case, the telephone company, in the interest of protecting its business, denied wholesale clients the

use of its broadband platform to provide IP voice service. The TDLC ordered the company to modify the restrictive clauses.[75]

Water and waste disposal

Reform of the water supply and sanitation sector involved the enactment of four regulatory laws in the late 1980s about the concession regime, the role of the Superintendency of Sanitation Services, the tariff regime and the subsidies for low-income consumers. Regulation of water and sewerage has not changed since 2004. Local service is the responsibility of a single monopoly, which may be public, private or mixed. Department of Public Works grants concessions to firms on the basis of competitive bidding.

In 1997, the Competition Commission approved the acquisition of a water company by ENERSIS, the dominant electricity supplier. The Commission recommended that the conglomeration of public utility companies should be subject to closer government surveillance. Then, in 1998, it promoted the enactment of the Sanitary Services Act, which increased transparency, and sought to pave the way for the future introduction of competition where possible by restricting integration among public service companies operating in the same area.

The law also encourages competition by requiring water distribution and sewerage collection firms to permit other water production and sewerage disposal firms to use their network and contract directly with "large consumers." The TDLC is responsible for deciding whether utility concessionaires are natural monopolies and hence subject to maximum tariffs and other rules. The Superintendency applies the efficient company model to fix rates. The Sanitary Services Superintendency fixes the maximum rates and may authorise utilities with fewer than 25 000 water connections to provide services jointly if this results in efficiencies that lead to lower rates.

The FNE has been very active in bringing cases involving the conditions of tender bids for waste disposal services. In 2006 it brought a claim before the TDLC against the biggest four water supply providers of Chile for abusing their dominant position in the imposition of abusive charges to non-urban developers users. The TDLC has adopted, at the FNE's request, a set of general instructions about tendering in this sector.[76] These instructions are intended to set the basic criteria for submitting tender bids in this market, in order to ensure proper publicity, transparency and market access and the existence of general, uniform and non-discriminatory objective conditions to promote participation of as many bidders as possible and the entry of new players at different stages of treatment process for household solid waste. The instructions also state that

companies providing services in the intermediate or late stages of household solid waste management must give equal treatment to all users and customers that require such services, whether or not they are their competitors, refraining from any arbitrary discrimination.

5. Competition issues in regulatory and legislative processes

Competition advocacy is conceived in broad terms. Advocacy activities can include testifying, making submissions or issuing papers to the legislature, ministries, courts, sectoral regulators or municipalities, or making speeches to professional and trade associations, academic institutions and conferences and writing articles for publication. Even holding press conferences and publicly explaining the importance and implications of competition and market principles could be considered advocacy.

The Competition Act provides specific advocacy powers. The FNE may pursue non-contentious advocacy before a sector regulator or public authority. If the regulator rejects the FNE position, the FNE can file proceedings before the TDLC. The TDLC can also act on its own initiative to issue recommendations to eliminate regulatory constraints on competition.

In some sectors, the TDLC also has the power to determine when competitive conditions require regulatory intervention to set prices. The competition institutions' review of the competitiveness of the electricity and telecom markets determines whether rates are free or fixed. A proceeding to revise price regulations in the telecom industry has not been completed, after a decision from the regulator indicating its intended objective of liberalising this market.[77]

The FNE assesses the potential impact on competition of legislative proposals. It may do so in response to requests from Congress or individual congressmen, or on its own initiative.

Non-contentious advocacy by the FNE is prominent in telecommunications, electric power and public tendering of government concessions. In telecommunications, the FNE has prepared several reports at the request of the sector regulator, on digital TV regulations, the creation of a technical dispute settlement body, amendments to licensing rules and a general study on the barriers to the development of telecommunications. In these reports, the FNE has encouraged the telecommunications regulator to lift barriers that reduce consumer welfare. A notable example is the FNE's proposal, approved by the TDLC, to unblock mobile phones and eliminate a legal provision that prevented users from switching to alternative service

providers (SIM blocking). The telecommunications regulator accepted the FNE's opinion, and the legal barrier was eliminated.[78]

In public concessions, the FNE recommended amendment of the new tariff system that had been introduced by the Ministry of Public Works to apply to Santiago's airport. The new tariff changed the terms of the concession contract by tying the lease of the jet ways and aircraft to the electricity supplying service. The FNE concluded that the new tariff system unreasonably increased the costs and created a barrier against the users of the airport (*i.e.* airlines), in favour of the concessionary firm, SCL. The regulator accepted the opinion of FNE, and eliminated the provisions of the addendum that tied the two services. Similarly, in an older case involving the use of airport infrastructure, the Preventive Commissions proposed establishing limits on the degree of vertical integration between airport concessionaires and airlines. The FNE sought to prevent the limitation of the airport concessions in favour of airline companies. Following these recommendations, the regulator issued a notice excluding airline companies from future tendering processes, during the pre-qualification stage of the bid.[79] A novel initiative about tendering involved university entry examinations. The FNE recommended that the *Ministerio de Educación* and *Consejo de Rectores* introduce minimum quality standards and select exam provider firms on the basis of their lowest prices, in order to introduce competition at the tender for selecting the exam provider

Sometimes regulators reject FNE proposals. The FNE then has the option of bringing a case against the regulator before the TDLC. An example of this process is the decision of the *Junta de Aeronautica Civil*, the regulator of international air transport, not to adopt an open skies policy. The FNE initiated an adversarial procedure against it before the TDLC to force the opening of the market.[80]

The TDLC may request any public body to exercise its regulatory powers to protect competition or to amend or repeal of any anticompetitive statutory or regulatory provision. The TDLC can make recommendations to President of the Republic, proposing the elimination of legislation or rules that impair competition. It may also propose adopting new regulations or laws needed to encourage competition or to regulate the exercise of certain activities which take place under non-competitive conditions (Art. 18.4, Competition Act).

In the telecommunications industry, the TDLC ordered the regulator to reduce final consumer switching costs, which prevented telephone companies from offering their service in their competitors' phone units. It recommended that the regulator order mobile phone companies to make open offers of wholesale facilities for resale, in order to develop a mobile phone retail

market.[81] It issued several suggestions about the optimal voice-over-internet service regulation, aimed at ensuring free competition.[82] In a decision, initiated at the request of the regulator for an opinion about the allocation of rights under a "beauty contest proceeding", the TDLC ordered mobile number portability.

TDLC recommendations have covered a wide range of other sectors. The Customs Agency (*Servicio Nacional de Aduanas*) followed a TDLC recommendation aimed at promoting competition between storage warehouses operating inside and outside the airports concessions. In the fuel distribution industry, the TDLC recommended that a group of wholesale fuel distributors to grant potential competitors non-discriminatory treatment in access to a joint wholesale fuel distributor, and it recommended legislation to grant open access in the use of joint fuel transportation facilities.[83] The TDLC has also given made recommendations for competitive tendering of contracts at airport and seaport facilities,[84] and for rules about the limits to vertical integration applicable to seaports[85] and airports[86]. The TDLC proposed new regulations for interconnection to the electricity network as well as to encourage electric generation companies to participate at electricity supply tendering processes. These rules are intended to set requirements for bidding for supply contracts aimed at reducing barriers to entry.[87]

The TDLC has issued general instructions in the market for the collection, transportation and disposal of urban solid waste. General Instruction No. 1 orders the regulator to separate, for tendering purposes, competitive services (garbage collection or transportation) from non-competitive ones (land facilities offering for final garbage sewage and disposal). This measure is intended to prevent market foreclosure through leverage.[88]

The FNE has developed joint initiatives with the OECD to promote awareness of competition issues. In 2008, the FNE launched the "OECD/FNE programme against bid rigging in public procurement". The FNE has made several public appearances and presentations to increase awareness about the negative consequences of bid rigging, and to design mechanisms for preventing and detecting this conduct. A new banner at the FNE website publicises this initiative. Discussions about bid rigging were also highlighted at the FNE's annual Competition Day.

6. Conclusions and assessment

This report has examined Chile's competition law and policy in light of the accession roadmap[89], to assist the Competition Committee in its assessment of Chile's willingness and ability to assume the obligations of membership in the OECD concerning competition policy. The concluding section summarises the

findings under the three dimensions that the Committee has prescribed for its assessment: (1) the current situation of competition policy and enforcement, (2) the magnitude and direction of change in competition policy over the last 5-10 years, and (3) the extent of conformity with the particular recommendations in the competition policy instruments that are referenced in the roadmap.

6.1. Current competition policy and enforcement

The substantive rules of Chile's competition law are unusually general but nonetheless sufficient to support effective policy and enforcement. Content is being supplied by case experience. The simplicity of Chile's Competition Act invites application of economic analysis to elaborate how it applies. A single, general Article of the Competition Act sets out all of its substantive principle. Three subsections with examples of anti-competitive, prohibited conduct correspond to familiar categories of competition law: restrictive agreements and concerted actions, unilateral abusive dominance and predatory exclusion. Merger control is not mentioned, but statutory support for merger control decisions is inferred from the prohibition against any conduct that "tends to produce" anticompetitive effects. Greater clarity and detail about merger rules and processes would be desirable.

Enforcement is paying much more attention now to cartels. High-profile action has gotten the attention of the business public. In 2008, the largest fine ever applied was confirmed by the Supreme Court, in the Flat-Panel TV price war case, and the TDLC issued its most far-reaching decision rejecting a merger, in the *Falabella* case. At the end of the year, the FNE filed charges about price co-ordination by retail pharmacies. Nonetheless, abusive dominance remains the most important area of antitrust enforcement. Decisions of the TDLC have elaborated what the law covers as abusive dominance, applying an economic approach which asks whether abusive conduct is "objectively" exclusionary or exploitative. The TDLC will not construe as abusive conduct which is economically efficient.

The allocation of enforcement tasks between two separate, independent investigative and decision making authorities is working, so far. The TDLC has been efficient and productive, issuing about 20 decisions per year, most of them in adversarial proceedings. Economic analysis underlies decisions in a growing body of case law that could explain in more detail the scope of doctrines that are implied in the text of the statute. Flexibility comes at a cost, though, of unpredictability. The *Falabella* case shows how economic creativity creates legal instability. In finding a relevant market of "integrated retail", which included department stores, malls and related consumer credit, the TDLC

decision acknowledges the significance of economies of scope in retailing. But it also departs from the traditional, more limited approach of previous decisions and from the methodology of the FNE's Guides.

Uncertainty about what the TDLC will do is magnified by the inconsistency of the Supreme Court's directions. The Supreme Court lacks capacity to deal with complex economic issues itself, and its disagreements with the TDLC reveal a lingering judicial preference for decisions in terms of legal categories and rules. Uncertainty remains about the methods for defining markets, the legal standard applicable to mergers and the evidentiary standard applied to hard core cartels. The standards applied to predatory exclusion are unclear. Notably, a Supreme Court decision implies that pricing could be found to be predatory in the absence of market power, treating it as a nearly *per se* offence.

Enforcement guidelines can clarify the scope and direction of policy. Guidelines can respond to criticism that standards are not transparent or comprehensible. FNE has issued guidelines about mergers, but the TDLC, as an independent judicial body, is not bound to follow such instruments. To be most useful to help businesses in Chile comply with the law, guides about interpretation and analysis should follow the decision practices of the TDLC, as well as rely on models and learning from the international competition community.

6.2. Trends: magnitude and direction of change over 5-10 years

Enforcement has increased dramatically since legislative changes in 2003 strengthened sanctions and made enforcement an adversarial procedure. The 2004 LACF Review[90] noted there was little enforcement, except in infrastructure, and weak sanctions. It also advocated expanding the law's section that describes prohibited conduct. Following that recommendation, the 2003 Competition Act introduced three categories as examples of anti-competitive, prohibited conduct. Since 2003, the number of formal cases and the level of sanctions have both increased substantially. Recommendations, once the usual outcome of an enforcement proceeding are now used only for policy advice and advocacy.

The structural changes in institutions followed the recommendations made by the 2004 LACF Review. The most important was the creation of the Tribunal to replace the Competition Commission and the substitution of a two-tiered adversarial system for the three-tiered advisory system. The TDLC performs both the decision making and advocacy roles that had previously been performed by different entities. Compared to the old Commission, the TLDC

has more independence, more qualified members and a larger budget, and its members work on a more regular basis, from three days per week to full time. As a judicial body, it has higher status and power. The structural changes made the system more transparent and more effective. The FNE and TDLC increasingly rely on international experiences and authorities to support their decisions. The TDLC has rejected the legalistic approach that the 2004 LACF Report associated with a preference for *per se* rules. Literal interpretation has yielded to reliance on economic analysis. In the area of vertical restraints, for example, where the legalistic approach had emphasised "objective" discrimination, decisions now rely more on considerations of market power and economic efficiency.

Relationships and responsibilities are still evolving among the three principal institutions, the FNE, the TDLC and the Supreme Court. In the *Falabella* case, the TDLC did not follow FNE's Merger Guidelines. The two judicial bodies have been more reluctant than the FNE to find collusion in the absence of direct evidence of the agreement. Major differences may diminish with more experience. The Supreme Court needs to become more knowledgeable about the economic principles on which competition rules are based. That can result from more experience reviewing more decision of the TDLC. Or, the Court's capacity could be improved by training or by additional resources, to retain economic consultants where necessary.

6.3. Implementation of the six Roadmap principles

Chile has accepted all Council Recommendations on competition policy, as well as the 2005 Guiding Principles for Regulatory Quality and Performance and the 2005 Information Exchange Best Practices. In general, competition law and regulatory policy in Chile conform to the principles set out in the Recommendations and the two 2005 instruments, although in several respects, noted below, further improvements of enforcement and regulation are recommended.

1. Cartels

Chile has committed to ensuring that competition laws, sanctions and enforcement procedures and institutions effectively halt, deter and remedy hard core cartels. The recommendation of the 1998 Council Concerning Effective Action against Hard Core Cartels focuses on interdicting cartels, addressing effective control, deterrence and remedy, enforcement processes and powers, sanctions against firms and individuals, exemptions and exclusions, and enforcement co-operation and comity. (The issue of co-operation is discussed separately below; a reservation about capacity to share confidential information

applies to cartel enforcement as well as other areas). Chile has accepted the Hard Core Cartel Recommendation in its Initial Memorandum, subject to a timeframe for full implementation. This is the area in which additional efforts to increase the effectiveness of enforcement appear most advisable. The observation about timeframe would be met by the adoption and implementation of the legislation now pending about investigative powers, sanctions and leniency.

The competition institutions are committed to effective prosecution of hard core cartels. The penalties sought have increased. But there have been virtually no findings of violation, because courts have been reluctant to accept circumstantial evidence as a sufficient demonstration of agreement. In a sign of movement, though, the Supreme Court affirmed the finding of an agreement in the Flat-Panel TV War case, where the evidence showed a pattern of communication but not the content of the messages. This case was also the first to impose a substantial fine, although the conduct at issue was a collusive boycott, not a price-fixing agreement.

The 2009 law addresses the practical limitations. These changes provide for the introduction of a standard leniency programme, give the FNE dawn raid powers and increase the maximum sanctions. Authorising a leniency programme will be a major step toward more effective enforcement. Stronger investigation power and sanctions will also help, though court support for the large fine in the Flat Panel case shows that less education may be needed about the importance of deterrent sanctions than in some other jurisdictions. The new investigative powers that FNE can apply, to collect evidence that will prove agreement, are exercised already by other enforcement bodies in Chile.

2. Mergers

Chile has committed to ensuring that review of mergers is effective, efficient and timely, following the standards of the 2005 Council Recommendation concerning Merger Review. This Recommendation provides best-practice guidance about merger control. It deals with effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and powers and enforcement co-operation. (The issue of co-operation is addressed separately below). Chile's merger review procedures follow the Recommendation.

Despite the omission of mergers from the text of the Competition Act, no cases challenging the legality of merger enforcement have been reported.

Nonetheless, it could be desirable to clarify the jurisdiction of the TDLC, the stages of merger analysis and the substantive standards applied.

The absence of a formal pre-merger notification requirement has not impaired the effectiveness of merger review. The non-adversarial proceeding at the TDLC is a framework for voluntary merger review. Once a firm asks for review, the transaction cannot be closed until the TDLC renders a favourable decision. Chile is not considering a formal pre-merger notification requirement. Businesses are now spared transaction costs of notifications and the TDLC and FNE can better set their priorities, not burdened by the obligation to deal with notifications. The voluntary review process enables the TDLC to obtain enough information to assess the competitive effects of a merger, and it gives the TDLC effective power to take remedial action if necessary. The information requirements do not impose unnecessary costs and burdens on parties. Because the process is voluntary, it is unlikely that it would apply to a merger that did not have an appropriate nexus with Chile. The TDLC is moving to regularise the non-adversarial merger review, as it is developing an instruction for parties about the information they should submit to the TDLC.

Because the non-adversarial review is voluntary, there is less concern about unnecessary burden on parties and about clearing non-problematic transactions quickly. To be sure, parties may be disappointed. That is, they may ask for review out of caution, believing that their transaction is non-problematic, and then be surprised when the TDLC finds a problem. That is what happened in the *Falabella* case. That experience does not necessarily mean that non-problematic transactions face undue costs and risks; rather, it could also show that even a voluntary programme can review and take action in advance about problematic transactions.

Concerns about third-party rights in merger review are met in two ways. First, third parties and the FNE can initiate adversarial merger review proceedings by claiming that a transaction would violate Art. 3. Second, the body handling both the adversarial and non-adversarial proceedings, the TDLC, is a court, whose rules for these cases permit third-party participation. To deter lobbying abuses, though, the TDLC has a policy of total disclosure: it publishes on its website all requests from private parties for meetings with its members.

The FNE's *Internal Guide for the Analysis of Horizontal Concentration Operations* (2006) sets forth substantive standards of analysis similar to those applied by Member competition authorities. These standards include a review of the relevant market, market concentration, entry barriers, competition dynamics, efficiency considerations and failing firm considerations. The Guide does not bind the TDLC, which makes it difficult to predict how the TDLC would follow

and apply these standards. Similarly, there is no formal rule setting a deadline for completing a review, once it is undertaken. The FNE Guide does not bind the TDLC about its procedures, any more than it does about its substantive analysis. The TDLC tries to issue decisions within a reasonable time frame, but it does not set itself deadlines.

The practice of the FNE in dealing with trans-national mergers is scant. Whether remedies sought in Chile would be consistent with those sought in other reviewing jurisdictions remains to be tested.

3. Structural separation

Chile has committed to consider carefully the costs and benefits of structural and behavioural measures in facing situations that combine non-competitive and competitive activities in regulated industries, particularly when undertaking privatisation, liberalisation and regulatory reform, following the 2001 Council Recommendation Concerning Structural Separation in Regulated Industries. This Recommendation addresses cost-benefit assessment of behavioural and structural measures, including consideration of transition costs and public benefits of vertical integration. Such balancing should involve sector regulators and competition authorities. Chile accepts this Recommendation. Chile has applied the principles of the Recommendation, notably in reforming telecommunications; however, structural reform is taking more time in the electricity sector.

4. Market regulation

Chile has committed to supporting effective competition policy and ensuring that regulatory restrictions on competition are proportionate to the public interests they serve, in accordance with the OECD's Guiding Principles for Regulatory Quality and Performance (2005). These principles and objectives include the elimination of sectoral gaps in the coverage of competition law, co-ordination of regulatory oversight and competition law enforcement, proportionality in design of economic regulation, periodic review of cost-benefit balance, efficiency in reform to introduce competition, consumer choice, state ownership, universal service, consideration of competition in regulatory impact analysis, competition agency authority to advocate reform and linkages to other objectives.

Regulators in the telecom and electricity sectors are not authorised to set tariffs unless the TDLC has found that the market is not competitive; in one instance, the Commission's ruling that local telephony services were not

competitive laid out six provisions aimed at creating a genuinely competitive market.

Competition policy institutions can take action to remove entry barriers that are due to regulation. The FNE may ask the regulator to re-examine the regulation of concern. If the regulator rejects the FNE's petition, the FNE may bring a formal request before the TDLC, and the TDLC can issue recommendations to amend or eliminate the regulations. The TDLC can also act on its own initiative to issue recommendations to eliminate regulatory constraints on competition. In the water and waste disposal, they have been particularly active, filling gaps to create a regulatory situation conducing to competition. In infrastructure sectors, competition authorities were particularly active in the earlier stages of reform. Chile's Competition Commission once prohibited the national telecom regulator from allocating additional spectrum to the two firms it had chosen and ordered it to hold an auction instead. The process continues. In 2006 the TDLC issued general instructions about the regulation of tendering processes in waste disposal services. TDLC enforcement decisions in 2004 and again in 2006 have opened markets and lowered barriers in telecoms.

5. International co-operation

Chile has committed to co-operating in investigations and proceedings applying competition laws, through notification and co-ordination pursuant to the 1995 Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade and through implementing the Competition Committee's 2005 Statement of Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations. The Council Recommendations on hard core cartels (1998) and mergers (2005) also address international co-operation. The topics of these instruments include notification, co-ordination, exchange of information, consultation-conciliation-comity, confidentiality and privilege protection, effects on leniency applicants and informants and notification to information providers. Chile accepts these recommendations, subject to a timeframe for full implementation and to a reservation with respect to the best practices concerning cartel investigations. Chile conforms with the principles set forth in these instruments.

International co-operation on antitrust matters is limited by the protection of constitutional rights to privacy. The FNE must comply with domestic rules limiting the extent of information exchanges. The FNE can request information from private parties only once an investigation has been launched in Chile or in the context of an existing international investigation. Before information

contained in documents or other information obtained from private parties can be shared with an agency outside Chile, there is a legal obligation to inform the parties if this could affect their interests and rights. Under general law drawn from Constitutional principles, those parties have the right to oppose the transfer of their information. Compliance with the instruments dealing with enforcement co-operation is subject to this qualification.

The FNE and foreign competition agencies often have informal contact during investigations. Both the FNE and the TDLC have made information requests in connection with specific cases at the TDLC. Co-operation is achieved through memoranda of understanding or co-operation agreements. The FNE has signed agreements with Canada, Costa Rica, Mexico, Brazil and El Salvador, and it is considering initiating negotiations for the adoption of new agreements with several other countries. These agreements all include provisions about technical assistance, and most of them also have provisions about co-operation and information exchanges for enforcement.

6. Intellectual property rights

Chile has committed to effective enforcement of intellectual property rights. To the extent this is affected by competition law and enforcement,[91] Chilean law appears to be consistent with this principle. The Competition Act contains no specific provision concerning intellectual property rights, and there is no general block exemption or regulation concerning the licensing of intellectual property rights. Thus, the law's general provisions concerning restrictive agreements apply to intellectual property license agreements. Provisions concerning abuse of dominance may be applicable to conduct such as refusal to license. The law on Unfair Competition adopted in 2007 may affect how rights to intellectual property such as trademarks are protected in civil court litigation. Bodies with a more direct interest in these policies and controversies include the National Industrial Property Institute (INAPI) Industrial Property Tribunal.

Chile, which accepts the recommendation, has noted that the FNE and TDLC take into account the particular characteristics of innovation and intellectual property rights in appropriate cases involving these rights. Analysis of vertical restrictions arising from contracts to license patents or transfer technology has been modernised, along with the rest of Chile's competition analysis, to consider economic efficiency. Chile has observed that conflicts between competition and intellectual property rights have been rare, in part because there are few patents registered in Chile.

Notes

1. Available at *http://www.oecd.org/dataoecd/61/58/41463062.pdf*

2. A list of bilateral and regional free trade agreements in force can be found at: *http://www.direcon.cl/*. Most of them contain competition policy chapters and other provisions related to competition policy.

3. Ruling No. 24/2005 –TDLC, 28 July 2005.

4. Ruling No. 1/2004 –TDLC, 25 July 2004.

5. Ruling No. 16/2005 –TDLC, 20 May 2005.

6. Ruling No. 1/2004 –TDLC, 25 October 2004.

7. *E.g*. TDLC, 06 June 2007, Ruling No. 53/2007, where it condemned a gasoline wholesaler to pay a fine of CLP 97 million (Chilean pesos) - USD 150 000 approx. - for violation of decisions No. 435 and 438 concerning vertical restraints in gasoline distribution (overturned by the Supreme Court, 25 September 2007, file 3506-2007); or TDLC, 03 August 2006, Decision No. 15/2006, about an arbitration provision in a franchising contract.

8. *E.g*. TDLC, 08 May 2008, Ruling No. 65/2008, where it stated that "the use of buying power [understood as asymmetric bargaining power] could only affect competition negatively when it permanently influences the aggregate supply of products, whether by the reduction of quantities, retail price increases or the reduction of research and development investments". (Gr. 104).

9. Ruling No. 24/2008 –TDLC, 31 January 2008.

10. The Competition Act acknowledges that legal evidence will be considered as circumstantial evidence under the rule of reasonableness (*sana critica*), which is widely acknowledged in the legal principles applied by other countries in the region. Under this principle, "judges must indicate the reasons why they develop certain convictions over the facts of the case, based on logic and experience, once they have examined the evidence before them"

(S.Ct, 04 July 2007, File 6236-2006, Gr. 34, partially affirming and partially overturning Ruling TDLC No. 45/2006 of 26 October 2006.).

11. Ruling Nº 74-TDLC, 2 September 2008.

12. Ruling No. 79 –TDLC, 10 December 2008, FNE's appeal pending before the S. Ct.

13. Ruling No. 38/2006 –TDLC, 07 June 2006, overturned by the Supreme Court, 12.28.2006.

14. Ruling No. 43/2006 –TDLC, 07 September 2006, overturned by Supreme Court, 01.22.2007.

15. The dissenting vote of TDLC, in the case of *ISAPRES*, mentions that given the practical difficulty of having direct evidence -because there are no powers to seize documents or raid offices in search of proof - evidence of conduct constitutes collusion, despite its inherent ambiguity.

16. Ruling No. 74/2007 –TDLC, 02 September 2008 affirmed by the Supreme Court, 12.29.2008 but reducing the amount of the fines to 1,5 tax units each.

17. Ruling No. 22/2007 –TDLC, 19 October 2007.

18. Ruling No. 734/2004 –*Comisión Resolutiva*, 24 August 2004.

19. Ruling No. 69/2008 –TDLC, 26 June 2008.

20. Ruling No. 15/2006 –TDLC, 03 August 2006, Ruling No. 16/2006 –TDLC, 17 August 2006, and Ruling No. 16/2005 –TDLC, 20 May 2005.

21. *E.g.* Ruling No. 26/2005-TDLC, 05 August 2005, and Ruling No. 45/2006-TDLC, 26 October 2006, sanctioned for exclusionary abuses, a subsidiary of British American Tobacco, and the main company in fixed telephony market, respectively. The latter was also found to have dominance in the telecommunication networks and broadband market.

22. *E.g.* Ruling No. 15/2006 –TDLC, 03 August 2006, where an injunction was issued against the main pharmaceutical wholesaler concerning the arbitration clause (a fairness standard in the nomination of the arbitrator); and Ruling No. 16/2005 –TDLC, 20 May 2005, where an injunction was issued against two motion picture distributors, requiring them to tell exhibitors what motion pictures would be subject of premieres and the dates of them, and to ground their distribution and allocation of film copies system on general, objective and uniform criteria.

23. S.Ct, 26 May 2005, File 4927-2004, partially overturning Ruling No. 9/2006 –TDLC, 05 October 2004.

24. Ruling TDLC No. 45/2006 of 26 October 2006.

25. The Supreme Court, however, on appeal, decided that the TDLC had overlooked the economic evidence supporting the defendant's position; therefore, it overruled its decision, precisely on the grounds that it lacked supportive economic reasoning.

26. Ruling No. 79/2008 –TDLC, 04 December 2008.

27. Ruling No. 55/2007 –TDLC, 21 June 2006.

28. Approx. USD 273,984. Ruling No. 73/2008 TDLC, 08.20.2008, affirmed by the S. Ct., 11.26.2008, but reducing the fine to 300 tax units.

29. Ruling No. 16/2005 –TDLC, 20 May 2005.

30. Approx. USD 312,000. Ruling No. 37/2006 –TDLC, 10 May 2005.

31. Approx. USD 75,000. Ruling No. 29/2005 – TDLC 12 September 2005.

32. Ruling No. 26/2005 –TDLC, 05 August 2005.

33. Supreme Court 08.13.2008, file 2339-2008, affirming in most part Ruling N°63/2008 –TDLC, 10 April 2008.

34. Approx. USD 90 000.

35. Ruling No. 28/2005 –TDLC 07 September 2005.

36. Approximately USD 720 000. Ruling No. 39/2006 –TDLC, 13 June 2006 and Supreme Court, file 3449-2006 of 29 November 2006.

37. Ruling No. 1/2004 –TDLC, 25 October 2004.

38. Ruling No. 22/2007 –TDLC, of 19 October 2007.

39. General Instruction No. 1/2006 –TDLC, of 08 June 2006.

40. Ruling No. 45/2006 –TDLC, of 26 October 2006.

41. S.Ct, 04 July 2007, File 6236-2006, Gr. 34, partially affirming and partially overturning Ruling No. 45/2006 – TDLC, 26 October 2006.

42. The HHI is calculated as the sum of the squares of market shares of each market participant. The FNE presumes that post merger HHI lower than 1.000 points will not be entail potential anticompetitive effects. Markets with HHI between 1.000 and 1.800 points are moderately concentrated. Finally, post-merger HHI higher than 1.800 points will be regarded as potentially harmful and will require further review.

43. Article 38, Freedom of Opinion and Speech Act (Law No. 19,733).

44. Ruling No. 1,045 of the former Competition Commission.

45. Sent 9/2004 TDLC and Sent 65/2008 TDLC.

46. S.Ct, 26 May 2005, File 4927-2004, partially overturning Ruling No. 9/2006 –TDLC, 05 October 2004.

47. Decision No. 1/2004 –TDLC, 25 October 2004.

48. Decision No. 20/2007 –TDLC, 27 July 2007.

49. Decision No. 23/2008 –TDLC, 04 January 2005.

50. Ruling No. 24/2008 –TDLC, 31 January 2008.

51. Law No. 20.169 of 16 February 2007.

52. Article 3 (c) of the Competition Act.

53. Ruling No. 10/2004 –TDLC, 24 November 2004, and Ruling No. 12/2004 – TDLC, 20 December 2004. In both cases, the TDLC noted that a violation against art.3 of the Competition Act required both, an unfair competition practice and a purpose of attaining, maintaining or increasing a dominant position. In addition, the TDLC rated that, although the provisions of different subsections of art. 3 were mere examples, following the wording and the discussions of the legislative process of the unfair competition provision, it was clear that the legislator's purpose had been to exclude unfair competition from the scope of the Competition Act, if the unfair acts did not affect the market as a whole.

54. Ruling No. 8/2004 –TDLC, 22 September 2004, imposing fine on a laboratory for comparative and denigrating advertising, in a concentrated market; also ruling No. 24/2005 –TDLC, 28 July 2005, imposing a fine for imitating a supplier's product and risking confusion on an integrated retail chain laboratory in a concentrated market; furthermore, ruling No. 30/2005 – TDLC, 21 September 2005, against a fishing corporation for creating entry

barriers through trademark procedures involving the registration of the generic name of a product and preventing its use by other industry actors, thus abusing its IPRs; finally, ruling No. 35/2005, against a kinesiologists' professional association for several boycott, denigrating and exclusionary practices against an educational institution of kinesiology.

55. S.Ct, 27 September 2005, confirming Ruling No. 17/2005 –TDLC, 20 May 2005.

56. Ruling No. 24/2008 –TLDC, 31 January 2008.

57. Ruling No. 15/2005 –TLDC, 20 April 2005.

58. Ruling No. 41/2006 –TLDC, 27 July 2006.

59. Ruling No. 56/2007 –TLDC, 27 June 2007.

60. Ruling No. 1243/203 –*Comisión Resolutiva*, 28 March 2003.

61. C 156-08, 19 March 2008. The FNE filed a claim against John C. Malone, VTR controller Broadband SA, for indirectly acquiring control of Chile Ltda DirecTV, a satellite television operator. Resolution No. 01/2004 –TDLC, 25 October 2004 expressly prohibited the owners of VTR Broadband SA to participate, directly or indirectly, in satellite TV operations in Chile. The defendant does not have a legal domicile or residence in Chile; therefore, the FNE is seeking to apply Chilean Law on an extraterritorial basis.

62. In the investigation related to the oxygen case condemned by TDLC (Ruling No. 43/2006 –TDLC 07 September 2006, overturned by the S.Ct), the FNE requested information concerning a similar case from the *Comisión Nacional de Defensa de la Competencia* of Argentina.

63. Ruling No. 23/2005 –TDLC, 19 July 2005.

64. Ruling No. 67/2008 –TDLC, 17 June 2008, involving several prescriptions for a non profit, government-owned entity in forest fire fighting services by aircrafts

65. *E.g.* Ruling No. 65/2008 TDLC, 05 May 2008 stated that the use of buying power [understood as asymmetric bargaining power] can only affect competition when it permanently influences market's total supply of products, whether by the reduction of quantities, retail price increases or the reduction of research and development investment. (Gr. 104)

66. D.F.L. No. 4/20,208 of 2007, and Decree No. 327 of 1988.

67. Ruling No. 389/1993 –*Comisión Resolutiva*, of 16 April 1993.

68. Ruling No. 77/2008 –TLDC, 04 November 2008.

69. Ruling No. 81/2009 –TDLC 16 January 2009.

70. DFL No. 1 de 1982 Ley General de Servicios Eléctricos del Ministerio de Minería, today contained in D.F.L. No. 4/20.018, 2007.

71. Ruling No. 488/1997 – *Comisión Resolutiva* and Ruling No 667/2002 – *Comisión Resolutiva*. Ruling No. 488 was not appealed, and Ruling No. 667 was upheld by the Supreme Court.

72. Ruling No. 22/2007 –TDLC, of 19 October 2007.

73. The Competition Commission set up the long distance market through its Resolution No. 389/1989. The rationale held in this decision eventually supported the issuance of Supreme Decree No. 189 of Subtel (1994), regarding the long distance multicarrier system. Today, the multicarrier system is regulated under the Telecommunications Act (arts. 24 bis and 26).

74. Ruling No. 1/2004 –TDLC, 25 October 2004.

75. Ruling No. 45/2006 –TDLC, of 26 October 2006.

76. General Instruction No. 1/2006 –TDLC, 08 June 2006.

77. File NC 246-08 –TDLC.

78. Res. Ex. No 1498/2004 –SUBTEL; later amended by Res. Ex. No 486/2005 of 28 April 2005.

79. Related to this issue are: Ruling No. 10/2005 –TDLC, 11 August 2005 and former decisions No.1014 of the Central Preventative Commission.

80. The decision of this case has been recently issued (Sent. No. 81/2009 TDLC).

81. Ruling No. 2/2005 –TDLC, 01 April 2005.

82. Ruling No. 45/2006 –TDLC, 26 October 2006.

83. Ruling No. 18/2005 –TDLC, 10 June 2005.

84. Ruling No. 61/2007 –TDLC, 27 December 2007.

85. Ruling No. 11/2006 –TDLC, 24 January 2006.

86. Ruling No. 10/2005 –TDLC, 11 August 2005.

87. Ruling No. 22/2007 –TDLC, 19 October 2007.

88. General Instruction No. 1/2006 –TDLC, 08 June 2006.

89. See footnote 1.

90. Available at *http://www.oecd.org/dataoecd/43/60/34823239.pdf*.

91. See OECD, The Economic Impact of Counterfeiting and Piracy (2008), about aspects outside the ambit of competition law and policy.

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