Assessment of Merger Control in Chile

Report by the OECD Secretariat

OECD

2014

EXECUTIVE SUMMARY

This Report identifies and assesses the main issues arising from Chile's current merger control regime and proposes recommendations for improvement in light of the OECD analysis and existing international best practices.

The main finding of this Report is that Chile's current merger control regime lacks transparency, legal certainty and predictability, which are key elements for an effective merger control system. The main reasons of Chile's current situation are the absence of specific legal provisions on merger control, the lack of clear merger control jurisdictional criteria, the reliance on general antitrust procedures which were not designed for merger control purposes, and the absence of streamlined merger review powers between the Competition Authority (FNE) and the Competition Tribunal (TDLC).

This Report analyses these issues and suggests possible ways forward for consideration by Chile. Merger control constitutes an essential component of an effective competition system. The recommendations in this Report aim at the adoption of a more effective and transparent merger control regime in Chile.

(1) Merger control should be established by law as an integral part of Chile's competition law and policy.

In Chile, merger control is not established by law. Merger control has been exercised and developed by the FNE and the TDLC, relying on general provisions of the Competition Act N° 211. The absence of legal framework may give rise to legality and consistency issues, and expose the system to legal uncertainty for enforcers, businesses and ultimately for consumers and society. As a priority, Chile's competition law and policy should therefore establish a formal and binding merger control regime by law. Merger control should be preventive, collaborative and specific in determining when a merger may have or not have anti-competitive effects. The legal framework for such analysis should be clear and precise but not excessively rigid.

It should distinguish between merger control rules that need to be established by law, where certainty and legal force are essential, and merger control rules that could be left to soft law or to the enforcement practice, where flexibility is necessary to ensure the effectiveness of the system.

The essential elements of a merger control system that should be established by law include: a definition of the types of transactions deemed "mergers" for merger control purposes; the establishment of a merger notification system, with streamlined merger review procedures and clear review powers; a substantive test for assessing mergers; specific sanctions to ensure the enforceability and effectiveness of merger control rules. Each of these essential elements requires attention under Chile's current merger control.

(2) Chile should establish a clear jurisdiction over mergers, by defining what transactions are subject to merger control and by establishing a clear merger notification system.

There is no merger control jurisdiction under Chile's current law. The first step in designing an effective merger control regime consists in delineating Chile's jurisdiction over mergers, which may depend on three factors: the definition of transactions which ought to be subject to merger control, the establishment of a notification system, and the determination of notification thresholds.

Regarding merger definition, the law should clarify what a "merger" is, i.e. what transactions should be subject to merger control. Full mergers (or "fusions") and acquisitions are generally considered mergers for merger control purpose, as they create a durable structural change in the market. Merger definition criteria are especially critical to identify the transactions at the fringe – such as joint ventures and the acquisition of minority interests – that may also deserve scrutiny. Merger definition may also include criteria to establish jurisdiction over staggered transactions, which together amount to one single merger.

For mergers to be actually reviewed by an enforcer, it is necessary to establish a merger notification system, which may be mandatory, voluntary or hybrid. Currently, Chile has a *de facto* semi-voluntary notification system, where mergers can be submitted to the TDLC by the merging parties, the FNE or even third parties upon a contentious

or non-contentious action, whether pre- or post-consummation. A large number of mergers have also been detected and reviewed *ex officio* by the FNE without triggering a formal TDLC review. This voluntary notification system generates uncertainty to businesses and consumers as to whether a merger should or would ever be subject to review. This Report suggests that Chile should adopt a merger notification system that is clear, effective and timely. Given the pros and cons of voluntary and mandatory systems and given Chile's context, Chile should consider adopting either a mandatory or a hybrid notification system. A hybrid notification system could potentially extend Chile's jurisdiction to a broader range of mergers, but its relevance and effectiveness will depend on additional factors. Under either system, notifications should be done by the merging parties only.

After defining the notion of mergers and establishing a notification system, Chile should identify appropriate notification thresholds. Notification thresholds determine which specific transaction should be subject to notification either because of its size/value or because of the size/value of the merging parties' activities in the country. Notification thresholds must be determined to establish a sufficient nexus with the jurisdiction, and to filter mergers that are potentially more likely to raise competition concerns. Such criteria should be clear and equally applicable to all mergers.

- Notification thresholds should first rely on objective and quantifiable criteria, e.g. turnover or asset value (company size) and/or in the value of the contemplated merger (transaction size). To ensure a sufficient local nexus, at least the turnover or assets of the target company should be domestic.
- Notification thresholds should then be determined as to their numerical level in light of e.g. Chile's GDP, the standard size of companies operating on its territory, and the number of transactions that could be effectively reviewed. The threshold levels should be monitored and adapted over time to reflect the changing economic context of the country.

(3) *The merger review procedure should be efficient, transparent, predictable and collaborative. Merger review powers should be clearly assigned by law to (a) competent authority(ies).*

The use and coexistence of various procedures of a general nature (e.g. consultation, adversarial, settlement) available pre- and post-consummation, have led to inefficiencies and uncertainties. Long and uncertain review periods may have a chilling effect and lead companies either to avoid notification or even to abandon (potentially pro-competitive) merger plans. Today, Chile's enforcement landscape is characterised by shared powers between the FNE and the TDLC. Both enforcers are highly qualified and can offer strengths to the merger control system. This duality, however, should not add undue complexity or delays to the merger control process. A reform of Chile's merger control regime should streamline the FNE's and TDLC's respective merger review powers, along the following lines.

First, Chile should adopt a merger-specific procedure, consisting of two phases: a Phase I for the review and clearance (with or without remedies) of unproblematic mergers and a Phase II for the assessment of mergers requiring an in-depth review because of their complexity or likelihood of anti-competitive effects. The Phase II review may lead to a clearance decision, to the imposition of remedies or to a prohibition decision. Review powers may be allocated along one of these two options:

- Option 1: Phase I with the FNE and Phase II with the TDLC;
- Option 2: Phase I and Phase II with the FNE, and judicial review by the TDLC of the FNE decision upon appeal. This option may provide for enhanced effectiveness and timeliness in the review process.

Second, whether the merger review process lies essentially with the FNE and/or the TDLC, procedural rights should be reinforced at each level, which in the merger context requires that: independence and incompatibilities be fully guaranteed by law; merger review periods be established and respected; a transparent and collaborative process be adopted especially vis-à-vis the merging parties. To ensure that merger control is preventive, the law should also establish that the review process has a suspensory effect.

These procedural reforms would allow mergers to be reviewed timely, effectively and in a predictable manner to the benefit of Chile's economy and consumers.

(4) Merger control should provide for a substantive test under which mergers are reviewed.

The purpose of merger control is to assess the impact of mergers on competition and to prevent mergers with anticompetitive effects from taking place. Merger control rules should include a clear substantive test under which the impact of the merger will be assessed. Chile's Competition Act prohibits any act that has or may have anticompetitive effects, but it is silent on the test under which such anticompetitive effects are established. In their enforcement practice, the FNE and the TDLC have adopted a standard of review based on the substantial lessening of competition (the SLC test). This test, however, should be set in the law. Clear guidance should be provided, whether by law or by implementing soft law, on the qualitative and quantitative factors relevant to the enforcement of the test, and on how the analysis may vary between horizontal, vertical and conglomerate mergers. The adoption of substantive thresholds (distinct from notification thresholds) could also help identify which of the notified mergers may benefit from expedited clearance.

(5) Chile should adopt adequate enforcement tools and sanctions to ensure the effectiveness of the merger control system.

An effective merger control system must include sanctions for the infringement of statutory obligations. These sanctions are distinct from sanctions for anticompetitive conduct (foreseen in article 26 of the Competition Act), and relate to the obstruction or violation of merger control rules as such, regardless of whether the merger is pro- or anti-competitive. Currently, only a sanction of imprisonment is available against the obstruction of the FNE investigation, which can only be imposed following a separate procedure in criminal court. Similarly, non-compliance with merger remedies can only be sanctioned following a separate infringement procedure to be lodged by the FNE before the TDLC. To ensure its effectiveness, Chile's merger control should provide for clear sanctions (e.g. administrative fines) and periodic penalties by law against violations of the merger process rules. Such sanctions and penalties would be particularly

relevant for: failure to notify a reportable merger, the consummation of the merger during the suspensory period, the provision by the merging parties or third parties of incomplete or inaccurate information, and non-compliance with merger remedies.

PART 1. CHILE'S CURRENT MERGER CONTROL REGIME

Introduction

This first Part describes Chile's current merger control.[2] Merger control in Chile is first and foremost characterised by the fact that it is not explicitly established by law. The main features of Chile's merger control highlighted in this first Part result from an examination of Chile's current competition law, relevant case law and soft law, and from substantive discussions held with the enforcers and stakeholders of merger control in Chile. These main features consist in: Chile's current legal framework (section 1), merger control jurisdiction (section 2), merger control powers and procedures (section 3), judicial review of merger decisions (section 4), the substantive test to assessing mergers' competition impact (section 5), and finally the enforcement tools and sanctions potentially applicable in the merger review context (section 6).

1. Legal framework

Competition law in Chile is governed by the Decree Law N° 211 of 17 December 1973 (hereinafter the "Competition Act"),[3] as last amended in 2009.[4] The Competition Act describes the types of acts that constitute competition

2 This Report was closed in April 2014.

3 Decreto Ley N° 211, available in Spanish at: http://www.leychile.cl/Navegar?idNorma=236106&idVersion=2009-10-11; and in English at: http://www.fne.gob.cl/wp-content/uploads/2012/03/DL_211_ingles.pdf. The first competition law was adopted in 1959, as part of the industrial statute N° 13.305.

4 The Competition Act of 1973 was essentially amended by the Law N° 19.911 of 14 November 2003, available at: http://www.leychile.cl/Navegar?idNorma=217122; and the Law N° 20.361 of 13 July 2009, available at: http://www.leychile.cl/Navegar?idNorma=1004121&idParte=8740652&idVersion=2009-07-13.

infringements, together with applicable remedies and sanctions. It also establishes the powers of Chile's competition law enforcers: the Fiscalía Nacional Económica or national prosecutor's office (hereinafter the "FNE") and the Tribunal de Defensa de la Libre Competencia or competition tribunal (hereinafter the "TDLC").[5] The TDLC essentially holds decision-making powers in competition matters. It is an independent specialised court that operates under the Supreme Court's supervision. Its judges are lawyers and economists. The FNE is primarily in charge of conducting investigations. It is an independent body placed within the executive branch; it is subject to the supervision of the President of Chile and the Ministry of Economy.[6] It is also composed of lawyers and economists.

The Competition Act includes no specific provision on merger control.[7] Merger control in Chile is primarily based on the general substantive provisions of articles 1, 3 and 26 of the Competition Act and on the practice developed over time by the two enforcers. Article 1 provides that the Competition Act should *"promote and defend free competition in the markets"*. Article 3 establishes that "*any fact, act or agreement that prevents, restricts or hinders free competition, or that tends to have such effects"*, will be sanctioned as set forth by article 26.[8] The

5 Portal of the FNE: www.fne.gob.cl. The FNE was created in 1963; the FNE's Merger Unit was created in 2012. Portal of the TDLC: www.tdlc.cl. The TDLC was created in 2003 (effective in 2004), to replace the Competition Commission and the Consultative Commissions established by the Competition Act in 1973. Article 2 of the Competition Act grants enforcement powers to the FNE and the TDLC, each of which plays an important role, as explained *infra*.

6 Article 33 of the Competition Act. The FNE is an independent body placed within the executive branch of the government, and institutional arrangements provide for guarantees of independence in the enforcement of Chilean competition law and policy. E.g., the National Economic Prosecutor (the "Fiscal" of the FNE) is appointed by the President but he or she can only be dismissed by the President in case of manifest negligence and subject to the Supreme Court's vote.

7 The term "merger" referred to throughout this Report is used in the broad generic sense, including any concentration; whether horizontal vertical or conglomerate mergers, acquisitions, JVs, etc.

8 Article 26 of the Competition Act provides for three types of sanctions: "*the modification or the termination of the acts or […] agreements that contravene the Competition Act*", "*the modification or the dissolution of the companies […] resulting from such acts or […] agreements*" and/or pecuniary fines.

substantive provisions of the Competition Act provide the overall goal and guidance for the development and enforcement of merger control rules in Chile. In particular, the inclusion in article 3 of acts that "*tend to have such [anticompetitive] effects*" has served as the legal basis for merger control.

An indirect reference to merger control is also found in article 18 (2) of the Competition Act, which empowers the TDLC to: "*Review and adjudicate, at the request of a party with a legitimate interest or the National Economic Prosecutor, non-contentious matters, acts or contracts, whether existing or to be executed, that could infringe the provisions of the present law, [and] determine the conditions which must be met by the said matters, acts or contracts*".[9] Although not aimed at merger control specifically, this power has formally opened the door to voluntary pre- and post-merger consultation submissions to the TDLC, as explained below.

Chile is a civil law based jurisdiction, where statutory law constitutes the primary legally binding source. In the absence of legal merger control standards, the following FNE guidelines and TDLC decrees constitute the main source of substantive and procedural rules applicable to merger control in Chile:[10]

- The FNE Guide for the analysis of concentrations (hereinafter the "FNE Merger Guidelines"):[11] the FNE Merger Guidelines include two sections, a first analytical and substantive section applying to horizontal mergers and a second procedural section applying to all types of mergers, including explicitly horizontal, vertical and conglomerate mergers. This new set of guidelines adopted in 2012 takes account of the legislative amendments brought to the Competition Law in 2009

9 Article 31 of the Competition Act details the consultation procedure, whereas article 32 describes the effect of the TDLC's approval of a merger through consultation.

10 The FNE guidelines are not binding, whereas the TDLC decrees are binding within the sphere of its jurisdiction.

11 FNE, "Guide for the Analysis of Merger Transactions", October, 2012, available in Spanish at: http://www.fne.gob.cl/wp-content/uploads/2012/10/Guia-Fusiones.pdf and in English at: http://www.fne.gob.cl/english/wp-content/uploads/2013/01/Guia-fusiones-traducida-final-2.pdf. These 2012 Guidelines replace prior FNE merger guidelines of 2006.

and reflects to a large extent the recent merger practice of the FNE and recent case law of the TDLC. The FNE Merger Guidelines do not bind the TDLC or the Supreme Court, and they are without prejudice to the consultation mechanism established in article 18 (2) of the Competition Act.

- The TDLC Decree N° 12/2009 on relevant information to be provided for the preventive control of concentrations (hereinafter the "TDLC Decree on Concentrations"):[12] this decree provides useful indications regarding the factors examined by the TDLC to assess a merger submitted for consultation in a non-contentious proceeding under article 18 (2) of the Competition Act.[13]
- The TDLC Decree N° 5/2004 on adversarial and consultation procedures targeting the same facts, acts or agreements (hereinafter the "TDLC Decree on Parallel Procedures"):[14] this Decree was adopted following the introduction of the consultation procedure under article 18 (2) of the Competition Act. Mergers, especially consummated ones, can in fact be submitted to the TDLC under a non-contentious consultation and/or under a contentious proceeding. The Decree establishes the method followed by the TDLC to avoid parallel procedures and the risk of contradictory decisions.[15]

Last, the FNE and the TDLC have adopted internal rules of procedure, which apply to merger procedures. The FNE Internal Instructions for the FNE's Enforcement Proceedings set forth procedural rules to be respected by the FNE in conducting its investigations (hereinafter the "FNE Procedural Instructions").[16]

12 A court decree or "auto acordado" is a judicial instrument adopted by the courts for the administration of justice. TDLC Decree N° 12/2009 on Information relevant to the preventive control of concentrations, 20 March 2009, www.tdlc.cl/DocumentosMultiples/Autoacordado_N_12_2009.pdf.

13 See *infra*, section 5 on the "substantive analysis" for further detail on these factors.

14 TDLC Decree N° 5/2004 on parallel procedures, 22 July 2004, http://www.tdlc.cl/DocumentosMultiples/Autoacordado_N_5-2004.pdf.

15 *See infra*, section 3 on "review procedures" for further detail on the consultation and contentious procedures.

16 FNE. "Internal instructions for the National Economic Prosecutor's office enforcement proceedings", May 2013; the English version available at: http://www.fne.gob.cl/english/wp-content/uploads/2013/06/Internal-Instruccions-2.pdf.

The TDLC Decree N° 11/2008 on the Reservation and Confidentiality of Procedures recalls the principle that proceedings before the TDLC are public and sets for the exceptional circumstances in which elements of the procedure can be protected as confidential or reserved.[17]

Additional guidance is found in the TDLC's merger case law and in the FNE's investigation reports, all of which are published.[18] The TDLC in its 2013 Annual Report (hereinafter the "TDLC 2013 Annual Report"), and the Commission of Competition Experts in its report of 2012 mandated by Mr. Piñera, then President of Chile (hereinafter the "Expert Commission Report") suggested amendments to the Competition Act regarding merger control.[19] The political program of newly elected President Bachelet foresees the introduction of merger control rules as part of its competition and consumer protection policy, which could translate into a legislative reform in the near future.[20]

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17 TDLC Decree N° 11/2008 on the reservation or confidentiality of information in TDLC procedures, 26 November 2008, http://www.tdlc.cl/DocumentosMultiples/Auto%20Acordado%20N%C2%B0%2011%20Refundido.pdf.

18 The FNE's reports are periodically published at: www.fne.cl; and the TDLC publishesits resolutions and rulings at: www.tdlc.cl.

19 Annual Report by the President of the TDLC, 13 May 2013, http://www.tdlc.cl/UserFiles/P0001/File/CUENTAS%20PUBLICAS%20TDLC/Cuenta%20Publica%202013.pdf. The Expert Commission Report "*Informe de la Comission Asesora Presidencial para la Defensa de la Libre Competencia*", July 2012, is available at: http://www.economia.cl/wp-content/uploads/2012/07/INFORME-FINAL-ENTREGADO-A-PDTE-PINERA-13-07-12.pdf. The purpose of the Expert Commission was to review existing competition rules and to propose key amendments *de lege ferenda* to improve Chilean competition law, including merger control. In 2004, a draft amending law, Bill No. 3618-03, was presented by members of Parliament seeking to establish a system of compulsory merger notification and merger control above certain thresholds. The project has not advanced since 2004 and is therefore deemed "archived": See Senate Bill; "Regulation of company mergers and takeovers", Bulletin 3618-03, 21 July 2004.

20 See Michelle Bachelet's Government Program 2014-18 on "Control de operaciones de concentracion" *in Proteccion y defensa de los consumidores, competencia y transparencia*, available at: http://michellebachelet.cl/programa/, p. 61.

This Report emphasises the importance of merger control and the need to adopt a clear, binding and effective merger control regime as part of Chile's competition law.

2. Merger control jurisdiction

There is no statutory definition of the **types of transactions** that ought to be subject to merger control in Chile. Any transaction, including mergers, may be caught under the Competition Act (article 3) insofar as it prevents, restricts or hinders free competition, or tends to have such effects. In practice, this provision has allowed for a broad approach to the types of transactions caught by merger control. In fact, any horizontal, vertical or conglomerate merger, acquisition or joint venture, may be subject to scrutiny and the enforcers can impose corrective measures or sanctions if they find actual or potential adverse effects on competition in Chile.[21] Foreign-to-foreign transactions and transactions that include at least one foreign party or business may equally be caught under this effect-based approach.[22] No special or additional nexus with Chile (e.g., domestic assets or turnover) is required.[23]

21 OECD, Competition Law and Policy in Chile: Accession Review (2010), available in English at: www.oecd.org/daf/competition/sectors/47950954.pdf and in Spanish at: www.oecd.org/daf/competition/sectors/47951548.pdf; and OECD, Follow-up to the Nine Peer Reviews of Competition Law and Policy in Latin American Countries (2012), available in English at: www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review_en.pdf and in Spanish at: www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review_sp.pdf.

22 Ibid.

23 A clear example of jurisdiction over foreign-to-foreign mergers is provided by the review in 2013 of the *Nestlé/ Pfizer* concentration: TDLC, *Nestlé/Pfizer*, AE N° 07-13, 18 April 2013, http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20ñ)%20_Resolución%20_07_2013.pdf; the settlement reached between the FNE and the parties is available at: http://www.fne.gob.cl/wp-content/uploads/2013/04/acuer_01_2013.pdf.

The Competition Act includes no exception, exclusion or exemption of the types of transactions, entities or sectors that could fall outside its scope (hence, outside merger control).[24]

Further guidance on the types of transactions caught for merger control purposes is provided by the FNE Merger Guidelines and the TDLC Decree on Concentrations:

- The FNE Merger Guidelines define a "horizontal concentration" as: *"the acquisition of stock, the acquisition of assets, associations and, in general, any arrangements or transactions that have as their object or effect for two or more independent economic entities to become a single entity, to make decisions in a coordinated manner, or to integrate the same corporate group." According to the FNE, "this definition is grounded on economic concepts" and directed towards "the change in incentives that occurs when, e.g., two independent economic entities, through some contractual or factual arrangement, align their incentives in order to maximise their joint profits, diminish their level of autonomy, or alter the way in which they take competitive decisions"*.[25] This wide approach allows the FNE to analyse also the joint participation in a business (e.g., joint ventures), the direct and indirect acquisition of a minority interest, overlaps in the management of a competing company, etc.[26] The FNE Merger Guidelines do not provide details of the types of vertical or conglomerate transactions that could also attract scrutiny from the FNE.[27]

24 Similarly, no other Chilean law provision, such as sector-specific regulations, provides for exclusion from the application of competition law. In one sector, merger notification is mandatory: the media regulation subjects transactions in this sector to the review of the FNE, which may refer the matter to the TDLC, under the Act Nº 19.733, article 38.

25 FNE Merger Guidelines, footnote 2. Emphasis added.

26 Ibid. One joint venture has so far been notified to the TDLC, namely the alliance between Nestlé and Fonterra for the joint production and sale of certain dairy products (due to the FNE's concerns and the structural remedies it requested, the parties eventually desisted from the operation). See TDLC, *Nestlé/Soprole*, Final resolution N° 85, 7 April 2011; and OECD 2010 Annual Report on Competition Policy Developments in Chile, DAF/COMP/AR(2011)25.

27 Footnote 1 of the FNE Merger Guidelines limits itself to defining what vertical and conglomerate mergers refer to.

- The TDLC Decree on Concentrations defines a concentration as "*any fact, act or agreement, simple or complex, regardless of its legal nature, by means of which: a) a competitively independent entity merges with or acquires on a lasting basis a decisive influence in the management of another competitively independent entity, which thus ceases to exist, or b) two or more of these entities jointly participate in a venture or establish a common entity, thereby reducing in a significant and lasting manner the competitive independence of any of them.*"[28] Unlike in the FNE Merger Guidelines, this definition is not limited to horizontal mergers. The "decisive influence" criterion retained by the TDLC reflects Chile's broad jurisdictional reach on mergers, although it may suggest a narrower understanding than the "change in incentive" criterion retained by the FNE as defined above.[29]

There are no numerical or value **thresholds** set by law to establish jurisdiction over a merger. The FNE Merger Guidelines indicate that the FNE will not investigate a horizontal merger falling below pre-determined HHI-based thresholds.[30] These thresholds are not jurisdictional *per se*, since they do not exclude jurisdiction or notification to the FNE. They may nonetheless be understood as substantive presumptions with jurisdictional effect: given the voluntary notification system and the likelihood that the FNE will not act against mergers below such thresholds, the merging parties (hereinafter the "Parties") may decide not to notify their planned merger if it does not meet these substantive thresholds. These thresholds are limited in

28 TDLC Decree on concentrations, article 4 (emphasis added). The decisive influence criterion was applied by the TDLC in its resolution re: the J.V. project between Endesa and Colbun: TDLC, *Endesa/Colbun*, NC 134-0619 October 2007, http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=829.

29 The wide approach adopted towards caught transactions also results from the voluntary notification system, which essentially takes place through the consultation procedure of article 18 (2) of the Competition Act, which in turn is not strictly limited to mergers. Approximately 25% of the TDLC consultations concern mergers.

30 FNE Merger Guidelines, section I.2.4. The thresholds are: (i) post-merger HHI below 1500; (ii) post-merger HHI equals or exceeds 1500 but is lower than 2500 (mildly concentrated market) and ΔHHI is below 2500; or (iii) post-merger HHI equals or exceeds 2500 (highly concentrated market) but ΔHHI is less than 100.

scope: they are not binding; their application is limited to horizontal mergers submitted to the FNE; and the FNE reserves itself the right to investigate mergers falling below the thresholds under one of the following special circumstances: (i) one of the Parties involved is a potential competitor; (ii) one of the Parties is an important innovator or a strong and independent competitor (a "maverick" company); or (iii) there are current or recent signs of co-ordination.[31]

Regarding the merger **notification system**, there is no mandatory merger control in Chile. The notification of a merger is **voluntary**: notification consists in the "consultation" set by article 18 (2) of the Competition Act, under which the Parties can submit their merger to the TDLC's review through a non-contentious procedure. The notification can take place before or after the merger consummation. Notification is not subject to any filing fee, threshold or deadline. The TDLC is the only competent authority to approve, to condition and/or to reject a merger following a voluntary consultation.[32]

In practice, merger notification in Chile is not as voluntary as it seems. First, a merger that is not submitted by the Parties to the TDLC for review may be subjected to the TDLC's scrutiny by the FNE or potentially by third parties through a consultation procedure under article 18 (2) of the Competition Act or through an adversarial procedure under article 18 (1).[33] This occurs where the FNE or third parties can establish that the merger may raise anticompetitive concerns.[34] The Competition Act foresees a 3-year period of limitation for contentious procedures, starting from the implementation of the contentious act; it is silent on timing for consultation procedures.[35] Second, the TDLC has in several instances (in the context of both mergers and restrictive practices) imposed as a remedy that the parties consult the TDLC with respect to any future merger.[36]

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31 Ibid.

32 See *infra*, section 3 on « review powers », subject to judicial review by the Supreme Court.

33 See *infra* regarding the controversial admission of third parties with a legitimate interest to submit a merger for consultation.

34 See TDLC 2013 Annual Report, op. cit.

35 Article 20 al. 3 of the Competition Act.

36 See *infra*, section 5 on "remedies". E.g. Some companies in the retail and energy sectors are required by virtue of TDLC decision to consult the TDLC regarding any future merger in the sector: TDLC, *SMU/SDS*, NC 397-11, 12 December 2012,

Third, in the media sector, Chile's media regulation requires the submission to the FNE of any change in the ownership or control of mass media.[37] For the above reasons, notification for merger control purposes qualifies as quasi-mandatory, or at least as semi-voluntary.

The voluntary notification (consultation) by the Parties to the TDLC offers several benefits:[38]

- If the merger satisfies the TDLC's resolution closing the consultation procedure (which may include conditions), no further liability (i.e. no contentious or damage claim) is possible in respect of the transaction;[39]
- The voluntary consultation allows for cost savings, given the lower procedural costs incurred in a non-contentious review as opposed to an adversarial one;
- Formal merger approval grants legal certainty to the Parties; their business stakeholders and customers.

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http://www.tdlc.cl/DocumentosMultiples/Resolucion_43_2012.pdf (confirmed by the Supreme Court); and TDLC, *Copec/Terpel*, NC 380-10, 26 May 2011, http://www.tdlc.cl/DocumentosMultiples/Resolucion_34_2011.pdf (in both cases, the parties notified their transaction post-closing).

37 Act on the Freedom of expression and opinion – Ley de Prensa Nº 19.733, http://www.leychile.cl/Navegar?idNorma=186049. Preliminary notification is required where the media transaction involves a concession to operate (e.g., radio spectrum), whereas for transactions that do not, post-closing notification is required with 30 days from the consummation. Such a notification is made with the FNE, which can refer the matter to the TDLC if it raises concerns. Transactions in other regulated industries – including banking, electricity, water, telecommunication, pension fund (AFP) – require notification to regulatory agencies, other than the competition authorities. The FNE co-operates with these institutions but generally hears first of mergers in the press or from the "Material Information" published by the Securities and Insurance Authority (SVS).

38 As detailed in Part 2, section 4 of this Report however, the consultation procedure also entails a number of hurdles that may deter the Parties from notifying their merger.

39 Save for a change of circumstances in which case the merger may be re-examined as set by Article 32 of the Competition Act. See also Chile contribution to the OECD Roundtable on "Remedies in Merger Cases", 2011, DAF/COMP(2011)13, http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf, p. 57.

The Competition Act does not foresee the notification of mergers to the FNE, but it grants the FNE the power to conclude extra-judicial settlements.[40] In addition, the FNE Merger Guidelines offer the Parties the possibility to submit a planned merger to the FNE for a fast-track review.[41] This soft law-based procedure before the FNE is used in particular when the Parties have no doubt regarding the lawfulness of their merger plan, or when they are willing to agree on remedies. Notification with the FNE does not grant certainty on the merger however, since it does not prevent third party filings with the TDLC, as explained below.[42]

3. Review powers and procedures

The Competition Act does not provide for specific **merger review powers**. Merger control powers are shared by the TDLC and the FNE, following their respective and general competition enforcement powers under articles 2, 18, 26 and 39 of the Competition Act:

- Competition enforcement, including merger control, in Chile is primarily court-based. The TDLC is the only authority that has the power to approve, to block, to condition and/or to sanction a merger, whether in a consultation or contentious proceeding.[43] In practice, the TDLC has imposed a diversified range of remedies in merger cases.[44]

40 Article 39 (ñ) of the Competition Act on extra-judicial settlements. Section II of the FNE Merger Guidelines provides the set of procedural rules adopted by the FNE for all types of concentrations (i.e., unlike section I, section II is not limited to horizontal mergers). See also OECD, Follow-up to the Nine Peer Reviews of Competition Law and Policy in Latin American Countries (2012), op. cit.

41 FNE Merger Guidelines, section II.4, in which the FNE commits to analyse the notified merger within 60 days from the formal opening of the investigation.

42 See *infra*, section 3 on "review powers and procedures" for further details on notification to the FNE and the settlement procedure.

43 Based on articles 3, 18 (1) and (2) and 26 of the Competition Act; the powers to approve and to prohibit are not explicitly mentioned by law however. In contrast, the FNE is not entrusted with any final decision-making power (article 39 of the Competition Act).

44 See *infra*, section 5 on "remedies" for some illustrations of the conditions imposed in merger cases.

The Supreme Court held that the TDLC was not subject to any legal restraints as to the remedies it is authorised to impose to mitigate the competition risks arising from a transaction.[45] The TDLC may also impose on the Parties administrative fines where the consummated merger is found to violate the Competition Act.[46]

- Investigative powers lie with the FNE. The FNE may investigate any actual or potential infringement of the Competition Act, *ex officio* or upon a third party complaint ("denuncia").[47] The FNE also acts as competition prosecutor and represents the public interest before the TDLC. In this role, the FNE may request the review of allegedly anti-competitive acts, and seek for sanctions and/or preliminary measures.[48] The FNE is also entrusted with the power to reach in-court conciliation and since 2009 with the power to reach extra-judicial settlements with the Parties to address competition concerns.[49] The FNE has used its settlement power notably in the context of merger control. Following its investigation, the FNE may settle the case with the Parties and close the investigation, or bring the case before the TDLC. [50] Depending on whether the transaction has already been consummated and on its anticompetitive effects, the FNE may bring the merger before the TDLC through a consultation or an adversarial proceeding, as described further below.

45 Supreme Court, 5 April 2012, Docket No. 9843-2011 (LAN/TAM case).

46 Article 26 of the Competition Act.

47 Articles 18 (2) and 39 (a) of the Competition Act; the FNE's specific investigation powers are set forth in article 39 (f) to (n).

48 Article 39 (b) and (c). "Prosecution" is used in the generic sense; competition law enforcement in Chile is not criminal in nature.

49 Article 39 (ñ) re: extra-judicial settlements, which are subject to the TDLC's approval; and article 22 re: in-court conciliation agreements.

50 The FNE may also reopen an investigation under article 39 of the Competition Act. However, the FNE cannot challenge a merger that has been approved by the TDLC based on the same facts: see Chile's contribution to the OECD Discussion on "Investigations of consummated and non-notifiable mergers", 25 February 2014, DAF/COMP/WP3/WD(2014)13, http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2014)13&docLanguage=En.

Merger control in Chile can take place through several **merger review procedures**. In fact, merger control can be triggered not only by a voluntary notification by the Parties, but by the FNE or by a third party before the TDLC. In addition, the Competition Act foresees two types of procedures before the TDLC: a contentious procedure (adversarial litigation) and a non-contentious procedure ("consultation") (section 3.1). The type of procedure depends on who initiates the procedure, and whether the request seeks the non-contentious review or rather the litigation of a merger. Furthermore, the FNE investigation and settlement powers grant the possibility of merger review process taking place before the FNE (section 3.2).

3.1 Merger review by the TDLC

A merger can be subject to the TDLC's review, either through a consultation procedure or through a contentious procedure. Since the creation of the TDLC effective in 2004, the TDLC has issued decisions on 16 merger cases,[51] as detailed in the Annex to this Report.

The **consultation procedure** is governed by articles 18 (2) and 31 of the Competition Act and it is further detailed in the TDLC Decree on Concentrations. According to article 18 (2), the TDLC's consultation consists in reviewing the submitted *"facts, acts, or contracts, whether existing or to be executed, for which it can fix the conditions to be met by the said facts, acts or contracts"*; it features the following procedural steps:

- The Parties, the FNE or third parties having a legitimate interest in the merger,[52] can submit the merger for consultation to the TDLC.[53] The TDLC cannot start a merger review *ex officio*.

51 Namely 14 consultation resolutions, one adversarial ruling and one extra-judicial settlement approval.

52 Article 18 (2) of the Competition Act refers to "anyone with a legitimate interest", there is controversy as to whether this reference includes third parties or whether it should rather be limited to the Parties only. In the LAN/TAM case, the TDLC voted in favour of third party standing on the basis of this provision, which suggests a broad interpretation of that provision. See TDLC, *LAN/TAM*, NC N° 388-11, 21 September 2011, http://www.tdlc.cl/DocumentosMultiples/Resolucion_37-11.pdf and Supreme Court, Docket N° 9843-2011, 5 April 2012, http://www.tdlc.cl/DocumentosMultiples/Resolucion_37_Corte_Suprema.pdf.