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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CHILE

-- 2011 --

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REPORT ON DEVELOPMENTS IN COMPETITION LAW AND POLICY IN CHILE

August 2011 – July 2012

Executive Summary

1. This report summarizes recent developments in competition law, policy and enforcement in Chile. It also refers to the main cases of competition law enforcement, activities advocating competition, and public debates regarding the current legal framework that occurred between August 2011 and July 2012.

2. The *Fiscalía Nacional Económica* (hereinafter “the FNE”) is an independent government competition agency whose main role is to detect, investigate and bring cases against antitrust violations, produce technical reports and develop activities advocating competition. The *Tribunal de Defensa de la Libre Competencia* (hereinafter “the TDLC”) is the independent judicial body with powers to decide, has exclusive and excluding jurisdiction in matters of antitrust law and resolves adversarial matters (e.g. FNE’s complaints, and also complaints brought by private parties regarding collusion and abuse of dominant position) as well as non-adversarial matters (e.g. preventive merger control). Decisions and resolutions made by the TDLC can be challenged before the Supreme Court. Competition law is Decree Law No. 211 and its subsequent modifications.¹

3. During the period covered by this report, competition law and policy in Chile has experienced a phase in which major developments in law enforcement regarding cartels and mergers have taken place as well as new steps in the implementation of legislative powers conferred to its authorities in 2009, all of which has translated into an increased interest by the community in competition law. The more relevant milestones in law enforcement of this period are:

- Regarding cartels, in January 2012, the TDLC ruled on the case known as the “Pharmacies Case”, the biggest cartel ever prosecuted in Chile by the FNE, issuing a condemnatory ruling and imposing for the first time the highest fines allowed by the Competition Act as had been requested by the FNE²; the case was lately upheld by the Supreme Court. In June 2012, the TDLC for the first time issued a condemnatory ruling on a hard core cartel case initiated by a FNE’s complaint based on information provided by one of the involved companies in exchange for leniency (Compressors case).³ A few months before, in December 2011, the FNE had submitted a complaint against the 3 major poultry producers and the trade association grouping them, requesting the imposition of the highest total amount of fines ever requested (Poultry case).⁴

¹ The major modifications to the law on competition in recent years have been Law No. 19.911/2003 created by the TDLC and Law No. 20.361/2009 which reinforced the law on hardcore cartels.

² TDLC’s Ruling No. 119 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_119_2012.pdf

³ TDLC’s Ruling No. 122 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_122_2012.pdf

⁴ The case is currently ongoing before the TDLC. The FNE’s complaint, in Spanish, can be downloaded from the following link: http://www.fne.gob.cl/wp-content/uploads/2011/12/requ_007_2011.pdf. One of

- Regarding mergers, major decisions on transnational mergers have been issued during the period under report. In the Lan/Tam case, a transaction in the Latin American air transport industry publicly announced in August 2010, the TDLC allowed for the first time the initiation of a merger review proceeding by a third party. This private initiative blocked the engagements agreed by the merging parties with the FNE and led to a proceeding finished by a TDLC's decision in September 2011.⁵ In April 2012, the Supreme Court dismissed the challenges that merging entities raised against some of the remedies imposed by the TDLC. In Shell/Terpel - a resolution subsequent to Copec/Terpel, a decision on a takeover with transnational effects that had ordered divestiture of Terpel Chile shares to avoid a 4 to 3 concentration in the fuel distribution market⁶- the TDLC did not authorize the proposal of acquisition of the assets by a remaining competitor.⁷ In addition, the TDLC's ruling on the Malone case shows commitment of competition authorities with ensuring compliance with merger remedies.⁸ And the FNE, with its complaint against Cine Hoyts *et al.* is innovatively challenging for the first time an already closed merger.⁹
- Finally, an enforcement action by the FNE against the regulator in charge of water rights also represents a milestone in the enforcement against public entities, evidencing the independence of the agency from governmental influence. Initiated as an adversarial proceeding before the TDLC, the case was settled though.¹⁰

4. As it was allowed by the latest amendment to the Competition Act, the FNE has increasingly submitted settlement agreements to TDLC's approval in order to save resources of an otherwise expensive litigation proceeding. For instance, settling before or after the initiation of an adversarial proceeding has been a regular solution for some abuse of dominance cases in regulated and non-regulated sectors. The request to the TDLC of using its power in regulated sectors to issue a report on the necessity of regulation and of issuing a formal recommendation of a legal amendment may be included in the FNE's tools palette, as well as FNE's filing resolutions with no further action but containing warning messages or references to the engagements committed by the parties.

5. The FNE continued its strategy of producing information materials to advocate competition, and provide transparency and greater judicial stability and predictability for individuals, businesses and the public sector. During this period, it is noteworthy to mention the publication of a guide on Competition and the Public Sector and a guide on Compliance Programs.

6. Besides, the FNE re-structured one of its departments creating the new Mergers and Research Division due to the significance acquired by mergers issues and has initiated the drafting process of a new version of its internal guidelines for horizontal mergers

7. On the international level, it is noteworthy to mention that the FNE, beyond participating in different forums as usual, has signed a cooperation agreement regarding a "Technical cooperation project

the first dawn raids performed by the FNE provided the evidence for this case. The defendants have raised due process issues suspending by this mean this proceeding for several months.

⁵ TDLC's Decision No. 37 is available at: www.tdlc.cl/DocumentosMultiples/Resolucion_37-11.pdf

⁶ A reference of this case in the previous Annual Report submitted by Chile to the OECD.

⁷ TDLC's Decision No. 34 is available at: http://www.tdlc.cl/DocumentosMultiples/Resolucion_34_2011.pdf

⁸ TDLC's Ruling No.117 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_117_2011.pdf

⁹ FNE's complaint is available at: http://www.fne.gob.cl/wp-content/uploads/2012/06/requ_01_2012.pdf

¹⁰ TDLC's approval of the settlement agreement between FNE and Dirección General de Aguas is available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2946&GUID>

to institutional strengthen, training and exchange best practices in advocacy and defense of competition” with the CFC competition agency of Mexico. As part of this initiative several internships of FNE’s officials have been possible in the authorities of Mexico, Australia, UK and Europe. In addition, the agreement has provided funds for hiring an international study on vertical restraints and competition in markets to a French consultancy. In addition, a week visit of FNE’s officials to U.S. FBI headquarters was an interesting training activity for improving FNE’s investigation techniques.

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions in competition law and related legislation

8. No legal provisions regarding competition law directly were enacted in the reported period.

9. A Commission of legal and economic experts called by the President of the Republic in December 2011 reviewed the current legal framework of Competition Law. This Commission celebrated thirteen meetings until May 2012 and issued a report with recommendations of future amendments.¹¹ The report’s recommendations refer to the basis of fines calculation¹², disqualification of individuals involved in competition law violations¹³, amendments to criminal provisions and enhancement of the leniency framework¹⁴, amendments to the merger control system¹⁵, and potential regulation of the FNE’s investigations procedure.¹⁶

10. It is likely that in the near future at least some of these proposals will be included in a formal bill of amendment if the adequate political conditions are met.

1.2 Other relevant measures, including new guidelines

1.2.1 The FNE

11. In June 2012 the FNE launched for open and public consultation a draft of an updated version of its internal guide for horizontal mergers.¹⁷ The draft builds on the 2006 guide, incorporating some legal

¹¹ *Ibidem.*

¹² The recommendation aims at using an indicator of proportionality in fines calculation such as a percentage of relevant company’s turnover during the length of the violation adding a deterrent factor.

¹³ The proposal aims at incorporating as an accessory sanction a 5 years disqualification to individuals that participated in the design and/or execution of the specific violation, including members of the board of public corporations, directors of trade and professional associations, state owned companies and other public entities.

¹⁴ The recommendation suggests the abrogation of criminal provisions contained in the penal code. The main problem of these provisions is that they are not covered by the leniency provisions of the Competition Act, and thus the applicant is exposed to criminal prosecution. The criminalization of hard-core cartels was also discussed within the Commission but no consensus was reached regarding this topic. Protecting the leniency applicant from criminal prosecution was identified as a crucial issue for enhancing the current system.

¹⁵ The recommendations point to move from a voluntarily system towards a mixed system, voluntarily under a determined threshold and mandatory over that threshold. The threshold must be defined according to merging parties’ assets or relevant turnover.

¹⁶ Some members of the Commission raised the point that the length of FNE’s investigations was too large, and hence proposed to introduce limitations to that length.

¹⁷ The draft guideline is available at: <http://www.fne.gob.cl/wp-content/uploads/2012/07/Guia-Fusiones1.pdf>

reforms, developments in economic theory, recent case law and the experience gained by the FNE in merger analysis since 2006.

12. Amongst the new elements incorporated into the new draft it is worth to mention a more accurate description of unilateral and coordinated effects, including examples of the frequent effects raised by horizontal mergers. The chapter on countervailing effects deals with efficiencies claimed by the merging parties as well as customer's bargaining power. As to relevant market definition, its lower significance regarding unilateral effects in markets of differentiated products is also acknowledged. Finally, thresholds justifying analysis are augmented reflecting the features of the current economy.

13. In addition, the draft regulates an internal proceeding to which the FNE will adjust its investigation procedure of the transactions voluntarily notified by the parties according to stages and deadlines, aimed at guaranteeing an effective and timely analysis by the FNE, previous to the TDLC's review.

14. *Advocacy material on Competition and the Public Sector.*¹⁸ In June 2012, the FNE launched an advocacy material on Competition and the Public Sector. These guidelines aimed first at clarifying the scope of public bodies' activities that can be reached by the FNE's enforcement actions. The other purpose sought by this advocacy material was to supply government officials with some basic tools for analyzing the real or potential anticompetitive effects that their activities may trigger. A draft version of this document was subject to open and public consultation.

15. *Advocacy material on Compliance Programs.*¹⁹ In June 2012, the FNE launched a document on Compliance Programs. Compliance with competition law is a major goal of competition authorities. Good corporate practices today consider the issuing and implementation of ethic codes and compliance programs. A compliance program is an efficient and effective preventative mechanism aimed at controlling damages. The document issued by the FNE aims at describing the core elements of an effective competition law compliance program implemented by an economic actor, from the point of view of the FNE. A draft version of this document was subject to open and public consultation.

1.2.2 The TDLC

16. *Amendment to the Internal Regulation (Auto Acordado) No. 11/2008 on privacy and confidentiality of information in proceedings.*²⁰ In March 2012 the TDLC issued Internal Regulation No. 15/2012. This procedural regulation issued according to legal provisions, aims at determining the degrees of publicity granted to the information submitted to the proceedings. The information may be qualified as 'public' (available to anyone), 'private' (available only in the court room to the parties intervening in the corresponding proceeding) and confidential (available only to the party that submitted the information and to the FNE in the court room).

17. The main modifications tend to favor transparency in proceedings, limiting the exceptions to the publicity principle. Parties requesting privacy or confidentiality of submitted documentation should now submit simultaneously public versions of the documents; a previous three days deadline considered for submitting public versions was abrogated.

¹⁸ The guideline is available at: <http://www.fne.gob.cl/wp-content/uploads/2012/06/Guia-final-sector-publico.pdf>

¹⁹ The guideline is available at: <http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf>

²⁰ TDLC's Internal Ruling No. 11 is available at: <http://www.tdlc.cl/DocumentosMultiples/Auto%20Acordado%20N%C2%B0%2015.pdf>

18. In addition, duties of not disclosing and not reproducing information qualified as private or confidential are explicitly described and certainty regarding safeguards and handling protocols concerning this information are provided.

2. Enforcement of competition law and policy

2.1 *Actions against anticompetitive practices, including agreements and abuses of dominant position*

2.1.1 *Competition Authorities: FNE's Summary of activities*

19. The FNE initiated 17 investigations in 2011. Through July 2012, it has initiated a total of 13 investigations. Moreover, the number of investigations rolled over from previous years is significant, but the FNE is working towards the progressive decline of this number (72 cases rolled over at the beginning of 2010, 73 at the beginning of 2011, and 52 at the beginning of 2012).

20. Traditionally, the majority of investigations dealt with situations of abuse of dominant position, however, the gap is closing between these and other types of cases. Particularly, there has been a relative increase in cases of horizontal agreements among competitors.

	New investigations in 2010	New investigations in 2011 ²¹	New investigations in 2012 ²²
Abuses of dominance	9	8	4
Agreements (horizontal)	8	5	3
Regulatory/Government acts.	5		1
Unfair Competition	1	-	2
Vertical Restraints	-	-	-
Infringements of previous decisions	-	4	3
Total	23	17	13

21. During the period covered by this report, the FNE filed a total of four complaints before the TDLC, three in 2011 (August-December)²³, and one through July 2012.²⁴

22. Taking into account the cases ruled by the TDLC through judicial decision in the same period, which total seven (five convictions²⁵, two absolutions²⁶), the success rate is estimated at 71%.

23. If we add to this number those cases that initially were brought from filing charges and ended as a result of settlements reached during the reported period (two²⁷), the success rate increases to 78%.

²¹ Higher numbers in the previous report for 2011 are explained by the inclusion of investigations that were finally declared inadmissible after the submission of the report, and thus they were no longer considered as investigations

²² Figures through the month of July 2012. The figures indicated here exclude cases declared inadmissible.

²³ FNE, Complaints: c/Pullman Bus Costa Central S.A. et al., c/Dirección General de Aguas, c/Agrícola Agrosuper S.A. et al.

²⁴ FNE, Complaint c/ Hoyts Cinema et al.

²⁵ TDLC's Rulings No. 115 (*Chiletabacos*), No. 116 (*Buses Puerto Montt*), No. 117 (*Malone infringement to VTR/Metropolis*), No. 119 (*Pharmacies*) and No. 122 (*Compressors*).

²⁶ TDLC's Rulings No. 113 (*Tourism operators*) and No. 118 (*KDM waste management contracts*).

- Extrajudicial agreements: efficient procedures for enforcing the law

According to a legal provision introduced in 2009 the National Economic Prosecutor may now enter into extrajudicial agreements with economic agents involved in the FNE's investigations in order to safeguard competition in markets. These settlements are subject to approval by the TDLC in an expedite proceeding.

During the period covered by this report, this mechanism has been successfully used by the FNE in one occasion.²⁸

- Leniency and intrusive powers: an effective use of new legal tools for the efficient fight against hardcore cartels

In June 2012, the TDLC for the first time issued a condemnatory ruling on an international hardcore cartel case initiated by a FNE's complaint based on information provided by one of the involved companies in exchange for leniency (Compressors case). The case is detailed below.²⁹ The case, still pending before the Supreme Court demonstrates how efficiently the leniency program is being used in Chile.

In December 2011, the FNE submitted a complaint against the 3 major poultry producers and the trade association grouping them, requesting the imposition of the highest total amount of fines ever requested (Chickens case).³⁰ The most relevant evidence for this case was obtained through one of the first dawn raids performed by the FNE.

2.1.2 Competition Authorities: TDLC's Summary of activities

24. In the period covered by this report the TDLC initiated 12 new adversarial cases.³¹ Of the total number of cases, 75% are related to unilateral conducts, and 25% to cartels.³²

25. The TDLC issued a total of 11 decisions in adversarial cases during the period covered by this report: 5 in 2011 (August-December)³³, and 6 through July 2012³⁴. These cases stemmed from both FNE

²⁷ TDLC's approval of the settlement agreement between FNE and Dirección General de Aguas, and TDLC's approval of the settlement agreement between the FNE and Coca-Cola bottlers.

²⁸ The case involved the suppliers of required school supplies. The FNE obtained companies' engagements in order to cease their aggressive commercial strategies favoring specific brand products and limiting free choice by students' parents. A press release about this settlement is available at: <http://www.fne.gob.cl/english/2012/05/09/the-competition-tribunal-granted-its-approval-to-a-settlement-between-the-fne-and-torre-s-a-libesa-ltda-and-fabrica-internacional-de-lapices-y-afines-chile-ltda/#more-1193>

²⁹ TDLC's Ruling No. 122 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_122_2012.pdf

³⁰ The case is currently ongoing before the TDLC. The FNE's complaint, in Spanish, can be downloaded from the following link: http://www.fne.gob.cl/wp-content/uploads/2011/12/requ_007_2011.pdf. One of the first dawn raids performed by the FNE provided the evidence for this case. The defendants have raised due process issues suspending by this mean this proceeding for several months.

³¹ TDLC, Docket No. 230-11, 231-11, 232-11, 233-11, 234-11, 235-11, 236-11, 237-11, 238-12, 239-12, 240-12, 241-12 and 242-12.

³² According to the statistics table available at: <http://www.tdlc.cl/DocumentosMultiples/Conductas%20-%20Contenciosas.pdf>

³³ TDLC, Rulings No. 117 (Malone infringement to VTR/Metropolis), No. 116 (Buses Puerto Montt), No. 115 (Chiletabacos), No. 114 (Dirección Compras y Licitaciones Públicas actos anticompetitivos autoridad) and No. 113 (Tourism operators).

claims as well as complaints filed by private parties. Of these 11 rulings, only 6 were condemnatory. The average length of these proceedings was 714 days (roughly 2 years).

26. Of these 11 decisions, 6 were challenged before the Supreme Court, 5 of which are still under review. The only challenge that the Supreme Court has resolved, out of these 6, confirmed the TDLC's decision. The review proceeding by the Supreme Court in this case was 178 days.

27. Of the 6 condemnatory decisions issued during the period covered by this report, one refers to a form of abuse of dominant position,³⁵ one refers to non compliance to a previous decision³⁶, one to barriers to entry³⁷ and three to some form of agreement between competitors.³⁸

2.1.3 Courts: The Supreme Court's Summary of activities

28. During the period covered by this report, the Supreme Court (SC) issued 2 decisions in matters relating to the enforcement of competition law in adversarial cases.

29. One of the SC's rulings regards a bid-rigging case (*Radios*) in which the SC upheld the condemnatory ruling of the TDLC³⁹ adding that the procedural costs of the proceeding should be borne by the losing defendants.⁴⁰

30. In the other case (*OMV*), the SC overturned an acquittal ruling issued by the TDLC with respect to the three major mobile companies accused by the FNE of refusing to offer infrastructure and inputs for developing virtual mobile operators technology. When overruling the SC condemned the companies and imposed a total amount of fines of USD\$ 8.1 m. approx.⁴¹

2.1.4 Courts – The Constitutional Tribunal's Summary of activities

31. The Constitutional Court did not issue any decision regarding a competition law enforcement proceeding. However, it is worth to mention a ruling regarding the constitutional character of the limitations to property rights that might have consequences broadening the scope of justifications of TDLC's powers.⁴²

³⁴ TDLC, Rulings No. 123 (Supermercado Naval), No. 122 (Compresores), No. 121 (Transporte Fluvial Niebla-Corral), No. 120 (CGE), No. 119 (Farmacias) and No. 118 (KDM).

³⁵ TDLC, Ruling No. 115 (Chiletabacos).

³⁶ TDLC Ruling No. 117 (Malone infringement to VTR/Metropolis Decision).

³⁷ TDLC Ruling No. 121 (Transporte Fluvial Niebla-Corral).

³⁸ TDLC, Rulings No. 122 (Compresores), No. 119 (Farmacias) and No. 116 (Buses Puerto Montt).

³⁹ The case was reported in the previous annual report submitted by Chile to the OECD.

⁴⁰ SC, January 11th, 2012, Docket Nr. 6874-2011, ruling on complaint recourses against TDLC Ruling No. 112 (*Radios*).

⁴¹ SC, December 23rd, 2011, Docket Nr. 7781-2010, ruling on complaint recourses against TDLC Ruling No. 104 (*OMV*)

⁴² Constitutional Tribunal Ruling No. 1863. In July 2012, the Constitutional Court decided over the constitutional character of a provision in the Roads Act which puts on the burden of the electricity distributors concessionaires the duty of relocating infrastructure joined to public roads when thus ordered by the Roads Authority, without right to compensation. The Court analyzed potential limitations to property rights grounded on the public interest, holding the constitutionality of the provision. Some

2.1.5 *Criminal issues in the pharmacies collusion case*

32. As a result of the Pharmacies Case, in 2009 the Criminal Prosecutor's Office initiated investigations against 18 executives towards ascertaining the possible crime of fraudulent adulteration of standard pricing in Article 285 of the 1874 Penal Code – practically never enforced up to that moment.

33. Through July 2012, 7 executives have obtained the benefit of conditional suspension of the proceeding, offering community service in exchange and subject to the duty of signing weekly. For the rest of the executives the proceeding is still ongoing and the trial hearings will take place in the following months.

2.2 *Description of important cases, including those with international implications*

34. The following is a summarized presentation of the most important cases of the period in question, which serves to sketch a panorama of how competition law has been enforced in adversarial cases during this timeframe. The list includes both cases that have concluded or still ongoing before the TDLC, or with pending recourses before the SC. It is also comprised of cases initiated by complaints filed by private parties or as part of an investigation or complaint filed by the FNE.

2.2.1 *Cases which manifest a development in the area of cartels:*

- *Pharmacies Case: A milestone in cartel prosecution in Chile*

In December 2008 the FNE filed a complaint against the 3 main retail pharmacies Farmacias Ahumada, Cruz Verde and Salcobrand accusing them of concerted action resulting in the price increases of around 200 drugs between December 2007 and March 2008.

In April 2009, a settlement between the FNE and Farmacias Ahumada was reached, according to which Farmacias Ahumada agreed to pay USD\$ 1 m. the settlement was approved by the TDLC and the Supreme Court. This was the first cartel settlement ever agreed in Chile. The confession by Farmacias Ahumada generated a high impact in the public opinion, and collusion among competitors became a hot topic.

In January 2012 the TDLC issued a unanimous condemnatory ruling against the two remaining pharmacies chains.⁴³ TDLC's ruling was the product of a long proceeding involving complex litigation, in which the parties submitted and presented documents, witnesses, e-mails, expert and legal opinions. The FNE was thus able to prove that competition had been harmed due to the concerted action of the defendants. The ruling, containing a detailed analysis of the grounding facts, was conclusive in establishing that the price increases of drugs had been the result of the concerted actions of the defendants. Cruz Verde and Salcobrand were each fined in USD\$ 20 m. approx., the maximum fines applicable according to the Competition Act, on the basis of the seriousness of the conduct displayed and the extension of the harm caused, affecting almost the whole supply of a significant number of consumers in the country. The overall amount of fines imposed by this ruling is higher than the sum of all fines applied by the TDLC and the Supreme Court since 2004, the year of the creation of the TDLC.

In September 2012 the Supreme Court issued a unanimous ruling upholding TDLC's decision.⁴⁴ In an extended decision, the Supreme Court provides insights in several subjects of competition

scholars have commented that this decision may have consequences in the justifications of the TDLC interventions, particularly regarding merger remedies.

⁴³ TDLC's Ruling No. 119 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_119_2012.pdf

⁴⁴ Supreme Court, September 7th, 2012, Docket No. 2578-2012 ruling on complaint recourses against TDLC Ruling No. 119 (*Farmacias*)

law and related topics such as administrative law penalties, inquiries in collusion conduct, and elements of the infringement.

- *Poultry case: Cartel prosecution continues: use of FNE's intrusive powers and the role of trade associations in cartel conduct*

In December 2011, the FNE filed a complaint⁴⁵ before the TDLC, accusing the three main poultry companies in Chile (Agrosuper, Ariztía and Don Pollo) of cartelization. The accusation claims that the cartel was implemented and monitored by the Poultry Trade Association (APA – Asociación de Productores Avícolas de Chile A.G.).

In its complaint, the FNE claims that the agreement between the aforementioned companies (who concentrate approximately the 92% of the national production), overseen by and coordinated through the Trade Association, aimed to reduce the production of poultry meat, controlling the quantity of meat offered in the national market and assigning market shares to the involved parties. In the APA meetings, firm's executives allegedly discussed projections and defined production shares to each company, which have been stable during time. In fact, continues the FNE, since 2006 these companies have not exceeded the quantity defined by the APA, freezing the increase in the production of poultry meat.

Taking into account the seriousness of their actions, the duration of the conduct, the market power the agreement conferred to the companies involved and the allegedly essential nature of the product affected, the FNE requested the imposition of the maximum fines established in the Act to each company cartelized – that is, 30.000 UTA (around USD\$ 30 m.). Additionally, the FNE asked for both a fine of 20.000 UTA and the dissolution of the Trade Association, due to its central role in coordinating and maintaining the cartel.

This is the major cartel complaint after the pharmacies case. Besides the seriousness of the conducts, the significance of this case is that for the first time the FNE submits evidence gathered through the use of the new raids and seizures powers provided by the 2009 reform to the Competition Act. Due to the use of these powers, defendants have raised a number of allegations against the way in which the FNE administered the documentation seized. These actions of defendants have delayed the pending proceeding before the TDLC.

- *Tecumseh: the Chilean leniency program and international co-operation*

The case was submitted before the TDLC in July 2010⁴⁶ against the companies Tecumseh do Brasil Ltda. and Whirlpool S.A. This is the first complaint filed by the FNE with information provided by a company that obtained the benefit of fine exemption incorporated by the 2009 amendments to the Competition Act. In its complaint, the FNE maintained that both companies breached the law by adopting and implementing a series of agreements aimed at artificially increasing the price of low wattage hermetic compressors marketed in the Chilean market— devices that constitute an essential input in the manufacturing of refrigeration appliances. The FNE requested the TDLC to declare the existence of said agreement, to order its immediate cessation, and to condemn Whirlpool to a fine of approximately USD\$ 15 million and to exempt Tecumseh from any fine in light of the leniency benefit.

In June 2012, the TDLC ruled unanimously against Whirlpool and Tecumseh for engaging in a collusive agreement. Since Tecumseh was the first company that met the legal requirement to be exempted from fines, according to the leniency provision, the TDLC's ruling for the first time

⁴⁵ FNE's complaint available at: http://www.fne.gob.cl/wp-content/uploads/2011/12/requ_007_2011.pdf

⁴⁶ FNE's complaint is available at: http://www.fne.gob.cl/wp-content/uploads/2012/02/requ_002_2010.pdf

applied this provision recognizing the fines exemption granted by the FNE. At the same time, the TDLC fined Whirlpool in approximately USD\$ 10 m.⁴⁷

In its ruling, the TDLC holds the Chilean competition law is applicable to conducts that have harmed competition in Chilean markets, wherever the conducts have been performed, in Chile or abroad. The case presented international aspects, due to which the FNE, particularly during the period the investigation was carried out, had to seek international cooperation from various international agencies that had background information regarding the case. The final decision on this case is pending before the Supreme Court.

2.2.2 *Cases reflecting developments in the area of exclusionary abuses of dominant position:*

- *Chiletabacos: exclusionary abuses through contractual clauses and incentives in distribution; FNE's role in monitoring compliance with previous TDLC's rulings*

In November 2011, the TDLC partially accepted the complaint filed by the FNE against Compañía Chilena de Tabacos S.A. (CCT) and the private suit filed by Philip Morris, holding that contractual clauses for the leasing of advertising rights or spaces by the CCT, when applied in practice, restrict and hinder competition or at the very least tend to produce said effects.⁴⁸

In fact, the TDLC pointed out that the use of the spaces to install advertising in sale points of the channel called "high trade" (restaurants, bars and pubs) implied exclusivity in the cases where competitors do not have a display cabinet in an equivalent place of visibility for the clients. The ruling thus forces CCT to reserve and transfer 20% of the facing of these display cabinets to the effective exhibition of competitors' cigarettes. Furthermore, the TDLC ordered CCT to refrain from executing actions, conducts or conventions aimed at restraining any licit promoting activity of rival cigarettes. Even though the TDLC found signs of other exclusionary conducts, they were not considered enough to convince the court that these conducts really happened and were attributable to CCT, thus the TDLC refused to impose a fine against CCT.

The FNE's complaint had been additionally based on the CCT infringement to the TDLC's Ruling No. 26/2005. The FNE plays a major role in monitoring compliance with previous TDLC's rulings, and in this case the defendant had delayed for no less than two years the implementation of a serious and credible program in order to effectively comply with the former ruling. The FNE challenged TDLC's ruling and the final decision on the case is pending before the Supreme Court.

- *Naviera Valdivia: limits to public tender design*

In May 2012 the TDLC ruled in favor of the claims submitted by Naviera Valdivia *et al.*, against Fisco de Chile and the maritime concessionaire Somarco.⁴⁹

The lawsuit aimed at challenging the public tender designed by the Ministry of Public Works (MOP) for assigning the concession of port infrastructure and transportation services between the villages of Niebla and Corral. MOP adjudicated the tender to Somarco and according to the tender conditions it allowed the vertically integrated tender winner to charge rates that were exclusionary for the remaining (non-vertically integrated) competitors in the transportation services.

⁴⁷ TDLC's Ruling No. 119 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_119_2012.pdf

⁴⁸ TDLC's Ruling No. 115 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_115_2011%20.pdf

⁴⁹ TDLC Ruling No. 121 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_121_2012.pdf

The ruling held that, in this case, the tender allowed Somarco to charge an unjustified high fare to its competitors for using port infrastructure. This exclusionary element had tended to eliminate competition in the market.

The TDLC hence held that the fare was anticompetitive and ordered the concessionaire to fix a new one based on the costs of the services provided and avoiding any exclusionary effect.

Besides, the TDLC ordered to the MOP that, after the expiration of the concession and in the case that a new tender on this route is called, to choose between avoiding vertical integration by assigning port infrastructure exploitation and transportation services to different and non-related companies or, if allowing vertical integration, to regulate maximum prices for port services.

The parties challenged TDLC's ruling, but before hearings at the Supreme Court they reached a settlement which is subject to TDLC's approval.

2.2.3 *Cases illustrating developments in the area of exploitative abuses of dominant position:*

35. There are no cases to report under this category for this period.

2.2.4 *Cases reflecting the effective and efficient use of a new alternative dispute resolution mechanisms*

- FNE/Coca-Cola bottlers

In April 2011, the FNE filed a complaint before the TDLC against two Coca-Cola Bottlers. Both companies hold licenses to produce and distribute Coca-Cola products in Chile, and are absolute leaders in the market of soft drinks within their respective concession areas. The accusation was grounded on exclusionary practices in the distribution and marketing of soft drinks, in particular, the defendant were accused of reducing the space to promote the distribution of other soft drinks companies holding smaller market participation.

By the end of 2011, the TDLC approved a settlement agreed between the FNE, private plaintiffs (alternative label soft drink companies) and the defendants.⁵⁰ On the basis of the settlement, the defendant committed not to sign exclusivity contracts with distributors or set exclusionary incentives. In addition, defendants committed that, under limited circumstances, Coca-Cola distributors will grant space to other competitors in their refrigerated displays, which were in current possession of their distributors.

Consumer's choices were rapidly protected by this expedient solution to the controversy and significant litigation costs were thus avoided.

- FNE/Dirección General de Aguas

In October 2011, the FNE filed a complaint before the TDLC against Dirección General de Aguas (DGA), the waters rights regulator, for non-compliance with Decision No. 992/1996 of the former Comisión Preventiva Central (replaced in 2006 by the TDLC), that had imposed information and publishing obligations regarding water rights.

The complaint was based in the fact that the DGA had disclosed only partially or, in other cases, completely omitted the obligation to send to the FNE the information related to every request and transfer of non-consumptive water rights suitable for electric generation. Besides, the FNE claimed that the DGA had violated its duty of publishing that information in his website.

⁵⁰ TDLC's approval of the settlement agreement between FNE and Coca Cola Bottlers is available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2937&GUID>

The TDLC approved a settlement reached between the FNE and the DGA.⁵¹ According to the settlement, the DGA –beyond recognizing its infringement- assumes several engagements, valued at least in 400 millions of pesos (almost USD\$ 1 m.). The engagements include to make a consolidate report containing all the information related to requests of non-consumptive water rights suitable for electric generation, to constitutions of the same rights, and a systematization of transfers and transmissions of the ownership of these rights communicated by the Land Registry Officer, which will be monthly send to the FNE with the corresponding actualizations of that information. The DGA also engages in not incurring again in a similar infringement.

In this case the FNE for the first time has submitted a complaint against a regulator. This is a clear demonstration of FNE's autonomy and independence from the government guaranteed by the Competition Act. The expedient settlement is also a demonstration that coordination between public entities is needed in order to ensure compliance with competition law decisions.

2.3 *Mergers and acquisitions*

2.3.1 *Statistics on number, size and type of mergers notified and/or controlled in accordance with competition laws*

36. In 2011 the FNE initiated 19 investigations into mergers and/or concentration operations. During 2012, through July, 7 internal proceedings were initiated to analyze mergers/concentration operations.

37. During the period covered by this report (August 2011-July 2012), 11 non- adversarial proceedings were initiated before the TDLC, including 5 concentration operations (2 of which refer to the same concentration, therefore only 4 cases total) and 6 matters linked thereto. Of those 4 concentration operations, 1 was blocked⁵², 1 ended by causes linked to the consulted operation (desist),⁵³ and 2 are currently ongoing.⁵⁴

2.3.2 *Changes in the organization of the FNE for dealing with merger control work*

38. **Setting up of the Mergers and Research Division.** In June 2012 the FNE reorganized its former Research and Advocacy Division creating the new Mergers and Research Division. This modification took place due to the relevance acquired last years by merger control workload at the FNE.

2.3.3 *Summary of important merger cases*

- *Lan/Tam: transnational merger in air transportation*

During the period covered by this report, the TDLC issued its decision on the merger between the national airline Lan and the Brazilian airline Tam.⁵⁵

The analysis illustrated possible risks of an increase in tariffs and a decrease in offer, mainly in the Santiago-Sao Paulo route, but also in others, such as routes between Santiago and Europe

⁵¹ TDLC's approval of the settlement agreement between FNE and Dirección General de Aguas is available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2946&GUID>

⁵² TDLC's Decision No. 39 (Quiñenco/Terpel)

⁵³ Consultation *Entel/GTD*, ended by desistance and withdrawal of the consultation

⁵⁴ TDLC's Case NC 397-11 Consultation *SMU/Supermercados del Sur* and TDLC, Case NC 404-12 FNE Consultation *Radiodifusión SPA*.

⁵⁵ TDLC's Decision No. 37/2011 (*Lan/Tam*)

(e.g. London, Milan and Frankfurt). Regarding coordination risks, the analysis considered relevant the background information of a cartel detected in the international freight transportation market in which Lan participated.

The TDLC cleared the merger since it considered that the transaction would generate efficiencies that would benefit consumers. However, considering that clearing the transaction without mitigating anticompetitive risks would threaten or harm competition, at the same time it imposed severe mitigation remedies, including the following: (i) Divestiture of four peers of daily slots in Santiago and Sao Paulo airports to new entrants; (ii) Extension of frequent flyers programs for 5 years to other airlines' passengers; (iii) The merged entity should be open to agree inter-airline alliances in the routes Santiago-Sao Paulo, Santiago-Río de Janeiro and/or Santiago-Asunción with any interested airline serving these routes; (iv) The merged entity will not be allowed to extend its capacity in flight frequencies in Santiago-Sao Paulo in the period between 15 minutes before and 15 minutes after frequencies corresponding to the slots divested; (v) Lan should modify its self-regulation plan currently in force; (vi) The merged entity should resign at least to one of the global alliances to which the merging parties are affiliated; (vii) Code share agreements are subject to strict regulations; (viii) Lan should resign to 4 air frequencies in Santiago-Lima in order for them to be assigned to another Chilean airline, and Lan's participation in future tender processes is restrained; (ix) Lan should express its commitment to unilaterally opening domestic transportation to foreign airline companies without requiring reciprocity; (x) The merged entity should promote growth and normal operation of Santiago and Sao Paulo airports, facilitating entry of other airlines; (xi) The merged entity should adopt non-exclusionary contractual terms with travel agencies and distributors; (xii) The merged entity should maintain pre-determined level of prices and number of flight frequencies until some of the mitigation remedies above mentioned are totally satisfied; (xiii) An independent consultancy company should be hired as a trustee by the merged entity in order to ensure compliance with the mitigation remedies.

Lan and Tam challenged before the Supreme Court three of the remedies imposed by the TDLC, including part of the regulations regarding code sharing agreements, the duty to resign to air frequencies in Lima-Santiago route, and the independent system for monitoring compliance. In the hearings before the Supreme Court that took place in December 2011, the FNE supported TDLC's decision, arguing that the remedies imposed were the minimum requirements to restore competition in the air industry, and that they had been imposed in protection of competition, national consumers, and strictly limited to the risks that the transaction generates.

In April 2012, the Supreme Court dismissed the challenges against TDLC's decision. Thus, Lan and Tam should abide the mitigation remedies imposed by the TDLC in order to complete the transaction. The Supreme Court held that the TDLC has no legal restraints regarding the remedies it is authorized to impose in order to mitigate the risks to competition a transaction may generate.⁵⁶

- Shell/Terpel: absence of an appropriate acquirer in a highly concentrated market

In May 2011 the TDLC, had approved the concentration transaction between Copec, a leading distributor of fuel in Chile and the Colombian fuel distributor Terpel with a series of mitigation remedies that considered, among others: (i) the divestiture of Terpel Chile's shares within the 18 month period after the takeover of Terpel Colombia by the consultant; (ii) the order to keep the FNE informed of the divestiture process; (iii) if the acquirer of said shares is a company previously established in the fuel distribution market, the acquisition operation must be consulted before the

⁵⁶

Supreme Court April 5th, 2012, Docket No. 9843-2011;

TDLC; (iv) Chinese wall mechanisms in the companies' corporate governance in order to avoid influences in their management that could incite anti-competitive effects.⁵⁷

In November 2011, on the basis of the remedy indicated in (iii) paragraph above, Terpel Chile and Quiñenco –who operates in the market by the brand Enx/Shell, submitted a consultation before the TDLC.⁵⁸

The TDLC held that the acquisition of Terpel Chile assets by Shell would contravene the competition normative.⁵⁹ The 4 to 3 transaction would involve the existence of concrete risks – price rises because the decrease in competition intensity and coordinated conducts- associated with high concentration and other qualitative characteristics of this market, as the homogeneity of the product, the easiness in reciprocal monitoring and the inelasticity of consumers' demand. It is worthy to indicate that Enx/Shell and Copec already shares storage and transport infrastructure in the country. The TDLC indicated that a highly concentrated fuel distribution industry have an impact in the retail segment, where barriers to entry and to competitors expansion exist.

The TDLC held that, on the one hand, the risks were not compensated by any of the efficiencies indicated by the consultants. On the other hand, there were no mitigation remedies proven effective to restore competition. Hence the proposed transaction was blocked. Two judge members of the TDLC dissented and defended that the efficiencies were sufficiently verifiable and thus that the transaction should be cleared. The final decision on this case is still pending before the Supreme Court.

- Cine Hoyts: challenging a closed merger for the first time

In June 2012, the FNE filed a complaint before the TDLC to challenge the acquisition by the third largest cinema chain Chile Films of the Hoyts cinema chain, which was the second player in the market.⁶⁰ With the deal, Chile Films has become the leading player in the market.

This is a landmark case in Chile's competition law, since it is the first time that the FNE files a complaint to challenge a closed merger, after a 6 months investigation.

In its complaint, the FNE concluded that the relevant product market involved in the challenged merger was the exhibition of first-run commercial movies in multiplex movie theaters. The FNE identified that merging parties were direct competitors in several areas, a circumstance that raised significant unilateral risks. The FNE concluded that the merger produced anticompetitive concerns in 3 zones of the capital Santiago and in the whole city of Valparaiso.

The FNE requested the TDLC to issue a divestiture order concerning the 3 areas (2 in the capital Santiago and 1 in Valparaiso) in which the merger produced the most serious anticompetitive concerns. In addition, it requested the TDLC to impose fines of a total of USD\$ 2 m. against the buyers, due to their dominant position in the market and the fact that they knew and foresaw that the merger would create actual or potential anticompetitive effects. The buyers decided not to voluntarily ask for TDLC's clearance in advance of closing thus assuming the risk that their merger might be challenged in an adversarial procedure. The proceeding is ongoing before the TDLC.

⁵⁷ TDLC's Decision No. 34/2011 is available at:
http://www.tdlc.cl/DocumentosMultiples/Resolucion_34_2011.pdf

⁵⁸ The consultation is available at: http://www.fne.gob.cl/wp-content/uploads/2011/12/inf_tdlc_010_2011.pdf

⁵⁹ TDLC's Decision No. 39/12 is available at:
http://www.tdlc.cl/DocumentosMultiples/Resolucion_39_2012.pdf

⁶⁰ FNE's complaint available at: http://www.fne.gob.cl/wp-content/uploads/2012/06/requ_01_2012.pdf

- Malone's infringement to VTR/Metropolis: ensuring compliance with merger remedies

The FNE had filed in 2008 a complaint before the TDLC against the American citizen John C. Malone based in his infringement against TDLC's Decision No. 1/2004⁶¹ regarding the review of the merger between Metropolis and VTR paid TV companies. The FNE claimed that the defendant had violated a remedy aimed at safeguarding competition in the market by forbidding the controller of the merged entity (nowadays VTR Globalcom S.A.) from directly or indirectly participate in the ownership of satellite television operators. The defendant had infringed this prohibition due to its shareholding acquisition in the parent company, DirecTV.

Nearly two years later, the FNE was able to serve the complaint in the U.S. through a formal request to the U.S. Ministry of Foreign Affairs.

In December 2011, the TDLC upheld the FNE's complaint and issued a condemnatory ruling against the defendant, confirming his violation of the judicial prohibition of participating in the ownership of satellite television operators⁶², and ordered John C. Malone to cease in any participation in the ownership of DirecTV in a period of six months. Besides, it applied a fine of 4.000 UTA (aprox. USD\$ 4 m). The final decision on this case is still pending before the Supreme Court. This case proves commitment of competition authorities with compliance with their merger decisions even in cases where infringements, having consequences in Chilean markets, have been executed abroad.

3. The role of competition authorities in originating and implementing other policies (e.g. regulatory reform, business and industrial policies, etc.)

39. Competition authorities in Chile conduct activities to advocate competition, in the strict sense, through three approaches: the FNE can persuade in favor of regulatory reform directly before the regulator; the FNE can, indirectly through its complaints or reports, request the TDLC measures such as recommendations to regulators or propose regulatory modifications; lastly, the TDLC can formulate recommendations or propose regulatory reforms.

40. During the period covered by this report, the FNE developed, among others, the following advocacy activities directly before regulators for various purposes. For the Office of the Undersecretary of Telecommunications, (*Subsecretaría de Telecomunicaciones*) the FNE reviewed tender conditions for 4G radio spectrum. For the electricity and fuels regulator (*Superintendencia de Electricidad y Combustibles*) the FNE proposed a system for introducing competition with respect to gas deposits owned by gas companies and, in other matter, issued a report regarding items exempted of charges. For the energy regulator (*Comisión Nacional de Energía*) the FNE proposed to introduce a delay in an implemented on-line system of automatic report of prices in gas stations. Unilateral opening of domestic air transport was also discussed with the air transport regulator. The FNE also conducted an analysis regarding the competitive assignment by public port companies of docking stations to private concessionaires in Valparaíso.

41. During the period covered by this report, through presentations made to the TDLC, the FNE made proposals in several topics.

⁶¹ TDLC's Decision No. 1 is available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=915&GUID>

⁶² TDLC, Ruling No.117 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_117_2011.pdf

42. One of the FNE's requests aimed at obtaining from the TDLC a formal recommendation of modifying the merchant marine normative, which exempts shipping conferences from competition law application.⁶³ The proceeding is ongoing before the TDLC.

43. Another FNE's submission regards to the electricity market. After a market investigation the FNE identified several services accessory to electricity distribution and not subject to price regulation that were priced excessively. In its submission to the TDLC, the FNE requested several measures to guarantee the efficiency in this market, including the extension of the price regulation in distribution market, increasing the publicity related to competition conditions regarding non-regulated clients and improving transparency regarding the fixed costs which have an important impact on the final price of the product.⁶⁴ The proceeding is ongoing before the TDLC.

44. The TDLC, during the period covered by this report, did not formulate any proposals in regulatory reform.

4. Budget and resources of competition authorities

4.1 The FNE

45. Overall resources (current numbers and changes over the previous year):

Annual budget

Year	Chilean pesos	Approx. USD
2010	\$ 3,940,884,000	≈ USD 7,858,976
2011	\$ 3,988,427,000	≈ USD 8,400,579
2012	\$ 4,220,158,000	≈ USD 8,941,012

No. of Employees

2010	2011	2012
87	89	93

Employees per category

Staff	2010	2011	2009
Economists	17	18	18
Lawyers	26	31	40
Other professionals	23	26	20
Support staff	18	14	13
All staff combined	87	89	91

Applied Human resources per area of work

	2010	2011
Enforcement against anti-competitive practices (cartel – dominance abuses)	52	66
Merger review and enforcement	11	10
Advocacy efforts	6	6

⁶³ FNE submission, available at: http://www.fne.gob.cl/wp-content/uploads/2012/05/cons_002_2012.pdf

⁶⁴ FNE, report. Available at: <http://www.fne.gob.cl/wp-content/uploads/2011/10/CONSULTA-NC-004-2011.pdf>

4.2 The TDLC

46. Resources overall (current numbers and changes over the previous year):

Annual budget

Year	Chilean pesos	Approx. USD
2010	\$ 1,009,641,000	≈ USD 1,992,400
2011	\$ 1,016,627,000	≈ USD 2,141,259
2012	\$1,117,052,000	≈ USD 2,151,487

No. of Employees (including staff members and judges)

2010	2011	2012
16	19	18

Employees per category

Staff	2010	2011	2009
Economists	4	5	5
Lawyers	7	7	7
Support staff	5	7	6
All staff combined	16	19	18

5. Summaries or references to new reports and studies in matters of competition policy

47. In 2011 the book “Libre Competencia y Regulación: Estudio de Casos”, authored by Felipe Morandé and Juan Esteban Doña was launched. The book contains the analysis of seven competition and regulation cases that took place between the years 2003 and 2007.⁶⁵

48. In October 2011 the FNE celebrated a new version of its annual conference “*Día de la Competencia*” that had taken place since 2003. Foreign panelists for this conference included scholars John Harrington, Patrick Rey, Daniel Sokol and the Chief Economist of the Competition Commission of South Africa, Simon Roberts. Panelist also included representatives of the FNE. The conference covered topics in Cartels, Abuses of Dominance and Vertical Restraints, amongst others.⁶⁶

49. As to the 2012 book “The Global Limits of Competition Law”, Daniel Sokol and Ioannis Lianos (eds.) it is worth mentioning a chapter written by Santiago Montt and Javier Tapia, researchers of *Centro de Regulación y Competencia de la Facultad de Derecho de la Universidad de Chile*, concerning judicial review and competition authorities, with a particular analysis of the Chilean system which differs significantly from other competition systems.⁶⁷

⁶⁵ A brief presentation of the book is available at: http://www.antartica.cl/antartica/servlet/LibroServlet?action=fichaLibro&id_libro=119097

⁶⁶ A summary of this activity is available at: <http://www.fne.gob.cl/2011/11/03/dia-de-la-competencia-2011-3/>

⁶⁷ A brief presentation of the book is available at: http://lawprofessors.typepad.com/antitrustprof_blog/2012/06/the-global-limits-of-competition-law-stanford-university-press.html

50. The *Centro de Regulación y Competencia de la Facultad de Derecho de la Universidad de Chile* has been active during the period covered by this report, issuing papers and working documents in regulation and competition downloadable from its web site.⁶⁸ The *Centro RegCom* has also organized frequent courses and seminars presented by national and international scholars, oriented to the community of professionals in regulation and competition.

51. The *Centro de Libre Competencia de la Universidad Católica* celebrated the sixth versión of its seminar “Jornada de Libre Competencia UC”. Competition and energy markets as well the optimal framework for merger control were the main topics covered during the seminar. Presentations are downloadable from the *Centro LCUC* web site.⁶⁹

⁶⁸ <http://regcom.uchile.cl/>

⁶⁹ An electronic version of this report is available at: <http://www.lcuc.cl/vi-jornada-de-libre-competencia/>