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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CHILE

-- 2012 --

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1. 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 other developments that occurred between August 2012 and July 2013.

2. The *Fiscalía Nacional Económica* (“FNE”) is an independent government competition agency whose main roles are to detect, investigate and bring cases against antitrust violations, to produce technical reports and studies, and to undertake competition advocacy. The *Tribunal de Defensa de la Libre Competencia* (“TDLC”) is the independent judicial body with exclusive and excluding jurisdiction to decide antitrust matters, including the resolution of adversarial matters (e.g., complaints brought by the FNE or private parties regarding collusion and abuse of dominance) as well as non-adversarial matters (e.g., preventative merger control). Decisions and resolutions issued by the TDLC can be challenged before the Supreme Court (“SC”). The competition law is Decree Law No. 211 and its subsequent modifications.¹

3. During the period covered by this report, various important enforcement matters were resolved, and new ones initiated.

- With respect to cartels, in September 2012, the SC issued a ruling in the “pharmacies” case, the largest cartel ever prosecuted in Chile by the FNE. The SC upheld the TDLC’s January 2012 ruling that had imposed the maximum fines then allowed by the Competition Act.² Another major cartel case currently pending before the TDLC, the “poultry” case, filed in December 2011, has seen increased litigation activity, as detailed below.
- Regarding merger control, notable developments include the SC’s ruling in the Shell/Terpel case (discussed in the prior annual report), in which the high court overturned the TDLC’s decision not to authorize the proposed acquisition of assets by a remaining competitor,³ and instead allowed the acquisition subject to divestitures.⁴ The TDLC’s ruling in the Malone case, involving non-compliance with merger remedies,⁵ was resolved before the SC in a settlement between the FNE and the defendant, in which the latter committed to cease and desist in the behavior and to pay litigation costs; the USD\$ 4 m. fine the TDLC had imposed was revoked by the SC. Regarding the first complaint the FNE ever submitted against an already closed merger, in the Cine Hoyts *et al.* case, on January 2013, the TDLC approved a judicial settlement between the FNE and the defendants. The transaction involved a merger between two major cinema exhibitors

¹ The most significant modifications to the competition law in recent years have been Law No. 19.911/2003 created 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; Supreme Court’s Ruling is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_119_Corte_Suprema.pdf

³ TDLC’s Decision No. 39 is available at: http://www.fne.gob.cl/wp-content/uploads/2012/08/reso_39_2012.pdf.

⁴ Supreme Court, January 2nd, 2013, docket no. 3993-2012; decision available at: http://www.fne.gob.cl/wp-content/uploads/2013/01/secs_01_2013.pdf

⁵ TDLC’s Ruling No.117 is available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_117_2011.pdf

in Chile. By virtue of the settlement, the companies committed to make divestitures in two geographic regions.⁶ Finally, in the Nestlé/Pfizer case, the FNE reached an extrajudicial agreement in connection with Nestlé's global acquisition of Pfizer's infant nutrition business, representing the first time the FNE obtained TDLC approval of an agreement before the merger had been consummated in Chile, and without a "consultation" having been initiated.

- Finally, as for abuse of dominance matters, the FNE recently demonstrated its willingness to litigate these cases when necessary by filing a complaint relating to alleged exclusionary conduct in the retail laundry detergent market. Several suits by other detergent producers followed the FNE's action, which is currently pending before the TDLC.

4. The FNE and the TDLC have both made efforts to provide general guidelines regarding market actors' conduct in different sectors. A common mechanism the FNE has used for this purpose has been to issue statements and recommendations in connection with the closing of investigations, even when no further action is taken. The TDLC, in turn, has been involved in a complex proceeding aimed at providing binding guidelines on some aspects of the telecommunications sector. Furthermore, with the goal of improving the transparency and predictability of enforcement proceedings, the FNE released a manual regarding the conduct of investigations and an updated version of its internal guidelines for merger review.

5. On the international level, Chilean competition authorities have taken a leading role in promoting international cooperation and exchanges of best practices in the region, actively participating in international seminars in Latin America with the aim of facilitating cooperation in law enforcement in the near future. The FNE has made particular efforts to support the launching of Ecuador's competition authority; several FNE's high officials have attended to conferences and seminars in the country. At his turn, the FNE has provided high quality training to its own officials. In the reported period, speakers from the US DOJ Antitrust Division, the DG Competition of the European Commission and foreign renowned economists such as Massimo Motta, Bruce Lyons and others have provided updated internal training on competition issues.

2. CHANGES TO COMPETITION LAWS AND POLICIES, PROPOSED OR ADOPTED

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

6. No legal provisions directly regarding competition law were enacted in the reported period. The report issued in May 2012 by a Presidential Commission of competition law and policy experts has not resulted in any amendments to the Competition Act so far.⁷

7. Early in 2013, Congress enacted a new Fisheries Act ("*Ley de Pesca y Acuicultura*").⁸ The modifications to the original Fisheries Act incorporated some of the recommendations that the TDLC had included in its twelfth regulatory amendment proposal, issued in 2011.⁹ One of the most important items in the new legislation was the creation of tradable, divisible and transmissible fishing permits (which were

⁶ The FNE's press release and details on this settlement are available at: <http://www.fne.gob.cl/english/2013/01/15/t DLC-grants-its-approval-to-a-judicial-settlement-between-the-fne-and-the-parties-of-cine-hoytscinemundo-an-already-closed-merger-in-the-cinema-exhibitors-market/>

⁷ A reference to that report was made in the previous annual report submitted by Chile (DAF/COMP/AR(2012)34), ¶ 9.

⁸ Act No. 20.657, published in official gazette on February, 9th, 2013.

⁹ TDLC's Regulatory Amendment Proposal No. 12 is available here: http://www.tdlc.cl/DocumentosMultiples/Proposicion_12_2011.pdf

only tradable before the modification), thereby allowing for a deeper permits market. Among other materials that the TDLC considered when designing its proposal was a technical report issued by the FNE.¹⁰

2.2 Other relevant measures, including new guidelines

2.2.1 The FNE

8. New FNE internal guidelines for horizontal mergers. In October 2012 the FNE issued an updated version of its internal guidelines for horizontal mergers.¹¹ The document builds on the 2006 guidelines by incorporating changes to account for legal reforms, developments in economic theory, recent case law and the experience gained by the FNE in merger analysis since the original guidelines were published. The final text is the product of an open and public consultation on an earlier draft, which was launched in June 2012.

9. The new guidelines provide 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, the new guidelines acknowledge its lower significance regarding unilateral effects in differentiated products markets. Finally, concentration thresholds justifying review are increased, reflecting the features of the current economy.

10. Most importantly, the guidelines established internal procedures to which the FNE will adhere in the case of the transactions voluntarily reported by the parties. These include stages and deadlines, aimed at guaranteeing an effective and timely analysis by the FNE.

11. The Deloitte report on stakeholder perceptions about FNE effectiveness. At the end of 2012, the FNE commissioned a study by Deloitte on the perception that expert antitrust lawyers have of the deterrent effect of competition law institutions in general and of the FNE's activity in particular. This initiative is one of the FNE's efforts to obtain an independent view about the challenges that still confront Chile's antitrust institutions.

12. The survey was answered by expert antitrust lawyers during individual meetings with Deloitte professionals. The results of the survey were provided to the FNE in an aggregated manner, so no access to the content of individual answers was available.

13. By and large, the results showed a positive perception of the performance and deterrent capacity of the FNE and TDLC.

2.2.2 The TDLC

14. New general instructions for telecommunication service providers: In December 2012, the TDLC issued general regulatory instructions¹² ("*Instrucciones de carácter general*") directed at mobile telephony service providers, as well as providers of fixed telephony, internet and cable television services. These

¹⁰ FNE's report, June 9th, 2010. Available here: http://www.fne.gob.cl/wp-content/uploads/2011/03/itlc_0004_2010.pdf

¹¹ The guide is available at: <http://www.fne.gob.cl/english/wp-content/uploads/2013/01/Guia-fusiones-traducida-final-2.pdf>

¹² TDLC's General Instructions No. 12 is available at: http://www.tdlc.cl/DocumentosMultiples/Instruccion_General_02_2012_Enmendado.pdf

instructions are applicable to private firms when their conduct or commercial agreements relate to or may affect competition, in accordance to Article 18 No. 3 of the Competition Act.

15. In summary, regarding mobile telephony, the TDLC considered that the difference between *on-net* and *off-net*¹³ prices for mobile network phone calls –which was observed to be much larger than the access fees for terminating calls in a competitor’s network– reduced competition between the incumbent firms and led to economically inefficient results in the market. The TDLC therefore instructed firms to price calls so that the price per second for an *off-net* call can only surpass the price per second for an *on-net* call by the amount of the access fee to the competitor’s network.

16. Regarding the telecommunications market, the TDLC considered that bundling of fixed and mobile telephony services could have adverse effects on competition, by eventually reducing the competitive pressure that one type of telephony imposes over the other. The same logic was applied to the fixed and mobile provision of internet services: given the current speed limitations of mobile internet services, they are considered as complements to fixed internet services.

17. Therefore, in this regulatory instruction, the TDLC determined that, although bundling of fixed and mobile telephony services is allowed, companies would not be permitted to offer discounts or more favorable conditions to customers who contract both services jointly. In addition, bundling of services that are offered via the same platform is allowed, but the price of the bundle must be greater than the sum of the prices of the individual services excluding the cheapest one. These restrictions will be active until 4G data transmission services are available throughout the country.

3. ENFORCEMENT OF COMPETITION LAW AND POLICY

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

3.1.1 Summary of activities:

3.1.1.1 Competition Authorities

The FNE

18. The FNE initiated 24 investigations in 2012. Through July 2013, it has initiated a total of 14 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 (73 cases rolled over at the beginning of 2011, 52 at the beginning of 2012, and 34 at the beginning of 2013).

19. 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.

¹³ *On-net* calls are phone calls that begin and end in the same company; *off-net* calls are those phone calls that begin in one company and end in a different company (e.g. an Entel client calling a Movistar client).

	New investigations in 2011	New investigations in 2012	New investigations in 2013¹⁴
Abuses of dominance	8	7	5
Agreements (horizontal)	5	5	2
Regulatory/Government acts.		6	2
Unfair Competition	-	2	1
Vertical Restraints	-	-	-
Infringements of previous decisions	4	4	4
Total	17	24	14

20. During the period covered by this report, the FNE filed three complaints before the TDLC: two in 2012 (August-December),¹⁵ and one through July 2013.¹⁶

21. In the same period, of the cases initiated by an FNE complaint and ruled upon by the TDLC, one resulted in a conviction,¹⁷ the other in absolution.¹⁸ In addition, one case initiated by a complaint ended in an extrajudicial settlement during the relevant period.¹⁹

Litigation challenges in cartel enforcement

22. The major cartel case currently being pursued by the FNE before the TDLC is a complaint against three major poultry processors and their industry trade association. According to the FNE, the defendants implemented an agreement that included several strategies to restrict production volumes.²⁰

23. The raid and the seizure of documents by the FNE during the investigation of this case have generated a significant amount of litigation. The trade association initiated two actions before the Court of Appeals of Santiago: a complaint procedure for violation of the legal requirements and formalities for the execution of the search procedure, and a request for the return of seized documents.

24. The complaints procedure was resolved in the lower court against the claimant and was later upheld by the appellate court on the grounds that a violation of the requirements and formalities had not been established, and instead that the allegations were related to the merit of the evidence, allegations that must be evaluated in the corresponding trial before the TDLC.²¹

¹⁴ Figures through the month of July 2013. The figures indicated here exclude cases declared inadmissible.

¹⁵ FNE Complaints: vs./Valdivia Buses and AGETV, and vs./Copiapó urban transportation services.

¹⁶ FNE's Complaint vs./ Unilever Chile.

¹⁷ TDLC's Ruling No. 128 (*ACHAP_Advertising Agencies*), January 29th, 2013.

¹⁸ TDLC's Ruling No. 124 (*Cámara de Comercio II*), August 9th, 2012; after the TDLC's ruling and before the Supreme Court ruled on the FNE's appeal, a settlement was reached between the FNE and the defendant.

¹⁹ TDLC's approval of the settlement agreement between FNE and Hoyts Cinemas et al. (TDLC's alternative ending decision No. 107, January 15th, 2013)

²⁰ The FNE's complaint is available here:
http://www.fne.gob.cl/wpcontent/uploads/2011/12/requ_007_2011.pdf

²¹ Corte de Apelaciones de Santiago, 3rd chamber, August, 19th, 2013, Docket No. 6523-2012. The ruling is available here: <http://www.fne.gob.cl/wp-content/uploads/2013/08/Fallo-APA-con-FNE-6523-2012.pdf>

25. The request for the return of documents, based on an alleged violation of the right to defense of the applicant, was resolved in favor of the latter on appeal.²² One of the defendant poultry producers also filed an application for the return of documents, but was rejected.

26. In addition, one of the accused poultry producers filed an application before the Constitutional Tribunal claiming, in summary, that the use of a statutorily provided evidentiary procedure (judicial confession), if allowed in the trial before the TDLC against a defendant or its representatives, would violate its constitutional right against self-incrimination, and its rights to due process.²³

27. These litigation activities reflect the difficulty and level of resources necessary for the prosecution of cartel cases.

The TDLC

28. During the period covered by this report, 15 new adversarial cases were initiated before the TDLC.²⁴ Of the total number of cases, 87% are related to unilateral conduct and 13% to cartels.

29. The TDLC issued 7 decisions in adversarial cases during the period covered by this report: 3 in 2012 (August-December),²⁵ and 4 through July 2013.²⁶ These cases originated both from claims by the FNE as well as through complaints filed by private parties. Of these 7 rulings, only 2 were condemnatory. The average length of these proceedings was 732 days (roughly 2 years).

30. Of these 7 decisions, 6 were challenged before the Supreme Court, 3 of which are still under review. The Supreme Court confirmed the other three challenged decisions in this period. These review proceedings by the Supreme Court averaged 192 days.

31. Of the 2 condemnatory decisions issued during the period covered by this report, one relates to an abuse of dominance,²⁷ and the other to a horizontal agreement between competitors.²⁸

²² Corte de Apelaciones de Santiago, 6th chamber, August, 7th, 2012, Docket No. 2440-2012. The FNE challenged this ruling before the Supreme Court but, after a submission by the defendant the recourse was declared non-admissible.

²³ The Constitutional Tribunal dismissed the claim accepting FNE's arguments. Constitutional Tribunal, August 20th, 2013, Docket No. 2381-12-INA. The ruling is available here: <http://www.fne.gob.cl/wp-content/uploads/2013/08/Sentencia-Tribunal-Constitucional1.pdf>

²⁴ TDLC, Docket No. 243-12, 244-12, 245-12, 246-12, 247-13, 248-13, 249-13, 250-13, 251-13, 252-13, 253-13, 254-13, 255-13, 256-13, 257-13, 258-13 and 259-13.

²⁵ TDLC, Rulings No. 124 (*Cámara de Comercio II*), No. 125 (*Laboratorios Recalcine vs. Roche Chile*) and No. 126 (*Acam vs. Comercial e Industrial Silfa*).

²⁶ TDLC, Rulings No. 127 (*Actigen Nova versus Bioagro*), No. 128 (*ACHAP - Advertising Agencies*), No. 129 (*Afex vs. Banco de Chile*) and No. 130 (*Beatriz Lea Zuberma vs. One Smart Star Number Chile*).

²⁷ TDLC, Ruling No. 130 (*Beatriz Lea Zuberma vs. One Smart Star Number Chile*).

²⁸ TDLC, Ruling No. 128 (*ACHAP - Advertising Agencies*).

3.1.1.2 Courts

The Supreme Court

32. During the period covered by this report, the SC issued 8 decisions in adversarial competition law matters.

33. The SC's first ruling in this period upheld in its entirety the TDLC's decision in the collusion case brought by the FNE against a pharmacies cartel.²⁹ In an extended decision, the SC provides insights regarding several subjects of competition law and related topics, such as administrative law penalties, inquiries in collusion conduct, and elements of the infringement.³⁰ This ruling confirmed the highest fines in the history of the TDLC: Cruz Verde and Salcobrand were each fined approximately US\$ 20 million.

34. The second SC ruling regards a collusion case (*Tour Operators*) in which the SC overturned an acquittal by the TDLC.³¹ A group of tour operators had been accused of colluding in the market for the intermediation of tourism services. In its ruling, the TDLC considered that the companies did not have a dominant position in the market, and would not have been able to force an increase in the commissions paid by an important hotel chain that had been deemed by the TDLC to be an irreplaceable trading partner to travel agencies and consumers. In its ruling, the SC considered that explicit collusive agreements could constitute a violation even when there is no direct evidence of having influence prices or quantities. The SC fined each of the 5 participating tourism operators 50 Annual Tax Units each (approximately US\$ 47,000).³²

35. The third of the SC's rulings concerns an abuse of dominant position case (*Tabacos*) in which the SC upheld the condemnatory ruling of the TDLC and the corrective measures it applied,³³ but also extended the corrective measures and imposed a fine of 20,000 Monthly Tax Units (approximately US\$ 1.6 million).³⁴

36. The SC's fourth ruling approved a settlement between the FNE and a trade association, the Cámara de Comercio de Santiago, reached after the agency had challenged a ruling by the TDLC, Ruling No. 124 (*Cámara de Comercio*), in which the tribunal had acquitted the association. The settlement included the modification of a license agreement between the Cámara de Comercio de Santiago and a competitor, whose commercial dispute had originated the initial case.³⁵

²⁹ The case was reported in the previous annual report submitted by Chile to the OECD.

³⁰ SC, September 7th, 2012, Docket Nr. 2578-2012, ruling on complaint recourses against TDLC Ruling No. 119 (*Pharmacies*).

³¹ The case was reported in the previous annual report submitted by Chile to the OECD.

³² SC, September 20th, 2012, Docket Nr. 10954-2011, ruling on complaint recourses against TDLC Ruling No. 113 (*Tourism operators*).

³³ The case was reported in the previous annual report submitted by Chile to the OECD.

³⁴ SC, December 4th, 2012, Docket Nr. 11968-2011, ruling on complaint recourses against TDLC Ruling No. 115 (*Tabacos*).

³⁵ SC, December 5th, 2012, Docket Nr. 6922-2012, approval of conciliatory agreement, in complaint resources against TDLC Ruling No. 124 (*Cámara de Comercio II*).

37. In its fifth ruling (*KDM*),³⁶ the SC upheld the TDLC's decision acquitting the defendants in a proceeding challenging the duration of contracts for waste management involving the companies and municipalities.³⁷

38. The SC's sixth ruling regards a case of barriers to entry (*Transporte Fluvial Niebla-Corral*), which overturned a decision by the TDLC. The SC considered that, because the parties had reached an agreement (in another court) that lowered tariffs charged by a company to its competitors for the use of an essential facility, no barrier was in effect and thus, contrary to the TDLC's original conclusion, no exclusion could have taken place.³⁸

39. The seventh³⁹ and eighth⁴⁰ of the SC's rulings upheld the respective rulings of the TDLC.

3.1.1.3 *Criminal issues in the pharmacies collusion case*

40. An investigation by the Criminal Prosecutor's Office against pharmacy executives, which was described in the Annual Report submitted last year, continued in the period covered by this report.

41. On July 8, 2013, ten executives obtained the benefit of conditional suspension of the proceeding, after committing themselves to attend business ethics classes, to develop and implement a competition compliance program, and to make donations to nonprofit organizations. But this was not the ending of the proceeding.⁴¹

3.1.1.4 *Damages*

42. On July 25, 2013, the Supreme Court upheld a decision by the Court of Appeals, which had set damages for lost profits (*lucrum cesans*) in the *Tobacos* case in the amount of approximately US\$ 2.1 million. This is the first damages case with a SC ruling that stems from a competition law case in Chile — TDLC Ruling No. 26, issued May 8th, 2006, an exclusionary abuse of dominance case— grounded on the new provision on damages enacted in 2003.

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

43. The following is a summarized presentation of the most relevant cases of the period in question. The list includes cases that have concluded or are still ongoing before the TDLC, or pending before the SC. It includes cases initiated by private parties or by the FNE.

³⁶ The case was reported in the previous annual report submitted by Chile to the OECD.

³⁷ SC, December 7th, 2012, Docket Nr. 2255-2012, ruling on complaint recourses against TDLC Ruling No. 118 (*KDM*).

³⁸ SC, January 30th, 2013, Docket Nr. 4470-2012, ruling on complaint recourses against TDLC Ruling No. 121 (*Transporte Fluvial Niebla-Corral*).

³⁹ SC, July 1st, 2013, Docket Nr. 9427-2012, ruling on complaint recourses against TDLC Ruling No. 126 (*Acam vs. Comercial e Industrial Silfa*).

⁴⁰ SC, July 23rd, 2013, Docket Nr. 8243-2012, ruling on complaint recourses against TDLC Ruling No. 125 (*Laboratorios Recalcine vs. Roche Chile*). In this case, an acquittal by the TDLC challenged by the plaintiff, the SC held that the procedural costs of the proceeding should not be borne by the plaintiff.

⁴¹ On August 30th, 2013, the Court of Appeals revoked this benefit. Therefore, the criminal proceeding continues its course and the criminal trial is expected for the following months.

3.1.2.1 Cases which manifest a development in the area of cartels

ACHAP (Adverstising Agencies): The role of trade associations in collusive behavior

44. This case was submitted by the FNE before the TDLC in September 2008. In its complaint,⁴² the FNE claimed that 34 advertising agencies—who combined accounted for around 70% of total media advertising expenditures in the country— had sought to impose contracting terms in three advertising tenders, through their trade association (ACHAP) and its executive president. The FNE requested the TDLC to order the immediate cease of these practices, to impose fines on the trade association and each agency of approximately US\$ 1.8 million, on the director of the association of approximately US\$900,000 and on each director of the association of approximately US\$750,000.

45. Given the number of defendants in this case, the litigation lasted more than 3 years. The TDLC ruled unanimously on January 29, 2013 that ACHAP, its executive director, its directors, and 11 advertising agencies had engaged in anticompetitive actions, by collectively boycotting advertising tenders organized by two prospective clients. The TDLC fined ACHAP approximately US\$46,000, its executive director approximately US\$9,300, 11 of the accused agencies approximately US\$7,000 each, and ACHAP's 8 directors approximately US\$4,600 each.⁴³

46. Most of the defendants did not challenge the TDLC's decision. A partial appeal was lodged by the FNE asking that the acquitted firms be sanctioned. Two advertising agencies requested that the rulings against them be overturned. A final decision is pending before the Supreme Court.

3.1.2.2 Cases reflecting developments in the area of exclusionary abuses of dominance

Prosecution of alleged exclusionary practices in consumer goods markets

47. In April 2013, the FNE filed a complaint before the TDLC⁴⁴ accusing the largest laundry detergent producer in the Chilean market of a series of exclusionary practices. The challenged practices can be summarized as (i) exclusivity discounts; (ii) retroactive conditional discounts (loyalty rebates), and (iii) other alleged restrictions relating to the use of shelf space, both in the traditional and supermarket distribution channels.

48. In June 2013, 5 private complaints against the defendant were consolidated with the FNE's case. The matter is currently ongoing in the TDLC.

3.2 Mergers and acquisitions

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

49. In 2012 the FNE initiated 12 investigations into mergers and/or concentration operations. During 2013, through July, the FNE has initiated reviews of 14 mergers/concentration operations.

⁴² FNE's complaint is available at:
http://www.tdlc.cl/DocumentosMultiples/Requerimiento_FNE_C_177_08.pdf

⁴³ TDLC, Ruling No. 128 (*ACHAP - Advertising Agencies*).

⁴⁴ FNE's complaint is available at:
<http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20de%20la%20FNE%2004-04-2013.pdf>

50. During the period covered by this report (August 2012-July 2013), no non-adversarial proceedings relating to merger control were initiated before the TDLC.

3.2.2 *Summary of important merger cases*

3.2.2.1 *Radiodifusión SpA: acquisition of radio broadcasting concessions*

51. During the period covered by this report, the TDLC issued its decision on the acquisition of 11 radio broadcasting concessions by Radiodifusión SpA, a company that belongs to a holding with participation in 117 television broadcasting concessions, as well as several other radio broadcasting concessions throughout the country.⁴⁵

52. The TDLC's analysis concluded that, although there are no relevant concentration effects in the radio broadcasting market, some competitive risks—in the form of portfolio effects—arose from the acquiring group's participation in the television broadcasting market, given the barriers to entry to this market (limited spectrum).

53. The TDLC cleared the merger because it concluded that the increase in concentration in the radio broadcasting market would not generate competitive risks in that market. However, given the recent technological convergence observed in telecommunications markets in general, the TDLC imposed the following mitigation remedies: (i) Prohibition against imposing on any advertiser the obligation to buy advertising space in television and one or more radio stations simultaneously, making clear that advertising agencies and clients are free to advertise in the media they deem convenient. (ii) Conditions for multiplatform or bundled sales of advertising space: (ii.a) media agencies and advertisers can purchase bundled items separately; and (ii.b) the price of the bundle of “n” items must be at least greater than the sum of the prices of “n-1” items, excluding the item with the highest price. (iii) Prohibition against arbitrary discrimination. (iv) Separation of radio and television in distinct enterprises. (v) Limitation of a non-compete clause to 2 years.

3.2.2.2 *SMU/SDS: concentration of supermarket chains*

54. During the period covered by this report, the TDLC issued its decision on the merger between the supermarket chains SMU and SDS (Supermercados del Sur).⁴⁶

55. In September 2011, SMU initiated a merger notification procedure before the TDLC (after the merger agreement with SDS had been signed) proposing mitigation measures in order to guarantee that the merger would not affect competition. This is the first time the TDLC considered a non-adversarial notification procedure initiated after the transaction had closed.

56. The TDLC approved this merger, subject to the following mitigation remedies: (i) SMU must sell a group of establishments (from options defined by the TDLC) in 19 municipalities where post-merger concentration levels caused concern, as well as the distribution centers that SDS operated in three locations, and at least one of the SDS operated brands. All these assets must be sold as one economic unit within 8 months. (ii) The buyer of these assets must not be related to SMU, and must not possess a market share over 25% in supermarkets at the national level. (iii) As long as condition (i) is not accomplished, SMU must operate those establishments and harmonize the prices of products sold there with the prices of the nearest location with sufficient competition conditions, as well as offer local providers with buying conditions at least as favorable as those offered providers of establishments of the nearest regional capital

⁴⁵ TDLC, Decision No. 41/2012 (*Radiodifusión SpA*)

⁴⁶ TDLC's Decision No. 43/2012 (*SMU/SDS*)

city. (iv) SMU must sell all direct or indirect participation in Supermercados Montserrat within 8 months. (v) Non-compete clauses agreed with the previous controllers of SMU cannot have an length greater than two years. (vi) SMU must establish general contracting terms, in an analogous fashion to Cencosud (another Chilean supermarket chain). (vii) SMU and its related companies must initiate a merger notification procedure prior to any future acquisition in the supermarket industry, be it in the retail or wholesaler segment.

57. This decision was challenged by SMU and by other two supermarket chains. The case is currently pending before the Supreme Court.

3.2.2.3 *Cine Hoyts: outcome of the challenge to an already closed merger*

58. On January 15, 2013, the TDLC approved a judicial settlement between the FNE and several contracting parties of CineHoyts/Cinemundo, a merger between two major cinema exhibitors in Chile. By virtue of the settlement, companies committed to make divestitures of assets in Estación Central (a Department in Santiago) and in the City of Valparaíso, to unrelated and independent entities.⁴⁷

59. The proceeding had been initiated by the FNE's June 2012 complaint against the companies, which was based on the general provisions of the Competition Act on transactions that may tend to harm competition. This represented the first FNE challenge to an already consummated merger.

3.2.2.4 *Nestlé/Pfizer: extrajudicial settlements for expedient review of some mergers*

60. On April 18, 2013, the TDLC approved an extrajudicial settlement relating to a transnational acquisition in which Nestlé purchased Pfizer's nutritional business. In the Chilean market, Nestlé is the leader in milk formulas for infants, followed at that time by Pfizer. Following its investigation, the FNE concluded that clearing the transaction with no mitigation remedies would significantly reduce competition in the relevant markets.

61. The investigation by the FNE required international cooperation with authorities in other jurisdictions, such as Mexico, that were investigating the same transaction.

62. The merging parties offered several commitments, including the mandatory licensing for a ten-year term of Pfizer's brands, formulae and know-how, followed by a ten-year black-out period during which Nestlé would not be allowed to re-introduce any of those brands into the Chilean market. These and other commitments adopted by the merging parties were aimed at facilitating entry by an effective competitor.

63. On the basis of the commitments negotiated between the FNE and the merging parties, an extrajudicial settlement was reached and submitted to TDLC for approval.

64. The TDLC's approval of the reached settlement is a milestone in merger review proceedings in Chile, since for the first time the TDLC explicitly allowed the use of extrajudicial settlements for merger review.⁴⁸

⁴⁷ The settlement is available here: <http://www.fne.gob.cl/wp-content/uploads/2013/01/Acuerdo-conciliatorio-C240-12-001.pdf> and the TDLC's approval decision, here: http://www.fne.gob.cl/wp-content/uploads/2013/01/reso_01_2013.pdf

⁴⁸ TDLC's approval decision, April 18, 2013, available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=4025&FMT=155&GUID=>

4. THE ROLE OF COMPETITION AUTHORITIES IN ORIGINATING AND IMPLEMENTING OTHER POLICIES (E.G. REGULATORY REFORM, BUSINESS AND INDUSTRIAL POLICIES, ETC.)

65. Several economic sectors were the subject of important market studies, recommendations and use of other statutory powers by both the FNE and the TDLC. In what follows, we elaborate on some examples for illustrative purposes.

66. In October 2013, the FNE released a market study on ‘Private Health Care Services and Insurance’ conducted by the Pontificia Universidad Católica de Valparaíso. The study analyzes the markets for health insurance (Isapres) and health care provision (inpatient-hospital services and outpatient-ambulatory services), diagnosing the main informational and incentive problems that are present in each of them, and recommending several measures for improvement, many of which are consistent with the initiatives promoted by the government since 2010. Finally, the study raises some concerns about the costs and efficiencies of vertical integration among insurance companies and health care providers, recommending further analysis. Following the study, the issue of vertical integration between health insurance companies and private hospitals became an important topic of discussion in the political arena.⁴⁹

67. In April 2013, the TDLC issued a decision on shipping conferences. The Chilean Merchant Marine Act historically had provided for an antitrust exemption, a very exceptional circumstance in our competition system. The FNE submitted a report and request before the TDLC requesting that TDLC formally recommend the abrogation of this exemption. The TDLC deemed the abrogation was not necessary since the right interpretation of the provision implied an authorization to shipping companies to participate in conferences, pools and other forms of joint business initiatives, but that the provision must not be construed as an *ex ante* and complete immunity from competition law. Thus, it concluded that the competition authorities would be able to analyze, on a case-by-case basis, whether a specific conduct by shipping companies violated Chilean competition law.⁵⁰

68. Another interesting decision issued by the TDLC in the reported period was motivated by a non-adversarial proceeding initiated by the FNE. According to sector regulation in electricity markets, the TDLC has the statutory duty of qualifying the competitive/non-competitive conditions under which services are provided in order to determine whether existing price regulations are still justified or new price regulations are necessary. In this case, several services accessory to electricity distribution and not subject to price regulation were priced excessively. The FNE requested price-regulations to these services due to the non-competitive conditions under which they were provided. The TDLC approved in part the FNE’s submission and made the qualification that several of the identified services must be subject to price regulation, because market conditions were not competitive enough to maintain them freed from price regulation.⁵¹

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

⁴⁹ The Study, in Spanish, can be downloaded here: <http://www.fne.gob.cl/english/wp-content/uploads/2012/11/INFORME-PUCV-MERCADO-SALUD.pdf>

⁵⁰ The TDLC’s decision, issued on April 10th, 2013, is available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=4012&GUID=>

⁵¹ The TDLC’s decision, issued on October 12th, 2013, is available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=3904&GUID=>

5. BUDGET AND RESOURCES OF COMPETITION AUTHORITIES

5.1 The FNE

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

a) Annual budget (in Chilean pesos and US\$)

- 2011: \$ 3,988,427,000.- (Chilean pesos); approx. USD 8,400,579.-
- 2012: \$ 4,220,158,000.- (Chilean pesos); approx. USD 8,941,012.-
- 2013: \$ 4,489,840,000.- (Chilean pesos); approx. USD 8,799,656.-

b) Number of employees

- 2011: 89
- 2012: 93
- 2013: 94

71. Informing separately for each year:

2011:

- No. of economists: 18
- No. of lawyers: 31
- No. of other professionals: 26
- No. of support staff: 14
- No. of all staff combined: 89

2012:

- No. of economists: 18
- No. of lawyers: 40
- No. of other professionals: 20
- No. of support staff: 13
- No. of all staff combined: 91

2013:

- No. of economists: 19
- No. of lawyers: 35

- No. of other professionals: 22
- No. of support staff: 18
- No. of all staff combined: 94

72. Human resources applied to:

a) Enforcement against anti-competitive practices (cartel – dominance abuses):

- 2010: 52
- 2011: 66
- 2012: 58

b) Merger review and enforcement:

- 2010: 11
- 2011: 10
- 2012: 12

c) Advocacy efforts:

- 2010: 6
- 2011: 6
- 2012: 6

5.2 The TDLC

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

a) Annual budget (in your currency and US\$)

- 2011: \$ 1,016,627,000.- (Chilean pesos); approx. USD 2,141,259.-
- 2012: \$1,117,052,000.- (Chilean pesos); approx. USD 2,151,487.-
- 2013: \$1,228,933,000.- (Chilean pesos); approx. USD 2,366,974.-

b) Number of members (including staff members + judges)

- 2011: 19
- 2012: 18
- 2013: 21

74. Informing separately for each year:

2011:

- No.of economists: 5
- No.of lawyers: 7
- No.of support staff: 7
- No. of all staff combined: 19

2012:

- No.of economists: 5
- No. of lawyers: 7
- No. of support staff: 6
- No. of all staff combined: 18

2013:

- No.of economists: 6
- No. of lawyers: 8
- No. of support staff: 7
- No. of all staff combined: 21

6. SUMMARIES OR REFERENCES TO NEW REPORTS AND STUDIES IN MATTERS OF COMPETITION POLICY

75. In October 2012 the FNE celebrated a new version of its annual conference “*Día de la Competencia*” that has taken place since 2003. Foreign panelists for this conference included the scholar Bruce Lyons from University of East Anglia and the attorney Thomas Vinje, partner at Clifford Chance LLP Antitrust Practice. Michael Jacobs and Andrés Gómez-Lobo, external consultants of the FNE participated as presenters as well. Panelists also included representatives of the FNE. The conference covered topics such as the presentation of the FNE’s annual report, a new manual for FNE’s investigations, the state of the art on merger review in Chile and future developments in this area. A market study on private health market was also presented. Finally, the conference considered two breakout sessions, one on merger review and the other on vertical restraints and antitrust in the internet economy.⁵²

76. In May 2013, the *Grupo Res Publica Chile*, a privately funded group of experts, economists, social scientists, lawyers, etc. launched a book containing 95 public policy proposals aimed at contributing to Chile’s economic development. Amongst these proposals it is worth highlighting those related with competition policy and law, such as proposal 17 which recommends the elimination of entry barriers in

⁵² A summary of this activity is available at: <http://www.fne.gob.cl/2012/10/11/dia-de-la-competencia-2012-2/>

specific sectors such as logistics chains, capital markets, notaries and real estate registers, pharmaceutical markets, electricity and to award the access to government's real estates and resources through competitive tenders; proposal 27 that recommends the inclusion of statutory penalties for competition law infringements with actual deterrent effect, i.e., suppressing the fixed statutory fine caps currently provided by the Competition Act and, eventually, considering criminal penalties for individuals participating in cartels; proposal 28 that recommends improvements in merger review system; and proposal 29 that recommends granting the access to government's real estates and resources through competitive tenders.⁵³

77. 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. 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.

78. The *Centro de Libre Competencia de la Universidad Católica* celebrated the seventh version of its seminar "*Jornada de Libre Competencia UC*" in September 2012. Core topics covered were pharmaceuticals, cartel prosecution, evidence and punishment.

⁵³ The work and the report of Grupo Res Publica Chile can be reviewed here: <http://95propuestas.cl/2013/05/informe-grupo-res-publica-chile/>