

---

14 November 2017

**Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE**

## **Annual Report on Competition Policy Developments in Chile**

**-- 2016 --**

**5-6 December 2017**

This report is submitted by Chile to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-6 December 2017.

**JT03422865**

## *Table of contents*

<b>1. Changes to competition laws and policies, proposed or adopted .....</b>	<b>3</b>
1.1. Summary of new legal provisions of competition law and related legislation .....	3
<b>1.2. Other relevant measures, including new guidelines .....</b>	<b>3</b>
1.3. Government proposals for new legislation .....	4
<b>2. Enforcement of competition laws and policies.....</b>	<b>4</b>
2.1. Actions against anticompetitive practices, including agreements and abuses of dominant positions .....	4
2.1.1. Summary of activities of: .....	4
2.1.2. Description of significant cases, including those with international implications .....	6
2.2. Mergers and acquisitions .....	7
2.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws .....	7
2.2.2. Summary of significant/ongoing cases.....	7
<b>3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies .....</b>	<b>7</b>
3.1. FNE.....	7
3.1.1. Baby food regulatory recommendation .....	7
3.1.2. Lead batteries recycling recommendation.....	7
3.1.3. Mobile phone market recommendation.....	8
3.1.4. Recommendation to improve regulation regarding payment card market .....	8
<b>4. Resources of competition authorities.....</b>	<b>8</b>
4.1. The FNE:.....	8
4.1.1. Resources overall (current numbers and change over previous year): .....	8
4.1.2. Period covered by the above information: .....	9
4.2. The TDLC.....	9
4.2.1. Resources overall (current numbers and changes over the previous year): .....	9
4.2.2. Period covered by the above information: .....	10
<b>5. Summaries of or references to new reports and studies on competition policy issues .....</b>	<b>10</b>

### Tables

Table 1. Annual budget assigned to the FNE (in your currency and USD): .....	8
Table 2. Number of Employees (person-years).....	9
Table 3. Human resources (person-years) applied to: .....	9
Table 4. Annual budget (in your currency and US\$) .....	9
Table 5. Number of members (including staff members + judges).....	10
Table 6. Informing separately for each year.....	10

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

### 1.1. Summary of new legal provisions of competition law and related legislation

1. The legal reform (Law 20.945), which was enacted in August 2016 and explained in detail in the previous annual report, entails a substantial impact on the competition law system in Chile. The main amendments to the current system, which have been implemented during this past year, can be summarised as follows:

- Mandatory notification system for merger review when certain revenue thresholds (which are set by the agency) are surpassed.
- Increased fines, being the maximum 30 per cent of the sales related to the products or services involved in the infringement, or double the illegal gains obtained.
- Establishes cartel infringement as criminal offence. This implies that executives that are found guilty can be sanctioned with imprisonment up to 10 years. Moreover, the 2016 Legal Reform provides for a new sanction on individuals, prohibiting them to act as director or manager of stock corporations, State-owned enterprises or trade as well as professional associations, for a maximum period of ten years. The criminal cartel prosecution can only be initiated by a complaint filed by the FNE. Additionally, Law No. 20,945 recognises the *per se* rule with respect to hardcore cartels.
- Prohibition of interlocking directorates and relevant executives of companies that are competitors.
- Obligation for companies above certain income thresholds to inform the FNE of any minority interests that exceed 10 per cent of the property of competitors.
- The reform grants new powers to the FNE to conduct market studies and request information to private undertakings for such effects.
- Additional new powers for the FNE, such as the possibility to make regulatory recommendations -either to enact, amend or abolish statutes or administrative provisions-; financial fines to market agents that do not appear before the FNE or do not provide the information required by the FNE during an investigation, without prior justification; and imprisonment of those that provide false information.

### 1.2. Other relevant measures, including new guidelines

2. During this year, the FNE published five relevant guidelines. Three, published in June of 2017, are related to the new merger regime. These guidelines, named “Remedies Guidelines”, “Competition Guidelines” and “Threshold Guidelines” refer to relevant areas of the merger system and are vital public information of how the system works, giving private entities certainty about how the agency will evaluate mergers. These guidelines were published, after a public consultation procedure, where comments were received from various experts including local law firms, the Chilean Bar Association (*Colegio de Abogados*), the American Bar Association, the International Bar Association, and the Federal Trade Commission.

3. The other two guidelines relate to cartels and market studies. In regards to cartels, in March 2017, the agency published a new version of the leniency guidelines, in Spanish and in English, whereas in relation to market studies, the guideline which explains what market studies are and how they are conducted was published in May 2017.

### 1.3. Government proposals for new legislation

4. In addition to the 2016 Legal Reform, no other proposals have been submitted to the National Congress during 2016 or 2017.

## 2. Enforcement of competition laws and policies

### 2.1. Actions against anticompetitive practices, including agreements and abuses of dominant positions

#### 2.1.1. Summary of activities of:

##### *FNE<sup>1</sup>*

##### Procurement of injectable prescription drugs cartel.

5. On August 3, 2016, the FNE filed a complaint against a cartel in the market of public procurement of injectable prescription drugs. The FNE filed this complaint before the TDLC asking for fines totalling approximately USD 17 million for Fresenius Kabi and Sanderson, with no fine requested for the third party in the cartel, Biosano. The reason is that Biosano submitted a leniency application which was accepted. The investigation of this cartel was initiated ex officio in 2012 when the Comptroller General of the Republic and the Health Ministry made a complaint to the FNE regarding this market. This case is ongoing at this date.

##### Complaint before the TDLC against ATI for not complying with vertical integration restrictions.

6. On September 16, 2016 the FNE initiated an adversarial proceeding against Antofagasta Terminal Internacional (ATI), its shareholders, Punta Rieles Limitada and SAAM Puertos S.A. for infringing vertical restraints previously imposed by the former competition authority TDLC's predecessor). A settlement was reached in this case, which was approved by the TDLC, which involved the payment of a fine of USD 500,000 as well as various behavioural remedies to be complied by the different actors involved.

##### Intravenous drug cartel

7. On July 7, 2017, the FNE filed a complaint against two pharma companies - Baxter and Sanderson- accusing them of operating a cartel with the purpose of rigging bids by agreeing on a reference price in their bids. The cartel was formed for two particular tenders. The FNE requested fines for USD\$ 340,000 approximately. The judicial process is still ongoing.

##### *Competition Tribunal*

8. During the period covered by this report, 16 new adversarial cases were initiated before the TDLC. Nine cases were related to unilateral conduct, three referred to

---

<sup>1</sup> Please note that the activities mentioned in this Section are explained in more detail infra in Section 2.1.2.

infringement of remedies imposed previously by the TDLC or the Supreme Court, one referred to Public Administration acts that undermine competition and the remaining three referred to collusion. Moreover, two settlements were reached between the FNE and the defendants during ongoing trials.

9. The TDLC issued five decisions or rulings in adversarial cases during the period covered by this report: three in 2016 and the remaining two through August 2017. These cases stem from claims filed by the FNE, as well as from complaints filed by private parties. These five rulings acquitted the defendants and the average length of these proceedings was 563 days.

10. Four out of the five decisions were challenged before the Supreme Court and they are still under review.

11. The main decisions issued by the TDLC during the relevant period are the following:

**Abuse of a dominant position – telecom (Ruling No. 154/2016):**

12. The Competition Tribunal dismissed a lawsuit filed by the National Corporation of Consumers and Users, Consumers Association (“Conadecus”), against the three incumbent mobile operators- Telefónica Móviles Chile S.A. (“Telefónica”), Claro Chile S.A (“Claro”) and Entel PCS Telecomunicaciones S.A (“Entel”).

13. In particular, the TDLC stated that the plaintiff did not submit clear and conclusive evidence to support its claim that the defendants participated in the 700 MHz public auction with the strategic goal of hoarding the mobile spectrum and endangering its effective and efficient use.

14. Moreover, it pointed out that it was not possible to establish that the defendants, individually, held a dominant position in the upstream market –where the access to the mobile network is negotiated, and leverage such a position in the downstream market - commercialisation at retail level of analog and digital mobile telecommunications services-. Nevertheless, given that the wholesale market has an oligopolistic structure and that the consequences derived from the use of spectrum which are relevant to competition must be analysed in this trial, the Tribunal specifically studied the defendants’ conduct in order to determine its effects and if they were proven by the plaintiff. Finally, the Tribunal concluded that the conduct was not proven.

**Abuse of a dominant position and infringement of remedies previously imposed by the Supreme Court – telecom (Ruling No. 156/2017):**

15. The Competition Tribunal dismissed the lawsuit filed by three Mobile Virtual Network Operator (“MVNOs”) against incumbent mobile operators telecommunication companies -Claro Chile S.A (“Claro”), Entel PCS Telecomunicaciones S.A (“Entel”) and Telefónica Móviles Chile S.A. (“Telefónica”). The MVNOs alleged that the defendants had abused their dominant position by margin squeeze, price discrimination and refusal to supply and further, they had infringed a remedy previously imposed to them by a decision issued by the Supreme Court. In particular, this remedy entailed that the incumbent mobile operators granted open access to their mobile network to MVNOs, on the basis of general, uniform and non-discriminatory criteria.

16. The Tribunal concluded that, according to the evidence rendered during the trial: (i) the defendants had complied with the remedy by offering wholesale access to the

MVNOs; (ii) refusal to supply could not be demonstrated because the conditions were not fulfilled; (iii) wholesale access granted to MVNOs did allow entry to the market by efficient competitors and thereby, margin squeeze was ruled out, and; (iv) the terms and conditions contained in the wholesale access were not discriminatory.

Settlement between the FNE and pharma company:

17. The FNE filed a complaint against GD Searle LLC accusing the latter of an exclusionary abuse. More specifically, the FNE alleged that defendant restricted market entry by artificially extending the first patent of Celecoxib -main active ingredient of Pfizer's drug *Celebra*, an anti-inflammatory and anti-rheumatic treatment of rheumatoid arthritis and the management of acute and chronic pain in adults-. The FNE argued that the defendant aimed to extend the exclusive rights to a commercial drug by making non-clinical changes to its makeup and applying for a new patent (second patent).

18. A settlement was reached with GD Searle LLC whereby the defendant undertook to comply with several remedies, such as granting a license to any potential or actual competitor in Chile in order to supply and distribute Celecoxib according to the second patent terms, and undertook to decline the complaint it had filed against a generic drug maker -Synthon Chile- before a civil court for patent infringement and unfair competition.

### *Supreme Court*

#### *Asphalt cartel*

19. A standing case before the Supreme Court was decided in October 2016 where the Court partially upheld the decision of the Competition Tribunal in the case known as the asphalt cartel. In this case, four companies were accused by the FNE of having a market sharing agreement in regards to contracts for the provision of asphalt-based products used in the construction, replacement and repairing of public and private roads. One of these companies applied for leniency and was thus exempted from paying a fine, whereas the other defendants were imposed a fine equivalent to approximately USD 780,000.

#### *Infringement of remedies imposed to a merger between retailers*

20. In December, 2015, the Competition Tribunal partially accepted a lawsuit filed by the FNE against SMU S.A., alleging the infringement of remedies previously imposed to the merger between SMU and Supermercados del Sur in 2012. The Supreme Court upheld the TDLC's decision in September 2016 and increased the fine imposed to SMU S.A. in approximately USD 450,000.

### *2.1.2. Description of significant cases, including those with international implications*

21. Please refer to section 2.

## 2.2. Mergers and acquisitions

### *2.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws*

22. The new merger regime started operating in June 2017 and thus, for the period covered by this annual report, there are no significant statistics.

### *2.2.2. Summary of significant/ongoing cases*

#### *Merger of BSA with Holcim Chile*

23. The case involved the acquisition by Hormigones Bicentenario S.A. (BSA), a cement and concrete company (the fourth in the Chilean market), of the controlling interest of HolChile S.A. (part of the HolcimLafarge group) in Polpaico S.A., the largest actor in the cement and concrete market in Chile. After various rounds of negotiation, the agency agreed with the parties a series of structural and behavioural remedies in order to approve the merger. These remedies included the divestiture of seven concrete plants and that their operation is managed and monitored by a trustee. The agreement was approved by the TDLC.

## 3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

### 3.1. FNE

#### *3.1.1. Baby food regulatory recommendation*

24. An investigation started on the baby food market and found that an old health regulation, which established the nutritional content of this kind of food, was creating a virtual monopoly for Nestle. Most international producers of baby food have set formulas and usually do not adjust them unless the market is significant in size. This nutritional regulation established in Chile was very outdated and thus most producers were not complying with it, except for Nestle, which was the virtual monopolist in Chile with 95% of the market, and was willing to change its international formula for this market. This created a problem in the local market, as prices were high in relation to comparable markets which had more competition. The FNE thus recommended to the Administration to review and change the regulation and thereby, allow more competition in the market.

#### *3.1.2. Lead batteries recycling recommendation*

25. A case which investigated the market of lead batteries recycling, which in Chile is a *de facto* monopsony by a company named Recimat, found that a particular rule restricted competition in the market. This was a rule which prohibits the export of batteries, where more actors are present. As such, it was the conclusion of the FNE that this rule was protecting the monopsony of Recimat and thus a recommendation was made to amend the current regulation and allow the export of batteries.

### 3.1.3. Mobile phone market recommendation

26. An investigation opened in the mobile phones market in which telecommunications company sell the equipments at a discount (with a subsidy) to those clients that have contracts with them. Nevertheless, if a person wishes to change companies and take their phone with them, a fine has to be paid, which in most cases was not proportional to the subsidy given. No competition law infringement was found, but the FNE made a recommendation that the telecommunications services should be billed separately from the sale of equipment, and that there should not be a sanction for terminating one of the contracts.

### 3.1.4. Recommendation to improve regulation regarding payment card market

27. The Competition Tribunal issued a Recommendation addressed to the President of the Republic, in order to improve the regulation related to the payment market through debit or credit cards. The Recommendation encompasses the interchange fee, prohibition of the NAWI rule (no acquiring without issuing), prohibition for banks issuing cards to act as acquiring and further, the TDLC recommended to amend the regulation and approach it from the cards network perspective instead of cards issuers' view, differentiating the acquiring and issuance services from the operation.

28. The Chilean Treasury submitted an opinion regarding the Recommendation and is willing to enhance the regulation.

## 4. Resources of competition authorities

### 4.1. The FNE:

#### 4.1.1. Resources overall (current numbers and change over previous year):

**Table 1. Annual budget assigned to the FNE (in your currency and USD):**

Year	Chilean Pesos	USD
2012	4,220,158,000	6,403,882
2013	4,507,826,000	6,840,404
2014*	4,675,937,000	7,095,504
2015	7,070,663,000	10,729,382
2016	5,816,708,000	8,826,568
2017	6,575,860,000	10,207,159

\* Includes only operational budget. The total budget for 2014 is around USD 11,237,281 and includes the change of headquarters of the FNE.

Note: Change USD, 30/08/2017: 644,24 (Banco Central de Chile)



**Table 2. Number of Employees (person-years)**

Staff	2012	2013	2014	2015	2016	2017
Economists	18	20	20	20	19	25
Lawyers	40	36	42	39	42	43
Other professionals	20	20	19	23	22	29
Support staff	13	14	15	10	11	12
All Staff	91	90	96	92	94	109

**Table 3. Human resources (person-years) applied to:**

	2013	2014	2015	2016	2017
Enforcement against anticompetitive practices	36	45	33	33	39
Merger review and enforcement	9	8	11	13	22
Advocacy efforts	9	8	11	11	13
Litigation	13	12	18	18	15

**4.1.2. Period covered by the above information:**

29. The budget for the FNE refers to the period of January to December of each year. Staff as of January of each year.

**4.2. The TDLC****4.2.1. Resources overall (current numbers and changes over the previous year):****Table 4. Annual budget (in your currency and US\$)**

Year	Chilean Pesos	USD
2013	1,228,933,000	1,864,845
2014*	1,434,228,420	2,176,371
2015	1,729,560,000	2,624,522
2016	1,795,283,000	2,724,253
2017	1,849,141,000	2,898,340

\* Includes only operational budget. The total budget for 2014 is around USD 3,334,517 and includes the change of headquarters of the TDLC.

**Table 5. Number of members (including staff members + judges)**

Staff members + judges	
2013	21
2014	21
2015	22
2016	23
2017	23

**Table 6. Informing separately for each year**

	2014	2015	2016	2017
Economists	6	6	6	6
Lawyers	8	8	9	9
Support staff	7	8	8	8
All staff	21	22	23	23

**4.2.2. Period covered by the above information:**

30. The budget for the TDLC refers to the period of January to December of each year. Staff as of January 1<sup>st</sup> of each year.

**5. Summaries of or references to new reports and studies on competition policy issues**

31. Please refer to section 3.