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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CHILE**

-- 2010 --

*This report is submitted by Chile to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2011.*

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## REPORT ON DEVELOPMENTS IN COMPETITION LAW AND POLICY IN CHILE

*(August 2009 – July 2011)*

### Executive Summary

1. This report summarizes recent developments in competition law, policy and enforcement in Chile. It also refers to the implementation of legal reforms, activities advocating competition, and the principal cases of competition law enforcement occurred between August 2009 and July 2011.

2. The Fiscalía Nacional Económica (hereinafter “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 competency in matters of antitrust law and resolves adversarial matters (e.g. FNE charges and 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.<sup>1</sup>

3. During the period covered by this report, competition law and policy in Chile has experienced a phase in which new legislative powers have been implemented, conferred to its authorities in 2009, particularly to the FNE for the investigation of hardcore cartels as well as other antitrust matters. The more relevant milestones of this period are.

- In July 2010, the FNE filed for the first time charges against a hardcore cartel based on information provided by one of the involved companies in exchange for leniency.<sup>2</sup> The leniency program is in force in the country since October 2009. The benefit of leniency was used for a second time as grounds for charges brought in June 2011;
- The FNE is effectively using its intrusive investigation powers against hardcore cartels as evidenced in two complaints filed in June 2011, where it procured content by tapping telephone communications between members of a cartel of interurban bus companies<sup>3</sup> and conducting specific raids;

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

<sup>2</sup> The case is currently ongoing before the TDLC. Background on the case, in Spanish, can be downloaded from the following link: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2467&GUID=>

<sup>3</sup> 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/2011/03//Requerimiento\\_05\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03//Requerimiento_05_2011.pdf)

- In terms of controlling economic concentration operations, the FNE has used another new legal power which allows it to consult future operations before the TDLC, which has signified, in part, a counterweight to the existent, merely voluntary notification of control of concentrations;
- Another new faculty used by the FNE is the ability to reach extrajudicial agreements with parties that have infringed or threaten competition, subject to the TDLC's approval of said agreements. This power has been successfully used on several occasions, allowing for the extremely quick resolution of competition controversies with the consent of the offender;

4. On the other hand, the FNE has incorporated into its strategy the production of information materials to advocate competition, and provide transparency and greater judicial stability and predictability for individuals and businesses. During this period, it is noteworthy to mention the publication of a guide on Competition and Trade Associations and another on Competition and Public Hiring.

5. At an organizational level, the FNE formalized the creation of an Agricultural Unit and an Anti-Cartel Task Force, both functioning within the Division of Investigations, to improve and focus efforts in both areas.

6. In terms of advocating competition and circulating teaching materials to better inform the public on competition law and policy, it is noteworthy to mention the complete revamping of the FNE's website [www.fne.gob.cl](http://www.fne.gob.cl), and the signing of various collaboration agreements between the FNE and Chilean institutions such as the Ministry of Agriculture, the Industrial Property Office, the Chilean Internal Revenue Service and the Public Purchasing and Hiring Office.

7. On an international level, the FNE has actively participated in various international forums and seminars, and has had the opportunity to provide technical assistance in isolated cases. Additionally, in the scheme of international cooperation, the FNE signed an antitrust cooperation agreement with the U.S. Department of Justice and the Federal Trade Commission.

8. At the end of March 2010, Mr. Enrique Vergara Vial's term as National Economic Prosecutor of the FNE ended. In April 2010, Mr. Felipe Irrázabal Philippi replaced him as interim National Economic Prosecutor, and was formally named in August of the same year. His term ends in four years.

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

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

9. On October 13, 2009, Law No. 20.361 entered into force and reinforced competition law, mainly in the area addressing hardcore cartels, by incorporating the following provisions:

- A provision regarding the benefits of exemption (full immunity from antitrust prosecution) or reduction of fines in the case of hardcore cartels (Article 39 bis);
- Special powers of investigation (raids, seizures, interception and wiretapping of communications) (Article 39 letter n));
- An increase in the statute of limitations term from 2 to 5 years, in the case of hardcore cartels (Article 20);
- An increase in maximum fines. Using today's exchange rate, from approximately USD\$20 million to USD\$ 30 million (Article 26);
- Changes to the wording of the legal provision referring to cartels (Article 3 letter a));

10. The law also underwent modifications outside of the scope of hardcore cartels, the most notable being:

- In non-adversarial proceedings before the TDLC (applied to, among others, control of horizontal concentration operations), the FNE may now submit a consultation concerning future operations (previously, this was solely possible for ongoing or existing operations) (Article 18 No. 2). In these same proceedings, it is now possible to file a complaint recourse before the Supreme Court against a decision of the TDLC regarding the consultation, previously limited only to certain cases (Article 31);
- From thereafter, the FNE has been allowed to sign extrajudicial agreements with economic agents involved in its investigations, as a safeguard measure for competition in the markets. These agreements are submitted to the TDLC for approval (Article 39 letter ñ));
- The National Economic Prosecutor, executive director of the FNE, acquires greater autonomy and independence, conversely to the rules existent at the time. His or her appointment is submitted to the *Alta Dirección Pública* (agency in charge of recruiting high level public officials), which is not solely based on the government's decision, but also requires a favorable review by the Supreme Court, adopted during plenary session by the majority of its active justices.

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

### 1.2.1 *The FNE*

11. **Guidelines on Leniency Program**<sup>4</sup>. In October 2009, when the aforementioned legal reform entered into force, the FNE published its final and definite version of the “Internal Guide to Exemption Benefits and the Reduction of Fines in Cases of Collusion”. This guide purports to provide legal certainty to users regarding the methodology the FNE uses to effectively enforce the legal provision that introduced leniency for hardcore cartels in the country.

12. The guidelines were inspired by the highest standards of comparative institutional design in the administration of this type of benefits, considering, to this effect, a marker system, Chinese walls within the FNE between professionals who handle leniency applications and areas of investigation, and greater transparency and accuracy for potential applicants regarding the standard of evidence and collaboration required by the FNE in order to provide benefits. The guidelines were launched together with an electronic link with answers to frequently asked questions, a unique on-line application form and a telephone number for consultations. It is noteworthy to mention that a preliminary version of the guidelines, before the publication of the final and definite version, was subject to a public consultation period during which important observations were received. The document also contained technical comments from distinguished representatives of the U.S. Department of Justice, of the *Competition Bureau* of Canada, and the European Commission, who visited Santiago in September 2009 when Chilean competition authorities hosted the OECD/IDB Latin American Competition Forum.

13. **Advocacy materials on Trade Associations and Competition**<sup>5</sup>. In January 2011, in order to clarify the main concepts of and promote compliance with competition among trade associations (TAs), the

<sup>4</sup> The link to background related to the Guide is: <http://www.fne.gob.cl/comunicaciones/agenda-fiscal/historico-agenda-fiscal/delacion-compensada/>

<sup>5</sup> The link to background related to the Guide is: <http://www.fne.gob.cl/comunicaciones/agenda-fiscal/historico-agenda-fiscal/consulta-asociaciones-gremiales/>

FNE presented a preliminary version of a guide for public comment and consultation. The drafting of this document was preceded by a study conducted by a university research center specialized in regulation and competition, who reviewed the practice of case law by antitrust authorities in Chile over a 35 year period, including also foreign literature. During the consultation period, the FNE received comments and observations from approximately 30 TAs, including business associations and professional associations, and simultaneously held work meetings with the most important TAs in the country.

14. The final document, published in August 2011, conveyed the FNE's vision in matters of competition concerning collaboration between competitors, recommendations formulated by TAs, formal aspects and content originating from TAs meetings, boycott constituent infringements, criteria and conditions for membership, offer of essential services by the Trade Associations to members and non-members, self-regulation by TAs, fixing of technical standards, advertising, standard contracts and general marketing conditions, as well as general recommendations in matters of record-keeping, specialized advisory practices and the practical application of these criteria. For each of these issues, the document provides specific recommendations to guide TAs and their members.

15. **Advocacy Material on Public Procurement and Competition**<sup>6</sup>. In April 2011, the FNE published this informational document directed towards persons working in the field of public purchasing, to advocate competition in the marketplace and increase certainty, accountability and transparency by offering guidelines to support compliance with competition law. Furthermore, this document provides employees from the area of public hiring analytical tools (from a preventive point of view) to detect risks of collusion among bidders, in addition to detecting cases, informing employees of the steps to follow, and how to contact the FNE.

16. This Advocacy Material represents a new step in the efforts the FNE has taken since 2008, with the support of the OECD and the Competition Bureau of Canada, in matters pertaining to collusion among bidders of public competitive concessions.

### *1.2.2 The TDLC*

17. During the period covered by this report, the TDLC issued two procedural regulations. One was an adaptation of previous regulations relating to legislative reforms instituted in 2009 (Procedural Regulation No. 14/2010<sup>7</sup>). The other deserves special mention.

18. Procedural Regulation No. 13/2009, on the registration of acts of probative value through recording sound and its subsequent transcription<sup>8</sup>. At the end of September 2009, the TDLC issued this procedural regulation to implement the authorization contained in the law on recording probative hearings through alternative means. For such effect, it regulated the digital recording of sound and its subsequent literal transcription that must accompany the file.

### *1.3 Legislative proposals presented*

19. In 2009, in light of the public impact caused by the case known as the "pharmacies collusion case", representatives of various political parties submitted before Congress motions to criminalize collusion among competitors.

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<sup>6</sup> The link to this Guide is: [http://www.fne.gob.cl/wp-content/uploads/2011/05/compras\\_publicas\\_y\\_libre\\_competencia.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/05/compras_publicas_y_libre_competencia.pdf)

<sup>7</sup> This decision is available at: [http://www.tdlc.cl/DocumentosMultiples/Auto%20Acordado%20N\\_14\\_2010.pdf](http://www.tdlc.cl/DocumentosMultiples/Auto%20Acordado%20N_14_2010.pdf)

<sup>8</sup> This decision is available at: [http://www.tdlc.cl/DocumentosMultiples/Autoacordado\\_N\\_13\\_2009.pdf](http://www.tdlc.cl/DocumentosMultiples/Autoacordado_N_13_2009.pdf)

20. None of these projects, to date, has had significant progress.<sup>9</sup> The legislative procedure in Chile ascribes a significant role to the executive power in fast-tracking law projects, and government representatives have publicly manifested that the priority of competition policy is the adequate implementation of the new framework of powers introduced in 2009, before the approval of provisions that criminally sanction collusion.

## 2. Enforcement of competition law and policy

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

#### 2.1.1 *Summary of activities - Competition Authorities*

- The FNE

The FNE initiated 35 investigations in 2009 and 23 investigations in 2010. Through July 2011, it has initiated a total of 22 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 (58 cases rolled over at the beginning of 2009, 72 at the beginning of 2010, and 73 at the beginning of 2011).

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 2009	New investigations in 2010	New investigations in 2011 <sup>10</sup>
Abuses of dominance	19	9	6
Agreements (horizontal)	8	8	11
Regulatory/Government acts.	4	5	1
Unfair Competition	2	1	-
Vertical Restraints	2	0	-
Infringements of previous decisions	-	-	4
Total	35	23	22

During the period covered by this report, the FNE filed a total of eleven complaints<sup>11</sup> before the TDLC, five in 2009 (August-December), two in 2010, and four through July in 2011.

Taking into account the cases ruled by the TDLC through judicial decision in the same period, which total nine (five convictions<sup>12</sup>, four absolutions<sup>13</sup>), the success rate is estimated at 56%.

<sup>9</sup> These projects are individualized as Bulletin No. 6454-07, Bulletin No. 6438-03 and Bulletin No. 6439-07 and their contents can be found on the Senate's website: [www.senado.cl](http://www.senado.cl).

<sup>10</sup> Figures through the month of July 2011. The figures indicated here exclude cases declared inadmissible. Therefore, the overall number of investigations is higher. For 2011, the total for the month of July is 54 causes, of which only 22 led to investigations.

<sup>11</sup> FNE, Complaints: c/Corporación de Radio Valparaíso Ltda. et al.; c/Kiasa Demarco S.A.; c/Cía. Chilena de Tabacos S.A.; c/Abercrombie & Kent S.A. et al.; c/Punta de Choros A.G.; c/Cámara de Comercio de Santiago; c/Tecumseh do Brasil; c/Comercial Palo Santo et al.; c/Embotelladoras Andina and Coca-cola Embonor; c/Empresa de Transportes Rurales et al.; c/Pullman Bus Costa Central et al.

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 (one<sup>14</sup>), the success rate increases to 60%.

- Extrajudicial agreements: efficient procedures for enforcing the law

The 2009 Law No. 20.361, introduced a new attribute. 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. Settlements are subject to approval by the TDLC based on background information previously submitted to it and a hearing that must take place within the fifth business day after the receipting of said information. The extrajudicial agreement must be approved or rejected by the TDLC within a maximum of 15 business days from the date of the hearing. Any decisions are challengeable solely before the TDLC. Once decisions are final they are binding upon all parties who signed the agreement.

During the period covered by this report, this mechanism has been successfully used by the FNE on three occasions. On two occasions, for different matters, these agreements have been executed with the concessionaires of the Iquique and Santiago airports, and on one occasion with a supermarket chain.

In the case of the concessionaire of the Iquique airport, the FNE reproached the entity for the mechanism it had used to obtain the sub-concession of ground transportation services—a mechanism the FNE considered anti-competitive based on prior rulings made by the TDLC for similar cases. The agreement stated that the concessionaire would terminate the sub-concession contracts on their expiration date and place a tender for the sub-concession for the next period.<sup>15</sup>

In the case of the concessionaire of the Santiago airport, the FNE reproached the entity for the tariffs structure used to charge parking services. The concessionaire accorded to modify the tariffs structure under pro-competitive and satisfactory terms for the FNE—consequently, the TDLC approved the agreement between both parties.<sup>16</sup>

The case referring to the supermarket chain will be detailed below.<sup>17</sup> These extrajudicial agreements and the swift procedure the law provides for their approval saves a significant amount of resources that would, otherwise, be invested in extensive and uncertain litigation had this mechanism be unavailable. On the other hand, this mechanism complements conciliatory agreements made before the TDLC that could take place once a adversarial proceeding commenced. As such, this legislative innovation broadens the range of alternative mechanisms of dispute resolution at the disposal of the FNE and offenders.

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<sup>12</sup> TDLC, Rulings No. 85 (*Sanitarias*), No. 90 (*Fósforos*), No. 94 (*Transportes Central – Osorno*), No. 102 (*Agmital*), No. 112 (*Radios*).

<sup>13</sup> TDLC, Rulings No. 92 (*Municip. Antofagasta*), No. 93 (*Emelat*), No. 104 (*OMV*), No. 106 (*Ambulancias*).

<sup>14</sup> TDLC, Resolution No. 74 of 13.07.2010, approving the conciliatory agreement between the FNE and offenders in the case c/Punta de Choros A.G.

<sup>15</sup> The approving resolution can be found at:  
[http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20ñ\) Resolucion\\_01\\_2010.pdf](http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20ñ) Resolucion_01_2010.pdf)

<sup>16</sup> Background on the case and the approving resolution can be found at:  
<http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2709&GUID=>

<sup>17</sup> V. infra § II.1.2.4.

- Benefits of fine exemption and reduction and intrusive powers: an effective use of new legal tools for the efficient fight against hardcore cartels

Two of the six investigations into agreements between competitors during the period covered by this report were based on investigations conducted by the FNE relying on information provided by an applicant for benefits of fine exemption/reduction, in accordance with the leniency program set forth as a reform in the country in 2009. The cases—one pertaining to the refrigerator compressor market and the other to the transportation services market—are detailed below.<sup>18</sup> These cases—one of international scope—has permitted the FNE to gain experience in the handling of this detection/persecution mechanism against hardcore cartels and has also served to test the design of the legal provision and guidelines implemented by the FNE for its application. In this sense, it has also identified room for improvement. The most important factor is that they demonstrate how efficiently the leniency program is being used in Chile, applicable to both local and international cartels.

Wiretapping and dawn raids—powers also provided by the 2009 legal reform—have been effectively and efficiently used by the FNE. Regarding the interception of communications, two investigations into ground passenger transportation services carried out in June 2009, relied on the interception of telephone communications conducted by the FNE during its inquiries, with prior due authorization. These investigations are detailed in another section of this report.<sup>19</sup> Additionally, the press has reported on the FNE's practice of raiding. In effect, since the Law entered into force in October 2009, the FNE has conducted a total of 2 raids in investigations of hardcore cartels.

- Changes in the organization of the FNE with the aim of focusing efforts

At an organizational level, the FNE has formally created an Agricultural Unit and an Anti-cartel Task Force, both within the Division of Investigations, to improve and focus more efficiently efforts in both areas.

The Anti-cartel Task Force, created in April 2010, is comprised of 8 professionals—4 attorneys and 4 economists—whose mission is to prevent and detect infringements and propose sanctions to anti-competitive practices stemming from agreements amongst competitors, head investigations into cartels, train personnel assigned to these investigations, and design an annual work plan submitted for approval by the National Economic Prosecutor.

The Agricultural Unit, created in October 2010, is comprised of 2 professionals: one attorney and one economist. Its mission is to develop periodic work meetings with agricultural producers, agents and public bodies linked to the agriculture sector, head investigations into the area, and implement a collaboration agreement signed between the FNE and the Ministry of Agriculture in matters of competition in the agricultural sector. To this effect, the Agricultural Unit must develop an annual work plan submitted for approval by the National Economic Prosecutor.

These changes to the FNE's internal organization purported to provide it with an efficient structure in matters prioritized by the FNE. In the case of hardcore cartels, the FNE has progressively strengthened the institutional framework since 2006, manifested through the 2009 legal reform and its implementation, and the creation of the Anti-cartel Task Force. The agricultural sector constitutes a more recent priority for the FNE, established in 2010, embodied by the internal creation of the Agricultural Unit, and preceded by the signing of a collaboration agreement in matters of competition between the Ministry of Agriculture and the FNE.<sup>20</sup>

<sup>18</sup> V. infra § II.1.2.1, sections c) and d).

<sup>19</sup> V. infra § II.1.2.1, section d).

<sup>20</sup> This collaboration agreement can be found at: [http://www.fne.gob.cl/wp-content/uploads/2011/03/coop\\_minagri\\_2010.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/coop_minagri_2010.pdf)

- The TDLC

In 2009, the TDLC initiated 14 new adversarial cases, in 2010 it had initiated 18 new cases and, as of September 30, 2011, it has initiated 17 new cases.<sup>21</sup> Of the total number of cases, about 76% are related to unilateral conducts, and nearly 13% to cartels.<sup>22</sup>

The TDLC issued a total of twenty-six rulings in adversarial cases during the period covered by this report: six in 2009 (August-December)<sup>23</sup>, sixteen in 2010<sup>24</sup> and four through July 2011<sup>25</sup>. These cases stemmed from both FNE claims as well as complaints filed by private parties. Of these twenty-six rulings, only eight were condemnatory. The average length of these proceedings was 649 days.

Of these 26 decisions, 17 were reviewed by the Supreme Court and only one was overruled. The average time of the review proceeding by the Supreme Court was 195 days.

Of the eight condemnatory decisions issued during the period covered by this report, five refer to some form of abuse of dominant position,<sup>26</sup> and three to some form of agreement between competitors.<sup>27</sup>

### 2.1.2 *Summary of activities: Courts*

- The Supreme Court

During the period covered by this report, the Supreme Court (SC) issued 20 decisions in matters relating to the enforcement of the law on competition in adversarial cases.<sup>28</sup> In fifteen of these cases, the SC upheld the respective decision of the TDLC.

Of the five remaining cases, on one opportunity the SC completely accepted the recourse (*recurso de reclamación*) filed against a convicting decision of the TDLC in matters pertaining to excessive pricing charged by a concessionaire of public works.<sup>29</sup> In another case concerning excessive pricing charged by water distribution and sewerage companies outside of their respective concession areas, the SC accepted the subsidiary request to lower fines for some of the companies and the request to revoke a recommendation for legal reform issued by the TDLC.<sup>30</sup> In another two cases, the complaint-recourse accepted by the SC related to those filed by the FNE, resulting in an increase of fines by decision of the SC, over the amount determined by the

<sup>21</sup> According to the statistics table available at: <http://www.tdlc.cl/DocumentosMultiples/Ingresos%20Contenciosas%20por%20Año.pdf>

<sup>22</sup> According to the statistics table available at: <http://www.tdlc.cl/DocumentosMultiples/Conductas%20-%20Contenciosas.pdf>

<sup>23</sup> TDLC, Rulings No. 87/2009 to No. 92/2009.

<sup>24</sup> TDLC, Ruling No. 93/2010 to No. 108/2010.

<sup>25</sup> TDLC, Rulings No. 109/2011 to No. 112/2011.

<sup>26</sup> TDLC, Ruling No. 88 (*Celulink*); No. 90 (*Fósforos*); No. 97 (*Voissnet II*); No. 100 (*Pto. Terrestre Los Andes*); No. 103 (*Arauco c/ D&S*).

<sup>27</sup> TDLC, Ruling No. 94 (*Transportes Central – Osorno*); No. 102 (*Agmital*); No. 112 (*Radios*).

<sup>28</sup> SC, Ruling pronounced on complaint recourse filed against the following TDLC Rulings: No. 83, No. 84, No. 85, No. 88, No. 89, No. 90, No. 91, No. 93, No. 94, No. 95, No. 96, No. 97, No. 98, No. 99, No. 100, No. 102, No. 103, No. 105, No. 107, No. 109.

<sup>29</sup> SC, 28.01.11, Case 6100-2010, accepts complaint recourse filed against TDLC Ruling No. 100/2010 (*Pto. Terrestre Los Andes*), which becomes without effect.

<sup>30</sup> SC, 18.05.10, Case 5443-2009, rejects complaint recourse and partially accepts the recourse against TDLC Ruling No. 85/2009 TDLC (*Sanitarias*).

respective decision of the TDLC. One of these cases related to exclusionary abuse in the market for the distribution of matches,<sup>31</sup> and the other to an agreement between competitors in the urban passenger transportation market.<sup>32</sup> In the other case (of the five where the SC did not completely reject all the complaints), the SC's modification was limited to revoke the ruling regarding legal and procedural fees burdened by the claimant.<sup>33</sup>

- The Constitutional Tribunal

The Constitutional Tribunal has not had a relevant participation in adversarial causes involving the enforcement of competition law during the reported period.

### 2.1.3 *Criminal issue in the pharmacies collusion case*

21. As a result of the case known as the “pharmacies collusion case”, which had a huge public impact throughout the country, the Criminal Prosecutor's Office decided in 2009 to initiate investigations toward 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.

22. Nearing the end of the period covered by this report, the Criminal Prosecutor's Office has prosecuted 18 executives, including officials from three pharmaceutical chains and some pharmaceutical laboratories. The penal process is, therefore, currently ongoing and has a maximum duration period of 2 years counting from March 2011.

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

23. 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*

- Transportes Central – Osorno: collusion is the most serious anti-competitive offense

This case involves an agreement between competitors in the urban passenger transportation services market in the city of Osorno. The interest in this case lies in various aspects. First, there was some degree of intervention from the public sector authority. Second, the SC on ruling on the recourse filed against the TDLC's decision was fairly explicit stating that (i) it is suffice for conduct contrary to competition to tend to produce anti-competitive effects to be sanctionable, without said effects necessarily having been effectively produced<sup>34</sup> and that (ii) collusion between competitors constitutes the most reprehensible of anti-competitive conducts.<sup>35</sup> The latter opinion led the SC to increase some of the fines imposed over the amounts established in the TDLC's decision.

<sup>31</sup> SC, 02.06.10, Case 277-2010, accepts complaint recourse filed by the FNE and of private party against TDLC Ruling No. 90/2009 (*Fósforos*).

<sup>32</sup> SC, 29.12.10, Case 1746-2010, accepts complaint recourse filed by the FNE against TDLC Ruling No. 94/2010 (*Transportes Central – Osorno*).

<sup>33</sup> SC, 20.07.11, Case 2358-2011, partially accepts complaint recourse against TDLC Ruling No. 109/2011 (*Conservación Patagónica*).

<sup>34</sup> SC, 29.12.10, Case 1746-2010, (Cons. 8°).

<sup>35</sup> SC, 29.12.10, Case 1746-2010, (Cons. 12°).

The FNE filed charges against nine companies that provided urban passenger transportation services in the city of Osorno for executing agreements that, comprised into one document, consisted of: (a) freezing the depot for urban passenger transport buses in Osorno; (b) prohibiting traffic of inter-company buses; (c) submitting future individual decisions regarding transport services for the approval and authorization by the majority of the members of the agreement; (d) prohibiting the creation of new services or modifications to long-haul buses without prior authorization by the majority of the members of the agreement; (e) authorizing the local Secretariat of the Ministry of Transportation to not accept any modification of tariffs that do not have the unanimous consent of the group's companies; (f) this agreement would be irrevocable. This agreement ended a public transportation strike in the city of Osorno, and was followed by another agreement on tariffs between three local collective taxi syndicates in the same city, that also had the consent of the same public authority. The charges filed by the FNE also extended to the latter aforementioned parties.

The TDLC imposed fines totaling approximately USD\$ 79,300, indicating that collusion is the gravest of anti-competitive offenses and that the public authority involved could also have been fined had charges been filed against it.

The SC increased the fines against some of the companies, hence the total of fines amounted to approximately USD\$ 232,863. The SC's decision illustrated interesting reasonings and channeled the previous opinion of the TDLC in the same case.

- Radios: in bid rigging, the relevant market is determined by the bid or bids in question

This case, brought by an FNE complaint, entails an agreement between radio broadcasting companies competing in bids to use the radio-electric spectrum, an essential input for radio broadcasting. The case is relevant in terms of bid rigging which, unlike other jurisdictions, is not a *per se* offense in Chile. The relevance lies in the fact that in its convicting decision,<sup>36</sup> the TDLC delimited the determination of the relevant market to establish the unlawfulness of the respective bids, because *in a bidding process, the relevant market, its entry barriers and the possible power of negotiation of those participating therein are determined by the terms of the tender and regulation presently in force.*<sup>37</sup> In other conclusions, the TDLC introduces certain nuances concerning the interpretation of the offense of collusion between competitors and bid rigging in particular.<sup>38</sup>

The case is also interesting because it concluded with a second relevant conciliatory agreement in a collusion case between competitors, after the conciliatory agreement made with one of the three prosecuted companies in the pharmacies collusion case in 2009. Of the 8 companies and 2 individuals prosecuted, all of them ascribed to the conciliatory agreement, save one of the companies who went ahead with the proceedings. These proceedings are still pending before the SC.

- Tecumseh: the Chilean leniency programme and the international arena

This case constitutes the first complaint filed by the FNE with information provided by a company that attained the benefit of fine exemption incorporated by the 2009 amendments to the Competition Act.

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<sup>36</sup> TDLC, Ruling No. 112/2011 (*Radios*), of 22.06.11.

<sup>37</sup> *Ibidem*, Cons. 45°.

<sup>38</sup> *Ibidem*, Cons. 66° a 69°.

The case was filed in July 2010<sup>39</sup> against the companies Tecumseh do Brasil Ltda. and Whirlpool S.A. In its complaint, the FNE maintained that both companies breached the law by adopting and implementing a series of agreements aimed at artificially increase 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, order its immediate cessation, and sentence Whirlpool to a fine of approximately USD\$ 15 million and exempt Tecumseh from any fine in light of its application for leniency.

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. These international aspects also motivated defenses against the supposedly extraterritorial enforcement of Chilean law filed by Whirlpool, which have been rejected by the TDLC<sup>40</sup>. This case is still ongoing before the TDLC.

- Buses: the FNE effectively and efficiently puts into practice its intrusive powers for investigations

In June 2011, the FNE filed before the TDLC two complaints concerning severe and serious agreements made between competitors in various markets for public passenger ground transportation services offered by private companies.

In one of the cases, the FNE accused 4 companies of having mounted coordinated actions aiming to block competitors from accessing various terminals in the northern region of the country, by means of hoarding terminal offices in important cities, thus making the offer of renting ticket booths within inexistent, barring access to new participants to these terminals, an indispensable input to provide interurban ground transportation services. The FNE requested the imposition of fines totaling approximately USD\$ 41.5 million and compulsory prior consultation proceedings regarding new terminal acquisitions or concentration operations.<sup>41</sup>

In the other case, the FNE accused two companies and one individual of adopting and implementing in a coordinated fashion a series of acts and conventions aimed at fixing public tariffs and determining the distribution of bus frequencies for the offer of public passenger ground transportation services on specific routes to and from Santiago. The FNE requested the imposition of fines totaling approximately USD\$ 7 million for one of the companies and the individual under investigation, exempting the other company from any fine in light of its application for leniency.<sup>42</sup>

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<sup>39</sup> An electronic copy of this FNE complaint is available at: <http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20de%20la%20FNE%20contra%20Tecumseh%20Do%20Brasil%20Ltda.%20y%20otro.pdf>

<sup>40</sup> To reject the defense of extraterritorial enforcement of the law, in essence, the TDLC claimed that the TDLC has territorial competency in those places where anti-competitive effects were or could be produced, independently from the conduct that originated abroad. TDLC, resolution of 16.12.10, available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2467&GUID=>

<sup>41</sup> An electronic copy of this FNE complaint can be found at: [http://www.fne.gob.cl/wp-content/uploads/2011/03//requerimiento\\_04\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03//requerimiento_04_2011.pdf)

<sup>42</sup> An electronic copy of this FNE complaint can be found at: [http://www.fne.gob.cl/wp-content/uploads/2011/03//Requerimiento\\_05\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03//Requerimiento_05_2011.pdf)

This last case demonstrates that local companies are also beginning to favorably view the benefit of fine exemption contemplated in the leniency program.

Additionally, it is noteworthy to mention that in the investigation from which both cases ensued, the FNE used its powers to intercept wire communications, which was authorized by the TDLC and the respective Appellate Court, and direct evidence was gathered from these offenses.

Both cases are currently ongoing before the TDLC.

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

- Matches: exclusionary abuses through contractual clauses and incentives in distribution

In this case, ensuing from an FNE complaint and an individual lawsuit, the company dominant in the manufacturing and distribution of matches in the country was charged with having executed with its distributors certain contracts with exclusivity clauses and incentive clauses for meeting sales goals, all with the purpose of raising artificial entry barriers into the relevant market.

The TDLC fined the company approximately USD\$ 1 million. The SC raised the fine to USD\$ 1.3 million and in its sentence established important considerations, particularly, one referring to the necessary dissuasive effect the fine imposed should bear, in the sense of exceeding the benefit expected from the infringement<sup>43</sup>, and another referring to the fact that the weight of proof of the justification of a conduct illicit in principle, corresponds to someone who pleads the invoked defense.<sup>44</sup>

- Cellulink: first explicit reference to margin squeeze

Various companies providing technological conversion services from fixed-mobile calls to mobile-mobile calls within the same company (*on-net*) filed suit against Telefónica Móviles de Chile, one of the three principal mobile companies in the country, for raising tariffs on its mobile phone minute plans only to these types of companies, and not to other users of equal or even less traffic.

The TDLC determined that the defendant incurred in an arbitrary price discrimination practice that resulted in a margin squeeze for its competitors in the market, providing services for the termination of on-net fixed-mobile calls, and in a refusal to deal practice, with the objective of leveraging its dominant position in the mobile telephone market to the adjoining market of services for terminating on-net fixed-mobile calls. The TDLC ordered the defendant to pay a fine of approximately USD\$ 2.5 million. It prohibited the defendant to charge companies that offered services for terminating on-net fixed-mobile calls discriminatory prices arbitrary to those it charges other clients of its mobile telephone service. Lastly, it ordered the defendant to refrain in the future from conducting any action, act or practices signifying a discrimination to the characteristics of whomever procures its services, unless it is founded on objective circumstances and applicable to all present in the same conditions.<sup>45</sup>

The SC rejected the *recurso de reclamación* filed by the defendant against the TDLC's ruling, confirming the latter. The case posed interesting problems related to enforcing competition law in regulated sectors, since the defendant claimed, as part of its defense, that the services provided by the plaintiffs infringed regulation in force on the matter of public telephone services. In fact, the sector regulator had even brought charges against the plaintiff, but without the existence of a firm

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<sup>43</sup> SC, 02.06.10, Case 277-2010, (Cons. 22°).

<sup>44</sup> *Ibidem*, (Cons. 21°).

<sup>45</sup> TDLC, Ruling No. 88/2009 of 15.10.2009 (*Celulink*).

decision on the illegality. The SC gave priority to the enforcement of competition law, rejecting the defense in view that it entailed a regulated service (by not accessing the public telephone network) and excluded the illegality given that it was not declared by final judgment.<sup>46</sup>

- Voissnet II: bundled sales and multiproduct discounts: exclusionary standard

Voissnet S.A. (VoIP), an IP telephony services company filed a complaint against Compañía de Telecomunicaciones de Chile S.A. (TCH) for contractually conditioning the sale of broadband services to the hiring of telephone services, commercially bundling into this package deal a determined number of voice traffic minutes, with negative implicit prices.

The TDLC established that this conduct was contrary to competition, apt to exclude competitors in the telephony market and sentenced the latter to pay a fine of approximately USD\$ 5 million. Furthermore, it ordered TCH to also market separately each of the services integrally offered in its packaged services. Consequently, and as long as TCH is dominant in broadband services, it cannot bundle them with any other product or services, thus forced to maintain a naked offer of broadband. Additionally, the defendant must set prices for its packaged deals that do not restrict competition and must be higher, at least, than the separate sale price of the integrating product or service of greater value.<sup>47</sup>

The SC rejected the complaint recourse filed against the TDLC's decision, confirming the latter's decision.<sup>48</sup>

### 2.2.3 *A case illustrating developments in the area of exploitative abuses of dominant position*

- Sanitarias: operating water distribution companies abusing their monopoly in the area adjoining the operating concession area

A construction company filed suit and the FNE charged a sanitary services company for abusing their dominant position in projects located in territorial zones adjoining the operating concession area.

After long proceedings, the TDLC ruled against two sanitary companies to payment of fines totaling approximately USD\$ 4.5 million and ordered a series of additional measures to avoid these abuses from continuing.<sup>49</sup>

The SC partially rejected the complaints filed and partially accepted, for example, the request to reduce the fines. It upheld, however, the condemnatory character of the decision.<sup>50</sup>

### 2.2.4 *A case that reflects the effective and efficient use of a new alternative dispute resolution mechanism*

- SMU

The FNE charged SMU, the third largest participant in the national supermarket industry, with establishing—within the framework of the acquisition of various supermarkets and regional supermarket chains—non-compete clauses whose temporary duration (between 5 and 30 years)

<sup>46</sup> CS, 07.07.10, Case 8077-2009, rejects the complaint recourse against TDLC Ruling No. 88/2009 (*Celulink*).

<sup>47</sup> TDLC, Ruling No. 97/2010 de 04.03.2010 (*Voissnet II*).

<sup>48</sup> SC, 14.01.11, Case 2140-2010, rejects complaint recourse against TDLC Ruling No. 97/2010 (*Voissnet II*).

<sup>49</sup> TDLC, Ruling No. 85/2009 of 02.07.2009 (*Sanitarias*).

<sup>50</sup> SC, 18.05.10, Case 5443-2009, rejects complaint recourses—and partially accepts them—against TDLC Ruling No. 85/2009 (*Sanitarias*).

and geographical scope (between the respective region and up to the entire national territory) and material, exceeded that reasonably permitted by legitimate justifications, therefore affecting competition in said markets.

By virtue of an extrajudicial agreement between the FNE and SMU, the latter committed to adjust the non-compete clauses to the criteria set by the FNE in terms of the material, geographical and temporary scope. In this manner, regarding previously established and future clauses in matters of acquisitions, SMU will limit its material scope to the business of retail and wholesale supermarkets with self-service; its geographical scope will be limited to the neighborhood in which the sold or transferred businesses operated or to the influencing zone thereof, (measured in isochronic terms of 10 minutes by vehicle); and its duration, a maximum period of two years counting from the date the clause was executed in the case of future clauses, and counting from the date of the TDLC's decision approving the agreement in the case of previously established clauses.<sup>51</sup>

The TDLC, following the hearing where the parties' positions were expressed, approved this agreement.<sup>52</sup>

This new mechanism, that has been successfully used on another two occasions by the FNE, allows a quick resolution to controversies between the competition agency and potential offenders of competition when the latter are willing to accept the FNE's position or, eventually, negotiate another alternative resolution strategy. In this manner, the FNE can save significant resources that would, otherwise, be invested into extenuating and uncertain litigation processes.

## 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*

24. In 2009 the FNE initiated 7 investigations into mergers and/or concentration operations. During 2010, 9 proceedings were initiated in this area. And, during 2011, through July, 12 internal proceedings were initiated to analyze mergers/concentration operations.

25. During the period covered by this report (August 2009-July 2011), the TDLC initiated 10 non-adversarial proceedings to analyze concentration operations and matters linked thereto. Of that total, 4 ended with approval without conditions,<sup>53</sup> 2 ended with approval with conditions (mitigation remedies),<sup>54</sup> and two ended by causes linked to the consulted operation (desist, change in operation),<sup>55</sup> and 2 are currently ongoing.<sup>56</sup>

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<sup>51</sup> An electronic copy of this agreement is available at: [http://www.fne.gob.cl/wp-content/uploads/2011/05/acex\\_0002\\_2010.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/05/acex_0002_2010.pdf)

<sup>52</sup> An electronic copy of the TDLC's resolution is available at: [http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20n%20Resolucion\\_02\\_2010.pdf](http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20n%20Resolucion_02_2010.pdf)

<sup>53</sup> TDLC, Resolutions No. 32, No. 33, No. 35 and No. 36 are available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=311&IDI=1273>

<sup>54</sup> TDLC, Resolution No. 31/2009 of 09.12.09 (*Anagra*), relating to the fertilizer market for agricultural production; and, TDLC, Resolution No. 34/2011 of 26.05.11 relating to the fuel distribution market (*Copec/Terpel*). Both available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=311&IDI=1273>

<sup>55</sup> FNE Consultation *D&S/Alvi*, ended by withdrawal, TDLC, Final Resolution No. 83 of 02.03.11; and Consultation *Nestlé/Soprole*, ended by desistance and withdrawal of the consultation, TDLC, Final

26. A new power of the FNE originating from the 2009 modifications, relevant to the system of merger control, consisted in allowing the FNE to consult ex officio future operations, that is, operations that have not yet been carried out. Previously, the possibility of a consultation on behalf of the FNE was limited to operations already carried out; the power to consult future operations was reserved for the interested parties. The legal modification constitutes a counterweight to the voluntary consultation regime in force in the country and, according to the criteria applied by the FNE in exercising it, could constitute as an additional incentive to consultation by interested businesses. During the period covered by this report, the FNE has exercised the power to consult future concentration operations on two occasions, both relating to the supermarket sector.<sup>57</sup>

### 2.3.2 Summary of important merger cases

- D&S/Alvi: exercise of the FNE of the new power to consult ex officio future concentration operations

The FNE submitted a consultation to the TDLC concerning the takeover operation of Alvi (the largest wholesale distributor of supermarkets in Chile) by D&S (Chilean affiliate of Walmart), the leading chain in the supermarket segment in the country. The industry was generating significant overlaps in certain segments of demand (particularly, low income consumers who shop their foodstuffs and supplies at Alvi). Consequently, in said segment, Alvi exerts a significant competitive pressure on D&S without which the latter would have the power to increase its prices. Therefore, the FNE defended the thesis that this control operation generated anti-competitive effects.

The FNE carried out a sophisticated economic analysis in this case to defend its technical opinion. However, the case was not resolved by a TDLC's decision, but by the desistance of D&S to bring forth the operation. Alvi was, ultimately, acquired by another operator—an operation that was motivated, in part, by the FNE's apprehensions regarding its effects on competition as preliminarily conceived.<sup>58</sup>

- Nestlé/Soprole: thwarted concentration operation aimed at reinforcing a dominant position

In November 2010, foreign groups Nestlé and Fonterra submitted a consultation before the TDLC regarding a planned concentration operation aimed at implementing in Chile the alliance these companies have, since 2002, in different parts of America (excluding the U.S. and Canada), known as “Dairy Partners America”, whose purpose is the joint production and sale of certain dairy products. The proposed operation consisted of a joint venture to be implemented by the acquisition on the part of the Nestlé group of 50% of one of Fonterra's affiliates in Chile, Soprole S.A., changing the name of the latter to “Dairy Partners America Chile S.A.”

According to the request submitted by the operation's parties, different markets in Chile could be affected by the operation. Different dairy product markets were considered as separate markets and, in this regard, the parties claimed that the potential increase in price of those dairy products

Resolution No. 85 de 07.04.11. Both resolutions are available at : <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=321&IDI=1277>

<sup>56</sup> TDLC, Case NC 388-11 Consultation *Lan/Tam* and TDLC, Case NC 393-11 FNE Consultation *Ecomarket/Rendic*.

<sup>57</sup> FNE Consultation *D&S/Alvi*, TDLC, Final Resolution No. 83, of 02.03.11; and, FNE Consultation *Ecomarket/Rendic* TDLC, Case NC 393-11.

<sup>58</sup> TDLC, Final Resolution No. 83, of 02.03.11 (*D&S/Alvi*).

could be disciplined by imports. The parties also argued that the alliance had been implemented in various countries throughout the region such as Argentina, Brazil, Colombia, Venezuela and Ecuador without damaging competition. They also attached to their presentation the approvals of the alliance made by competition authorities in the European Union and Brazil.

On issuing its report in this case, the FNE therein requested structural remedies (disposal or transfer of trademarks, goods and production machinery in those areas facing competition problems) and not behavioral remedies as requested by the parties of the operation (one of them considered freezing prices for the duration of three years). At any event, the FNE claimed that the consulted operation implied the creation of an economic agent endowed with a dominant position in the dairy industry, capable of hindering the safeguarding of an effective competition in the markets in which it operates, and of acting, to a large extent, independently with respect to its competitors, suppliers and consumers. The FNE added that the risks associated to its dominance were not sufficiently controlled—not by the efficiencies alluded to by the parties nor by the mitigation measures proposed.

In addition to the FNE's unfavorable report, a strong political opposition was mounting in conjunction with interests groups opposing the operation in question. The concerns of the latter referred to the potential lay-offs and to unrecoverable investments already made by dairy producers who would be left exposed to a monopsonistic power.

The aforementioned led the parties to desist from the operation, withdrawing the consultation submitted to the TDLC.<sup>59</sup>

- Copec/Terpel: transnational concentration operation in fuel distribution

In June 2010 Copec, a leading distributor of fuel in Chile informed the TDLC of its intention to acquire a significant participation in the Colombian fuel distributor Terpel. The operation aimed at expanding the Chilean group's operations into the Colombian market. According to Copec's presentation, stock shares linked to its rival in Chile in fuel distribution—Terpel Chile, affiliate of the Colombian group—were not an essential part of the operation, contemplating the short-term disposal or transfer of said shares in the plan.

Copec proposed a structural measure consisting of the complete divestiture of Terpel Chile's shares. However, as divestiture could take no less than two years to perform, Copec also proposed a series of behavioural measures ('Chinese walls') in order to regulate the corporate governance of the Colombian group Terpel, so as to avoid anti-competitive influence by the Colombian parent company in Terpel Chile and avoid the exchange of sensitive business information between both companies.

In its report, the FNE claimed that there were not sufficient counterweights to the serious risks to competition this concentration operation bore and that these should be curtailed by shortening the timeframe proposed by Copec: (i) 18 months from when the consultation was submitted or (ii) 12 months from the takeover of Terpel Colombia or (iii) 6 months from the TDLC's decision. The FNE proposed to complement the mitigation commitments offered by the interested parties with other measures.

The TDLC, ultimately, approved the concentration operation with a series of mitigation measures 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

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<sup>59</sup> TDLC, Final Resolution No. 85 of 07.04.11. (*Nestlé/Soprole*).

TDLC; (iv) Chinese wall mechanisms in the companies' corporate governance in order to avoid influences in their management that could incite anti-competitive effects.<sup>60</sup>

- Lan/Tam: transnational merger in air transportation

During the period covered by this report, a consultation was submitted before the TDLC regarding a merger between national airline Lan and Brazilian airline Tam. Although the case was not resolved within the period in question, it is worthy to mention.<sup>61</sup>

The FNE filed a report to the TDLC presenting its analysis of the concentration operation. The report analyzed possible existing risks to competition resulting from the merger, the possibility of existing mitigation measures thereto, and the probability that these were to be passed on to consumers. Risks to competition were detected, namely in the transportation of passengers in certain routes where concentration would considerably increase, also considering all existing entry barriers. In effect, the analysis of the background information 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 (e.g. London, Milan and Frankfurt). Regarding coordination risks, the FNE considered relevant the background information of a cartel detected in the international freight transportation market in which Lan participated.

On analyzing efficiencies, it was noted that the detail of the grounds for each efficiency argued by the parties was insufficient, therefore it was not possible to verify if these could effectively be reached. Notwithstanding, it was noted that there were no grounds to assess that the synergies would be translated into lower prices to consumers on different routes or in another manner.

Notwithstanding the above, a series of mitigation measures were proposed in light of, in the FNE's judgment, the fact that the risks enunciated constituted contingencies possible to mitigate. The majority of the proposed measures mainly sought to reduce entry barriers in routes affected by the merger. Other measures sought to reduce the possibility of an increase in tariffs. Both structural and behavioral measures were proposed. Among others, the exchange of slots of the merged airline in favor of third party airlines requesting to enter or entering Guarulhos airport in Sao Paulo was proposed, given the existing congestion in this airport. Additionally, measures such as extending the frequent flyer program of the merged airline to passengers of an entering airline in determined routes and signing interline agreements were also proposed. To directly avoid the abuse of dominant position, measures to reduce tariffs and increase the offer on affected routes were proposed.

The TDLC issued its decision on this operation recently.<sup>62</sup>

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

27. 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

<sup>60</sup> TDLC, Resolution No. 34/2011 of 26.05.11 (*Copec/Terpel*). Available at: [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_34\\_2011.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_34_2011.pdf)

<sup>61</sup> TDLC, Case No. 388-11. Background for this case is available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2644>

<sup>62</sup> TDLC's decision was finally issued on September 21<sup>st</sup>, 2011, and challenged before the Supreme Court.

recommendations to regulators or propose regulatory modifications; lastly, the TDLC can formulate recommendations or propose regulatory reforms through its decisions.

28. During the period covered by this report, the FNE developed, among others, the following advocacy activities directly for regulators for various purposes. For the transport regulator (*Subsecretaría de Transportes*), the FNE presented various decisions of the TDLC concerning agreements between competitors within the sector with the aim of preventing authorities from facilitating these types of agreements. For the National Water Resources Board—a regulator in matters of water rights—the FNE’s aim was to ensure the compliance of a decision of the TDLC in that sector which imposed transparency measures in information regarding requests and transfers of water rights.<sup>63</sup> For the Office of the Undersecretary of Telecommunications, (*Subsecretaría de Telecomunicaciones*) the FNE lectured on the implementation of numeric portability for mobile phones and on the design of mechanisms for radio-electric spectrum concessions. For the Ministry of Energy, the FNE commented on a regulation that seeks to implement mechanisms to expedite the transfers in price drops to final consumers. The FNE also conducted an analysis regarding the role of public port companies in the competitive assignment of docking stations to private concessionaires, and with the operating company (concessionaire) of the Santiago airport (SCL), in relation to the mechanisms of assigning sub-concessions of specific services.

29. On the other hand, through presentations made to the TDLC (reports), the FNE made proposals, among others, for the following regulatory topics: regarding a future general instruction guide on on-net/off-net telephone services<sup>64</sup>; regarding the application of norms concerning access to fishing resources<sup>65</sup>; regarding competitive aspects of bids for tendering port concessions<sup>66</sup>. Also, in the case of complaints (adversarial causes) the FNE has usually requested measures of regulatory nature, such as demanding a prior consultation for future concentration operations or ordering the termination of long-term contracts and resolve a new tender thereof through a competitive bid. These types of measures have been requested, during the period in question, for charges filed in connection with the domestic waste collection services sector hired by municipalities,<sup>67</sup> and in the interurban passenger transportation sector.<sup>68</sup>

30. The TDLC, during the period covered by this report, formulated four proposals in regulatory reform in the following sectors: water distribution and sewerages<sup>69</sup>, unbundling in telecommunications services<sup>70</sup>, assignment of subsidies in telecommunications<sup>71</sup>, and on the access system of fishing

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<sup>63</sup> TDLC, Resolution No. 18/2006 of 16.11.06.

<sup>64</sup> The FNE report on this matter is available at : [http://www.fne.gob.cl/wp-content/uploads/2011/03/itlc\\_0001\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/itlc_0001_2011.pdf)

<sup>65</sup> The FNE reports on this matter are available at : [http://www.fne.gob.cl/wp-content/uploads/2011/03/itlc\\_0004\\_2010.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/itlc_0004_2010.pdf) and [http://www.fne.gob.cl/wp-content/uploads/2011/03/itlc\\_0005\\_2010.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/itlc_0005_2010.pdf)

<sup>66</sup> The participation of competition authorities in this matter stems from the legal mandate of the Law on Ports and, between 2009-2010, this took place on various occasions. For example, the FNE’s reports with respect to the bidding of a docking station in the Port of Valparaíso can be found at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?GUID=&ID=1781>

<sup>67</sup> We are considering here the following complaint: [http://www.fne.gob.cl/wp-content/uploads/2011/03/requ\\_0003\\_2009.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/requ_0003_2009.pdf)

<sup>68</sup> We are considering here the following complaint: [http://www.fne.gob.cl/wp-content/uploads/2011/03/requerimiento\\_04\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/requerimiento_04_2011.pdf)

<sup>69</sup> Available at: [http://www.tdlc.cl/DocumentosMultiples/Proposicion\\_10\\_2009.pdf](http://www.tdlc.cl/DocumentosMultiples/Proposicion_10_2009.pdf)

<sup>70</sup> Available at: [http://www.tdlc.cl/DocumentosMultiples/Proposicion\\_11\\_2010.pdf](http://www.tdlc.cl/DocumentosMultiples/Proposicion_11_2010.pdf)

<sup>71</sup> Available at: [http://www.tdlc.cl/DocumentosMultiples/Proposicion\\_13\\_2011.pdf](http://www.tdlc.cl/DocumentosMultiples/Proposicion_13_2011.pdf)

resources.<sup>72</sup> During the period in question, the FNE additionally carried out three reports relating to competition conditions in regulated sectors such as ports (tender of bids for operating docking stations) and in the collective administration of water rights<sup>73</sup>. Moreover, the TDLC, ex officio, initiated a process aimed at drafting a General Instruction on the effects in competition of price differentiation in public telephone services, “On-net / off-net tariffs”, and of package deals for telecommunications services, still undergoing development.<sup>74</sup> In addition, there are various pro-competitive recommendations directed toward regulatory bodies and other public services, as a part of its general attributes.

31. Conceiving competition advocacy in broad terms—that is, the circulation of materials and contributing to creating a “culture of competition”—in recent times the FNE has incorporated into its strategy the production of instructional materials to promote competition and aimed at providing transparency and greater legal security and predictability for individuals. The more noteworthy of the materials recently published are the publication of a document on Competition and Trade Associations<sup>75</sup>, and another on Competition and Public Procurement<sup>76</sup>.

32. Regarding the advocacy of competition and circulation of information for greater public knowledge on competition law and policy, it is also worth mentioning the complete revamping of the FNE’s website [www.fne.gob.cl](http://www.fne.gob.cl) and various collaboration agreements between the FNE and institutions such as the Ministry of Agriculture, the Industrial Property Office, the Chilean Internal Revenue Service and the Public Purchasing and Hiring Office. The FNE purports to work with all these bodies to advocate competition law and principles, in addition to obtaining a consistent flow of information relevant to its investigations.

#### 4. Budget and resources of competition authorities

##### 4.1 The FNE

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

##### 4.1.1 Annual budget (in Chilean pesos and US\$)

- 2009: \$ 3.357.215.000.- (Chilean pesos); approx. USD 6,155,961.
- 2010: \$ 3.940.884.000.- (Chilean pesos); approx. USD 7,858,976.
- 2011: \$ 3.988.427.000.- (Chilean pesos); approx. USD 8,400,579.

##### 4.1.2 Number of employees

- 2009: 84
- 2010: 87
- 2011: 89

<sup>72</sup> Available at: [http://www.tdlc.cl/DocumentosMultiples/Proposicion\\_12\\_2011.pdf](http://www.tdlc.cl/DocumentosMultiples/Proposicion_12_2011.pdf)

<sup>73</sup> TDLC, Report Nos. 5, 6 and 7. Available at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=320&IDI=1276>

<sup>74</sup> Background on this proceeding at: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2600&GUID=>

<sup>75</sup> The final version of this advocacy material, as well as documents that served as background, are available at: <http://www.fne.gob.cl/promocion-de-la-libre-competencia/herramientas-de-promocion/>

<sup>76</sup> The final version of this advocacy material is available at: <http://www.fne.gob.cl/wp-content/uploads/2011/08/Material-de-Promoción-1-Compras-públicas-Abr2011.pdf>

<b>Staff</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Economists	21	17	18
Lawyers	27	26	31
Other professionals	18	23	26
Support staff	18	18	14
<b>All staff combined</b>	<b>84</b>	<b>87</b>	<b>89</b>

34. Human resources applied to:

- Enforcement against anti-competitive practices (cartel – dominance abuses):
  - 2009: 39
  - 2010: 52
- Merger review and enforcement<sup>77</sup>:
  - 2009: 8
  - 2010: 11
- Advocacy efforts:
  - 2009: 13
  - 2010: 6

#### 4.2 *The TDLC*

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

##### 4.2.1 *Annual budget (in your currency and US\$)*

- 2009: \$ 936.233.000.- (Chilean pesos); approx. USD 1,719,436.
- 2010: \$ 1.009.641.000.- (Chilean pesos); approx. USD 1,992,400.
- 2011: \$ 1.016.627.000.- (Chilean pesos); approx. USD 2,141,259.

##### 4.2.2 *Number of members (including staff members + judges)*

- 2009: 18
- 2010: 19
- 2011: 21

<b>Staff</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Economists	4	5	6
Lawyers	7	7	9
Support staff	7	7	6
<b>All staff combined</b>	<b>18</b>	<b>19</b>	<b>21</b>

<sup>77</sup> These numbers are estimations. Human resources in merger cases are subject to changes due to the voluntary basis of the Chilean pre-merger notification system. The actual number varies with the increase or reduction in the number of cases submitted for review.

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

36. In 2009 the book “Competition Law and Policy in Latin America”, by Eleanor Fox, Daniel Sokol (eds.) *et al.* was published. This work, in 22 chapters, crafts a detailed analysis of different aspects in the design, implementation and practice of competition policy and law in the region. Various chapters in the book were written by Chilean authors and/or refer to competition law in Chile.<sup>78</sup>

37. In 2010 the book “Libre Competencia y Retail”, by Paulo Montt, Nicole Nehme (eds.) *et al.* was published. This work contains 12 articles by distinguished national authors, researchers, academics and specialists who jointly illustrate a complete overview of competition law enforcement in the country, with particular emphasis on the retail sector.<sup>79</sup>

38. In 2011 the TDLC and the Centro de Libre Competencia UC edited a book titled “La Libre Competencia en el Chile del Bicentenario”. The publication contains 15 articles by national authors—experts in competition—that span the main areas of enforcement. The book contains, in its appendix, two interesting and complete indexes of documents relating to competition available in Chile, and economic and law reports filed before the TDLC.<sup>80</sup>

39. In 2011 the OECD published a report on competition law and policy in Chile that served as a basis for the country’s accession review. Although the report only covers the period through June 2009, it is worth considering as it serves as a background for this present report and the fact that it was publicly published during 2011.<sup>81</sup>

40. The Centro de Libre Competencia de la Universidad Católica has sustained its activities to circulate and periodically publish its review *Anales de Derecho UC*, dedicated to competition issues. Through this activity, the center has become an important channel for the advocacy and discussion of competition matters in the country. During the period in question, two reviews specialized in competition have been published.<sup>82</sup>

41. Lastly, it is noteworthy to mention the creation of the Centro de Regulación y Competencia, under the wing of the School of Law of Universidad de Chile. This center has, during the period in question, issued various reports on regulation and competition, many of which are available for downloading from their website.<sup>83</sup> Moreover, the center has organized interesting periodic post-graduate courses and seminars with distinguished national and foreign speakers, experts in competition.

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<sup>78</sup> A brief presentation of the book is available at: <http://www.hartpub.co.uk/books/details.asp?isbn=9781841138824>

<sup>79</sup> A brief presentation of the book is available at: [http://www.libromar.cl/index.php?page=shop\\_product\\_details&flypage=flypage.tpl&product\\_id=1053&category\\_id=29&option=com\\_virtuemart&Itemid=1&vmcchk=1&Itemid=1](http://www.libromar.cl/index.php?page=shop_product_details&flypage=flypage.tpl&product_id=1053&category_id=29&option=com_virtuemart&Itemid=1&vmcchk=1&Itemid=1)

<sup>80</sup> A brief presentation of the book is available at: [http://www.lcuc.cl/home2011/?page\\_id=539](http://www.lcuc.cl/home2011/?page_id=539)

<sup>81</sup> An electronic version of this report is available at: <http://www.oecd.org/dataoecd/19/61/47950954.pdf>

<sup>82</sup> <http://www.lcuc.cl/>

<sup>83</sup> <http://www.regcom.uchile.cl/>