

# Competition Advocacy in the Regulatory and Legal Framework: The Chilean Experience

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***“...competition advocacy can move the political equilibrium towards one that is more favorable to competition...”***

**Federal Trade Commission  
United States of America**



# Outline

- 1. The Chilean Competition System**
  - Legal framework and institutional arrangements
- 2. FNE - Competition advocacy in the Chilean regulatory and legal framework**
- 3. Challenges**
  - Ongoing & future

## *The Chilean Competition System*

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# Legal framework and institutional arrangements

## Competition Act (CA)

- **Legal Body:** DL N°211/1973 and its amendments
- **Goal:** To **promote and defend** free competition in markets (Art.1)
- **Scope:** “... *any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects...*” (Art.3)
- **Entities targeted by law:** Any private or public entity could be targeted by law, without exemptions or exclusions
- **Who:** Public (FNE) and private enforcement

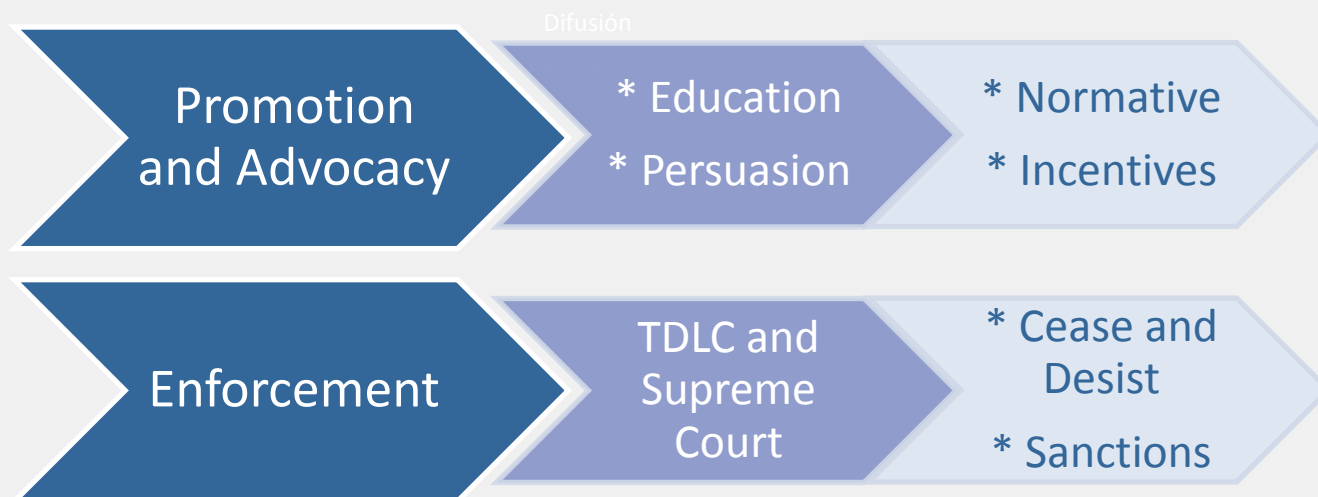
# Legal framework and institutional arrangements

## Dual system:

- **The Competition Agency –FNE**
  - Prosecution office, which can carry out investigation to enforce the law
  - Provides expert reports upon request from TDLC
  - Also in charge of competition advocacy and promotion
  
- **The Competition Tribunal –TDLC**
  - Judicial body. Its decisions may be punitive, restrictive or corrective.
  - Resolves on adversarial and non-adversarial competition cases, and consultations submitted by the FNE or directly by any private or public entity
  - **Can recommend the President of the Republic on amendments or abrogation of laws and regulations, and the enactment of regulations, with the object of promoting competition**

# Advocacy and Enforcement

## The two sides of competition policy



## **FNE - Conducting competition advocacy in the regulatory and legal framework**

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# How to conduct advocacy?

- **FNE has a general legal mandate to advocate competition**
  - The law does not specify the means to perform this task, as in the case of the TDLC (Art. 18, No 4, D.L. 211)
  
- **How the FNE has conducted competition advocacy?**

Mainly through these three institutional schemes:

  1. By interacting with legislators at Congress
  2. By means of technical opinions to the sectoral regulatory bodies
  3. Requests before the Competition Tribunal (Consultation and request to recommend legal and regulatory amendments to government)

# How to conduct advocacy?



## In its relation with Congress

Upon the **Legislative Power's** request to the FNE on assessments of competition issues or bills under discussion

In addition, mainly in high impact cases, the National Economic Prosecutor appears before Congress to describe the agency's position.

Ex. *FNE v. Pharmacy chains* (cartel case)

# How to conduct advocacy?



## In its direct relation with Regulatory Bodies

The FNE seeks to maintain frequent communication and collaborative activities with the regulatory bodies, either through informal interaction (consultations, meetings, exchange of information) or formal mechanisms such as institutional arrangements. These aims not just at identifying government agencies' and regulators' policies and practices that may have substantial adverse effects on market competition , but also aims at increasing the competition awareness of these bodies in their performance.

Ex.: Ministry of Transport and Telecommunications (MTT), regarding transport issues; or Undersecretariat of Telecommunications (SUBTEL), regarding telecom

# How to conduct advocacy?



## In cases brought to the Competition Tribunal

The FNE has suggested the TDLC to issue recommendations to complement or amend regulatory frameworks

Ex.: *FNE v. CTC Chile* (Ruling 45), where FNE advocated phone number portability (SUBTEL) and the explicit acknowledgement of telecomm convergence (MTT)

# Some examples on competition advocacy to regulatory bodies - Telecom

- **3G Case** In May 2007, the Undersecretariat of Telecommunications (SUBTEL) submitted a consultation to the TDLC regarding a future radio spectrum auction for mobile telephony to introduce 3G technology. In particular, due to the levels of concentration in that industry, SUBTEL consulted on the exclusion of incumbents in the market.
- The Competition Tribunal (TDLC) requested the FNE a technical report, which was submitted in November, 2007. The FNE suggested not to exclude players but to design an allocation scheme for the mobile telephony spectrum, granting a maximum block of 60Mhz to each incumbent or potential player. In order to avoid blocking the entrance, divestiture should be in order if a winning bidder, with its previous spectrum, accumulated more than the maximum.

# Some examples on competition advocacy to regulatory bodies - Telecom

- In its Resolution 27/2008, the TDLC rejected the exclusion consulted by SUBTEL dismissed the FNE's opinion on the allocation of a maximum spectrum, yet ordered SUBTEL to implement number portability prior to the radio spectrum bidding.
- In January 2009, the Supreme Court ruled this case upholding the FNE's recommendation about the spectrum limits, and dismissed the number portability condition.
- Finally, the auction was launched in April 2009. In accordance with the Supreme Court ruling, existing wireless players were allowed to bid. Any company surpassing the 60MHz limit was compelled to hand its additional spectrum in other bands back to the Government

# And what happens when competition advocacy does not work? – Air transport

- The FNE's advocacy efforts does not forgo its role as prosecutor on competition infringements: If the regulator contests the FNE's position, the FNE can decide to file proceedings before the TDLC
- **Case FNE v. Junta Aeronáutica Civil** (JAC, sectoral regulator for air transport):
  - For a long time the FNE and JAC had a strategic relationship intended for improving the sector's competitiveness
  - In 2007 the FNE learned that JAC had published its tender clauses for the public bidding of direct air frequencies between Santiago and Lima.
  - According to JAC's regulation (Supreme Decree No 102/81 & Decree Law N° 2564), the allocating criteria was to be the maximum price bid
- In 2007, the FNE brought a case against JAC before the TDLC (adversarial procedure), because JAC failed to consider the FNE's opinion concerning an open skies policy.

# And what happens when competition advocacy does not work? – Air transport

- In 2009, in its Ruling Ner. 81, the TDLC ordered JAC to modify the tender clauses. It also proposed the amendment of the Aeronautical Code and the Decree Law N° 2564, about commercial aviation rules (these, by its Art 18.4 powers)
- In the judicial review of this case, however, the Supreme Court dismissed the ruling in all its parts because this one contradicted the sectoral regulation
- The Supreme Court decision was based on:
  - First, the **rule of law**. JAC had designed its tender clauses according to its sectoral regulation, which needs not make competitive considerations, and
  - Second, the TDLC's powers to decide on adversarial procedures (Art. 26) do not allow it to recommend legal amendments, which must be requested through consultations or non-adversarial procedures (Art. 18, No 4, DL 211)



## Challenges

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# Challenges

## Ongoing issues...

- To strengthen the FNE's relationship with sectoral authorities, to instill a competition culture and, in particular, their awareness of the convenience of advocating before government, legislators, regulators, stakeholders and other relevant agents.
- The FNE is working on a Cooperation Agreement with the Ministry General Secretariat of the Presidency, which aims to develop a FNE's ***ex ante* non binding competition assessment** of bills proposed by the Executive

# Challenges for the FNE

## In the future ...

- To bring into practice the foregoing agreement, which entails devoting FNE's resources to assess different laws which may affect competition.
  
- To reinforce a pro-active role in competition promotion among Legislators
  - Ex. The “Optometrists Report”, which will be submitted to Congress by the FNE upon its own initiative, to advocate on consumer benefit from allowing new providers in the health-care sector (different from ophthalmologists).

## Creating a Competition Culture

**Thank you !**

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