Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

20-Oct-2015

English - Or. English

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

DAF/COMP/AR(2015)32
Unclassified

# ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CHILE

**-- 2014 --**

**27-28 October 2015**

*This report is submitted by Chile to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2015.*

**JT03384474**



English - Or. English

**TABLE OF CONTENTS**

# JOINT CONTRIBUTION BY THE FISCALÍA NACIONAL ECONÓMICA AND THE TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA (MAY 2014 – JULY 2015)

## Executive Summary

1. This report summarizes recent developments in competition law, policy and enforcement in Chile. It also refers to the main cases of competition law enforcement, competition advocacy activities, and other developments that occurred between May 2014 and July 2015.

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

3. A draft proposal of several amendments of the Chilean competition law was presented to Congress by the government in March 2015. The proposed modifications cover three main areas: (i) cartel prosecution; (ii) the establishment of a mandatory merger control regime; and, (iii) empowering the FNE so as to request information to private undertakings for executing market studies.

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

5. On Cartels, the Competition Tribunal issued its decision on the poultry cartel case in September 2014. In a unanimous ruling, the Tribunal declared that the 3 accused companies, who control over 80% of total poultry production in Chile, had colluded via their trade association, having agreed to limit production of poultry meat in the national market, as well as allocating quotas in the markets of production and commercialization of this product. Two of the companies were fined with the maximum applicable: approximately US $ 24 million, while the third company was fined with approximately US $ 9.7 million. The Competition Tribunal also ordered the dissolution of the trade association, who had acted as coordinator of the cartel. This decision was challenged before the Supreme Court, whose final ruling is still pending.

6. The Tribunal also issued its decision on a complaint by the FNE against the Trade Association of Obstetric Gynecologists of the rural area of Ñuble and its members stating that there was proof of an agreement between the medical doctors specialized in Obstetrics and Gynecology in the area. This agreement had been reached in order to steadily raise prices of medical consultations and surgical interventions, at least for a year and a half. The Tribunal fined the trade association, as well as all the doctors involved.

[1] The most significant modifications to the competition law in recent years have been Law No. 19.911/2003, which created the TDLC and Law No. 20.361/2009, which improved the law on hardcore cartel enforcement.

7. Additionally, in May, July and November 2014, the Competition Tribunal ruled in favor of the FNE in three collusion cases against intercity bus services that involved price fixing and artificial creation of entry barriers in different routes.

8. Regarding new cases, in July 2014, the FNE filed a complaint before the TDLC, accusing four asphalt companies of colluding, agreeing on a mechanism to allocate contracts for providing asphalt-based products. This case is still pending before the TDLC.

9. In January 2015, the FNE filed a complaint before the TDLC against six international shipping companies, claiming that these firms engaged in coordinated actions to ensure that each maintained their existing cargo contracts with specific car manufacturers or importers. This case is particularly noteworthy, because (i) it is the 4$^{th}$ leniency case in Chile; and (ii) it is the first time that two different companies applied for leniency in the same case. This case is in the early stages of trial before the TDLC.

10. Regarding mergers, the FNE initiated 19 investigations of merger cases in the period between May 2014 and July 2015; only 2 of these cases were voluntarily notified by the merging parties. The FNE entered into settlement negotiations in three of these cases, agreeing with the interested parties several structural and behavioral remedies, which aimed to eliminate the competition concerns raised by the respective mergers.

11. Regarding previously controlled mergers, in this period the FNE filed two cases of breach to remedies previously imposed by the TDLC: one in the supermarket industry which started in June 2014, and one in the airline industry which began in June 2015. Both cases are still ongoing in the TLDC.

12. Regarding advocacy, in this period the FNE issued a report on public procurement in the healthcare sector, titled "Study of Public Procurement of Pharmaceutical Drugs in Healthcare Facilities". This report analyzed more than 300 tenders in several public hospitals in Chile, concluding that there is room for improvement in the public procurement of pharmaceutical drugs, and recommending courses of action to increase competition in this market.

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

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

13. No legal provisions directly or indirectly regarding competition law were enacted in the reported period.

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

14. On July 6 2014, the FNE issued the "Guidelines for the Analysis of Vertical Restraints". This document provides guidance on the analysis to be followed by the FNE, when evaluating the mechanisms that regulate the commercial conditions agreed by or imposed to companies that operate at different stages of the productive chain.

15. The FNE's focus on vertical restraints is due to the fact that they may restrict competition in the marketplace though the promotion or facilitation of collusion among distributors or suppliers, and to block or delay entry or expansion of other industry agents.

16. Furthermore, the FNE has also centered on how to improve its leniency program. Under this scope, its 2009 "Internal Guidelines on Immunity and Reduction of Fines in Collusion Cases" is under review and after a public consultation process a new guideline, titled "Internal Guidelines on Leniency in Collusion Cases" will be promptly released.

### *1.3 Government proposals for new legislation*

17. In March, 2015, the Chilean government submitted to Congress a draft proposal that substantially amends the Chilean competition regulation. The proposal introduces modifications in three main areas: i) cartel prosecution; ii) the establishment of a mandatory merger control regime; and iii) to empower the FNE so as to request information to private undertakings for the execution of market studies.

18. Regarding cartel prosecution, it is noteworthy that the proposal considers an increase in fines, which aims at cartel deterrence – nonetheless, the raise is applicable for the entire spectrum of possible competition infringements. If the proposal is approved, the current fixed maximum fine will be replaced by a fine up to the double of the economic benefit reported by the offender – to the extent that said benefit could be clearly established. On the contrary, the fine's upper threshold will amount to the 30% of the offender's sales during the corresponding period in which the infringement was executed.

19. Moreover, the proposal establishes cartel infringements as criminal offences, categorizing the conduct in the Criminal Code.

20. Within merger control, the draft proposal contemplates mandatory notification of concentrations exceeding certain thresholds –to be determined by the Ministry of Economy through subsequent regulation– to the FNE. The bill proposes to establish a two-phase review procedure conducted by the FNE, subject to fixed legal terms: a Phase I for the review and clearance of unproblematic mergers; and a Phase II for the assessment of concentrations requiring an in-depth review due to their complexity and/or likelihood of anti-competitive effects. A decision blocking a merger could be appealed before the Competition Tribunal ("TDLC"). The proposal's merger assessment standard is the 'substantial reduction of competition'.

21. The bill is under ongoing parliamentary discussion and it has been subject to several amendments. It is not expected to be approved before 2016.

## 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:*

(a) FNE

i. Asphalt cartel

22. On July 7, 2014, the FNE filed a complaint before the TDLC against four asphalt companies: Asfaltos Chilenos, Dynal Industrial, ENEX and QLA. It claimed these companies agreed on a mechanism to allocate contracts for the provision of asphalt-based products used in the construction, replacement and repairing of public and private roads. The agreement was disclosed to the FNE by ENEX, who applied for leniency.

23. Considering the gravity of the infringements, the FNE requested the TDLC to impose fines of 5,000 UTA (about USD $ 5 million) to Asfaltos Chilenos, and QLA and 1,500 U.T.A. to Dynal (about USD $ 1.5 million), while ENEX was granted with immunity due to its cooperation through the leniency program.

24. This case is in the final stages of review in the TDLC.

ii. Cargo shipping cartel

25. On January 27, 2015, the FNE filed a complaint before the TDLC against six international shipping companies, namely Compañía Sudamericana de Vapores ("CSAV"), Compañía Chilena de Navegación Interoceanica ("CCNI"), Eukor Car Carriers Inc ("Eukor"), Kawasaki Kisen Kaisha ltd ("Kline"), Mitsui Osk Lines Ltd. ("MOL") and Nippon Yusen Kabushiki Kaisha ("NYK").

26. The companies operate the business of car shipping from Europe, America and Asia to Chile. The FNE claimed the incumbent firms engaged in a coordinated course of action that ensured that each company maintained its existing contracts with car manufacturers or importers. The cartel activity was executed through the submission of bids that were either higher than the incumbent firm's bid or unfeasible, in order to guarantee that the contract would remain in the hands of the coordinated firms.

27. The agreement was disclosed to the FNE by CSAV, who applied for leniency. Thereafter, NYK also cooperated with the agency's investigation through its participation in the leniency programme.

28. The FNE requested the TDLC to fine Eukor with approximately USD $ 25 million and USD $12.5 million for MOL, Kline, CCNI and NYK. The requested fines were determined considering the gravity of the infringement, the economic benefit and the duration of the cartel.

29. The FNE requested for a reduced fine for NYK due to its cooperation throughout the investigation, which implied a reduction of 50% of the total amount of the requested fine, about USD $12.5 million. In this scope, CSAV was granted with immunity, given that it was the first applicant in the leniency program.

30. This case is remarkable since this is the fourth time the leniency program has been used in a Chilean cartel case. Likewise, for the first time, two firms in the same case applied for leniency.

31. This case is still in the early stages of review in the TDLC.

iii. *On-net – off-net* calls price discrimination

32. On July 15, 2014, the FNE submitted two claims against member companies of the 'Movistar' holding, a telecommunications operator and former incumbent: one against Telefónica Chile and another against Telefónica Móviles. The complaint was based on the grounds that such companies had breached a recent TDLC ruling (General Instructions No. 2, issued in 2012) which regulated the terms on which telecommunications companies are allowed to discriminate between *on-net* and *off-net* calls, as well as having engaged in tying practices within telecommunications services. The FNE requested for fines of around USD $3.2 million for Telefónica Móviles and USD $45 thousand for Telefónica Chile.

33. In Telefonica Móviles complaint, the FNE argued that discrimination between *on-net* and *off-net* calls, generated by the commercialization of mobile plans which gave clients the right to register a "Preferred Number" of the same company, as well as prepaid minute packs exclusively intended for *on-net* traffic, were in breach of the language and regulatory objectives of TDLC ruling. The above, since it leads to the creation of user communities for the Movistar network, under which users are subject to high switching costs..

34. Telefónica Chile's claim was referred to a report submitted to the FNE, which allowed the agency to verify that, as of September 2011, the company had not commercialized its fiber optic TV service in a standalone manner, but only tied to the sale of broadband internet services. The above conduct was also allegedly to be in breach of the TDLC's 2012 ruling.

35. Both cases were closed after a settlement between Movistar and the FNE was approved by the TDLC.

(b) Competition Tribunal

36. During the period covered by this report, 19 new adversarial cases were initiated before the TDLC[2]. Of the total number of cases, 84% were related to unilateral conduct and 16% to cartels.

37. The TDLC issued 11 decisions in adversarial cases during the period covered by this report: 6 in 2014 (May-December)[3], and 5 through July 2015[4]. These cases originated both from claims by the FNE, as well as through complaints filed by private parties. 5 out of these 11 rulings were condemnatory. The average length of these proceedings was 645 days (roughly 1 year and 9 months).

38. Of these 11 decisions, 8 have been challenged before the Supreme Court. 2 of them have been confirmed by the Supreme Court, while the other 6 are still under review.

39. All 5 of the condemnatory decisions issued during the period covered by this report relate to collusion cases.

(c) Supreme Court

40. On August 2014, the Hon. Supreme Court of Chile overturned a decision of the Competition Tribunal, which had condemned the National Civil Registry and Identification Service (Registro Civil) for discrimination in the evaluation of proposals in the public tender N° 594-56-LP08, for a new identification card and passport system. According to the Tribunal's decision, this discrimination was deemed arbitrary, and might have resulted in the disqualification of a proponent (Sonda) from the tender. In the Competition Tribunal's decision, the Civil Registry had been fined with 200 UTA (equivalent to approximately US $ 162,000[5]).

41. This case was brought before the Supreme Court both by Sonda and the Civil Registry. Sonda claimed that the tender should have been deemed void, and that the fine should be augmented to 20,000 UTA (equivalent to approximately US $ 16.2 million). The Civil Registry claimed that the Competition Court's ruling and fine should be revoked, clearing it from the anticompetitive accusations. In its ruling, the Supreme Court stated that the case should not have been analyzed in the Competition Court, given that it had already been presented to the Public Procurement Court, who had already dismissed Sonda's case. Therefore, the Supreme Court overturned the Competition Tribunal's decision, dismissing Sonda's complaint and annulling the fine against the Civil Registry.

---

2 TDLC, Docket No. 278-14, 279-14, 280-14, 281-14, 282-14, 283-14, 284-14, 285-14, 286-14, 287-14, 288-14, 289-14, 290-14, 291-15, 292-15, 293-15, 294-15, 295-15 and 296-15.

3 TDLC, Rulings No. 136 (*FNE vs. Pullman Bus Costa Central and Others III - Cartagena*), No. 137 (*FNE vs. Casther and Others*), No. 138 (*Ramírez & Co. vs. Ministry of Transportation*), No. 139 (*FNE vs. Agrícola Agrosuper and Others*), No. 140 (*Condominio Campomar vs. Inmobiliaria Santa Rosa de Tunquén*) and No. 141 (*FNE vs. Transportes Línea Uno Collico*).

4 TDLC, Rulings No. 142 (*Multicaja and Other vs. Banco del Estado de Chile*), No. 143 (*Applus vs. Ministry of Transportation I*), No. 144 (*Applus vs. Ministry of Transportation II*), No. 145 (*FNE vs. Trade Association of OB-GYNs of the Province of Ñuble and Others*) and No. 146 (*Conadecus vs. Telefónica Móviles Chile and Others*).

5 Using the CL$-US$ exchange rate published by the Central Bank of Chile for the month of July 2015.

42. In January 2015, the Supreme Court upheld a decision issued by the TDLC, in a collusion case in which the FNE had accused interurban bus transport companies that serve the route Santiago – Cartagena of a price fixing agreement in this route. In this month, the Supreme Court also revised a decision by the TDLC in another collusion case in the interurban bus transport sector, this time in the Copiapó – Caldera route. In this case, the Supreme Court raised the fines that had been determined by the TDLC.

43. In April 2015, the Supreme Court confirmed the Competition Tribunal's Decision No. 133-2014, which had declared that 3 interurban bus transportation companies had colluded to fix prices and allocate frequencies in the Santiago – Curacaví – Santiago route.

(d) Other Courts

44. On October 9, 2014, the Constitutional Tribunal issued a decision regarding the proportionality of sanctions in the Competition Act (Decree Law No. 211, Article 26 (c)). This case was started by Servicios Pullman Bus S.A., one of the three companies that were fined in Decision No. 133-2014, while that decision was being reviewed by the Supreme Court. This company stated that Article 26 (c) of the Competition Act was unconstitutional, and therefore inapplicable, because it did not guarantee the constitutional principle of equality under the law, in its dimension of proportionality of sanctions. The Constitutional Tribunal dismissed the case, stating that this Article provided sufficient guarantee of proportionality of sanctions, given the fact that fines are determined by a collegiate Tribunal, and that several factors have to be taken into account when determining fines, such as the severity of the conduct and recidivism, among other considerations.

45. On June 23, 2015, the Fourth Oral Criminal Court reached a decision in the Criminal Prosecutor's Office accusation against 10 pharmaceutical executives. This accusation stems from the "Pharmacies Case", a high profile collusion case that was resolved by the TDLC in January 2012 and upheld by the Supreme Court in September 2012. The Criminal Prosecution Office had sued these 10 executives towards ascertaining the possible crime of fraudulent adulteration of standard pricing in Article 285 of the 1874 Criminal Code. The Criminal Court stated that this crime was not proven in the proceeding, thus clearing the accused executives of all charges.

46. On June 30, 2015, the 22nd Civil Court of Santiago solved a damages lawsuit by OPS Ingeniería Limitada (OPS) against Telefónica Móviles Chile (Movistar), stating that Movistar must pay OPS UF 510,011.92 (approximately US $ 20 million) as compensation for loss of earnings. The basis for OPS's compensation lawsuit was the Competition Tribunal's Decision No. 88-2009, which stated that Movistar had engaged in (i) margin squeeze practices towards its competitors in the market for termination of fixed-to-mobile telephone calls, and (ii) refusal to sell practices, geared towards transferring their dominant position in the mobile telephony market towards the connected market for termination of fixed-to-mobile telephone calls. The Civil Court's decision was appealed by Movistar, and is currently under review by the Court of Appeals.

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

(a) Collusion in the Chilean poultry industry:

47. On September 25, 2014, the TDLC issued its decision in the "poultry cartel case"[6]. In a unanimous ruling, the Tribunal accepted the lawsuit presented by the FNE in November 2011, and declared that Agrosuper, Ariztía and Don Pollo –3 companies that control over 80% of total poultry

6 Decision No. 139/2014. Available in http://www.tdlc.cl/DocumentosMultiples/Sentencia_139%20_2014.pdf.

production in Chile– colluded via their trade association, APA, having agreed to limit production of poultry meat in the national market, as well as allocating quotas in the market of production and commercialization of this product.

48. The Decision established the existence of an illicit agreement by means of e-mails and other evidence of coordination between the accused companies. In summary, the poultry meat producers had jointly projected future demand for their products, and allocated market quotas for production. The TDLC also considered that APA had a very important role in the coordination, execution and monitoring of compliance of the aforementioned agreement.

49. The Tribunal stated that there was abundant evidence that the accused companies, by means of defining a target production level, intended to determine the range of prices in which the prices of poultry meat products would fluctuate. This last exercise, by all accounts, constituted a collusive agreement on produced quantities, with the clear objective of achieving specific prices or price ranges, restricting or eliminating competition between participants. Each year –starting at least in the 1990s–, this agreement was monitored or adjusted by means of suggestions of production quantities, the slaughter of chicks or other coordinated mechanisms.

50. The Competition Tribunal stated that the aforementioned cartel was complex, describing several other instances of coordination between the accused companies.

51. In its ruling, the Tribunal rejected every exception, claim and defense put forward by the accused companies. In particular, Ariztía's exception of lack of passive legal standing, and all the companies' exceptions of exceeding the statute of limitations.

52. The Tribunal determined that the applicable law in this case corresponds to Decree Law No. 211, modified by Law No. 20361 of 2009. Under this law, Agrosuper and Ariztía were fined with the maximum applicable: 30,000 UTA each (approximately US $ 24 million[7]), while Don Pollo was fined with 12,000 UTA (approximately US $ 9.7 million[8]).The Tribunal also ordered the dissolution of APA, who acted as coordinator of the cartel. The Tribunal also stated that Agrosuper must begin a merger control proceeding before it embarks on any concentration operation in this market.

53. This decision was challenged by Agrosuper, Ariztía, Don Pollo, APA and the FNE before the Supreme Court, whose final ruling is still pending.

(b) Multicaja vs. BancoEstado: challenging the incumbent in acquiring and processing of credit and debit cards

54. In October 2012, Multicaja accused BancoEstado, one of the most important banks of the country, of (i) refusal to deal with Multicaja without justification, by refusing to enable the former's transactional network as an operator of debit cards for BancoEstado's product "CuentaRUT", and (ii) tying acquiring businesses for CuentaRUT to the operation services for Cuenta RUT that are offered by Transbank, a transactional network in which BancoEstado has a minority ownership.

55. The Competition Tribunal dismissed this lawsuit, stating that BancoEstado did not have a dominant position in the relevant markets of (i) acquiring businesses for credit and debit cards as payment mechanisms, and (ii) processing of transactions made with those payment methods. Since BancoEstado

7 Using the CL$-US$ exchange rate published by the Central Bank of Chile for the month of July 2015.

8 Using the CL$-US$ exchange rate published by the Central Bank of Chile for the month of July 2015.

lacked a dominant position, it could not have incurred in the abuses of dominant position that had been accused.

56. According to the TDLC's analysis, the services of acquiring businesses for BancoEstado's CuentaRUT and processing those transactions, are not significantly different from those same services towards other credit or debit cards. Consequently, it was determined that BancoEstado was only one of the possible issuers to whom the plaintiff could offer its services, and there was no proof that being hired by BancoEstado was necessary for Multicaja to participate in the relevant markets.

57. This decision was challenged by Multicaja in the Supreme Court. The final ruling is pending.

c) FNE vs. Obstetric Gynecologists: the role of Professional Associations as facilitators of illicit agreements

58. In October 2013, the FNE filed a complaint against the Trade Association of Obstetric Gynecologists of the rural area of Ñuble. According to the complaint, the Association was fixing minimum prices for standard maternity procedures, causing direct harm to privately insured patients.

59. The Competition Tribunal accepted the complaint, stating that there was proof of an agreement between medical doctors specialized in Obstetrics and Gynecology, concerted through their professional association (AGGOÑ). This agreement was reached in order to steadily raise prices of medical consultations and surgical interventions in the relevant markets, at least between the months of January 2012 and October 2013.

60. The Tribunal fined AGGOÑ with 10 UTA (approximately US $ 8,000), and the accused medical doctors had to pay fines that ranged between 1.66 and 9.52 UTA (approximately between US $ 1,300 and US $ 7,700).

61. The Competition Tribunal's decision was challenged before the Supreme Court, whose ruling is still pending.

(d) Recent decisions by the TDLC – Collusions in intercity transport services

62. In the period covered by this report, the Competition Tribunal issued three different decisions related to collusive practices in different intercity bus transport services.

63. In May 2014, the Competition Tribunal issued a decision on a complaint filed by the FNE against four intercity transport firms, Pullman Bus Costa Central, Bahía Azul, Bupesa and Andrade. The FNE accused these firms of agreeing to fix prices of intercity transport services for the Santiago-Cartagena-Santiago route in 2 opportunities: October 2009 and January 2010. Regarding the first price increase, the Tribunal considered that there was proof of coordination between Pullman Bus Costa Central and Bahía Azul; the participation of Bupesa and Andrade in this agreement was not proven. Regarding the price raise of January 2010, the Tribunal considered that the evidence presented in the proceeding was not enough to prove the second alleged collusive agreement. Considering this, the Tribunal imposed Pullman Bus Costa Central a fine of 80 UTA (approximately US $ 65,000), and Bahía Azul a fine of 30 UTA (approximately US $ 24,000). This decision was challenged before the Supreme Court, who confirmed the Competition Tribunal's ruling.

64. In July 2014, the Competition Tribunal issued a decision on a complaint filed by the FNE against three intercity transport firms: Casther, Expreso Caldera and Buses Caldera. The TDLC declared that these companies agreed to raise the price of tickets for services of rural intercity bus transport in the Copiapó-Caldera route in the months of April and May 2011, therefore infringing Article 3 of Decree Law No. 211.

The FNE reached a partial agreement with Expreso Caldera and Buses Caldera, in which the plaintiff reduced the maximum requested fine, while the defendants recognized facts and provided evidence. The Tribunal fined Casther with 60 UTA (approximately US $ 48,000), and Expreso Caldera and Buses Caldera with 15 UTA (approximately US $ 12,000) each. This decision was challenged before the Supreme Court, who confirmed the Competition Tribunal's findings, but raised the fines to more than double the total original amount.

65. In November 2014, the Competition Tribunal issued a decision on a complaint filed by the FNE against every line of intra-city bus transport services in the city of Valdivia, and their trade association AGETV. The TDLC declared that the defendants had agreed, inside AGETV, to raise prices of bus transportation in the city of Valdivia in May 2008, and agreed to raise prices again in July 2011. Two of the bus lines reached a partial agreement with the FNE. The Tribunal fined five bus lines with 15 UTA (approximately US $ 12,000) each; one with 5 UTA (approximately US $ 4,000), one with 2.5 UTA (approximately US $ 2,000), and the trade association with 10 UTA (approximately US $ 8,000). This decision was challenged before the Supreme Court; whose ruling is pending.

### *2.2 Mergers and acquisitions*

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

66. In the period between May 2014 and July 2015, 1 merger consultation was initiated before the TDLC, 19 merger investigations had been initiated by the FNE. 17 of the later were started ex officio by the FNE, while 2 of them were voluntarily notified by the merging parties.

67. It is noteworthy that Chile currently has a voluntary merger consultation and notification regime, in which the FNE acts as the enforcing agency and the TDLC as the adjudicatory body. This fact explains that few concentrations had been voluntarily consulted to the TDLC or notified to the FNE within the aforementioned period.

68. It is relevant to consider that in three merger investigations, the FNE has concluded that the proposed concentrations raise concerns from a competition law standpoint. Within that scope, the FNE and the merging parties have entered into settlement negotiation processes, agreeing that the proposed transactions should be conditioned to several remedies – both structural and behavioral – that aim to eliminate the competition concerns.

69. These settlements were submitted to the TDLC and were approved within a special fast-track settlement proceeding.

70. In one case regarding a concentration among international liner shipping operators, the FNE closed the ongoing merger investigation, since the parties submitted binding commitments in foreign jurisdictions. The above, given that these conditions at the same time served to relieve the competition concerns raised by the FNE.

*2.2.2 Summary of significant/ongoing cases*

(a) CFR Pharmaceuticals and Abbott Laboratories: Valproic acid

71. On September 4, 2014, the TDLC endorsed a settlement between the FNE and two international laboratories, CFR Pharmaceuticals ("CFR") – Recalcine in Chile - and Abbott Laboratories ("Abbott"), regarding the acquisition of Abbott by Recalcine which implied the divestiture of all the products that contained valproic acid, an active compound used to treat epilepsy, bipolar disorder and migraine.

72. The agreement provides that either Abbott or CFR must divest their brands, formulas, processes, technologies, rights, contracts and every indispensable asset for the successful participation in the business of manufacturing, marketing, promotion and distribution in Chile of valproic acid products to a feasible and independent competitor.

73. Abbott - through its brands Depakene and Valcote - and CFR – through Atemperator and Neuractin - were the largest players in that market at that time. In 2013, both companies held the 94% of sales in pharmacies and the 52% of sales in hospitals and related institutions.

74. The settlement aimed for the creation of a new market operator under a recognized brand, considering the strong market position of the merging parties, the entry barriers faced by other laboratories to enter into the valproic acid market, as well as the fact that medical practitioners often choose brands and tested drugs when it comes to fighting complex diseases, such as epilepsy.

(b) Oben Holding Group and Pack Film Chile: Polypropylene containers

75. On November 6, 2014, the TDLC approved a settlement agreed between the FNE and Oben Holding Group ("Oben"), a firm engaged in the commercialization of polypropylene products.

76. The settlement aimed to remedy the possible impairment of competition due to the dominant position that Oben Holding Group acquired in the local market for polypropylene due to the acquisition of its competitor, Sigdopack Sigdo Koppers ("Sigdopack"), in 2013. The resultant merged entity held an 80% market share. It is relevant to note that the settlement was reached once the merger between Oben and Sigdopack was already materialized.

77. The settlement contains five commitments: i) The setting, for a two-year term, of a fixed maximum price for customers in Chile whose purchase volume order equals or is less than 12 tonnes; ii) That Oben should refrain from subscribing exclusivity clauses with customers, or any other clauses that tend to produce any exclusionary effects; iii) To report any changes in business conditions to the FNE, with a 30 day notice; iv) To report any new mergers related to the merged entity that take effect in Chile and abroad to the FNE, in cases where the competition law of the country in which the transaction will materialize requires mandatory notification; and v) That Oben reduces the term of a non-compete clause agreed with Sigdo Koppers S.A. - a mining holding company formerly related to Sigdopack - from 5 to 2 years.

(c) Contitech Chile and Veyance Technologies: Conveyor Belts

78. On January 29, 2015, the TDLC approved a settlement between the FNE and the subsidiaries of two international conglomerates in the conveyor belts market, namely Contitech Chile S.A. ("Contitech") and Veyance Technologies Chile Ltda. ("Veyance"). The settlement aimed to prevent that competition in the Chilean market was hindered as a result of the merger between the holdings of the abovementioned companies.

79. The settlement's purpose was to reduce switching costs faced by the merging firms' clients, as well as lowering the entry barriers in the market. Accordingly, the parties agreed to (i) eliminate the exclusivity clause in force in a representation agreement between a Contitech's related company and TTM, a major national distributor; (ii) resign and refrain from subscribing price match clauses with its customers over the next five years; and (iii) to open the closed-monitoring system in force by Veyance that operated as an artificial barrier of entry of new competitors.

Breach of remedies proceedings

(a) LATAM Airlines Group

80. On June 10, 2015, the FNE filed a complaint against Latam Airlines Group ("Latam") before the TDLC. The FNE claimed that Latam breached one of the conditions set by the TDLC (in its Ruling N°37), which approved the merger of former Lan Airlines S.A. and Tam Linhas Aéreas S.A. in 2011.

81. In the Ruling, the Tribunal conditioned the merger clearance to 14 conditions. Condition No. 7 forced Latam to waive codeshare agreements with member airlines of an alliance other than Oneworld, in routes that connect Chile with Europe or North America. This remedy had a two-year timeframe - which expired on June 22, 2014. If Latam wished to keep the aforementioned agreements, it required the TDLC's authorization for their maintenance.

82. Likewise, new codeshare agreements between Latam and member airlines of an alliance other than Oneworld also required previous authorization by the TDLC.

83. Within the FNE's assessment of the Remedies compliance, the FNE noted that the Company kept six codeshare agreements in breach of the Ruling and that moreover, after the Ruling, it engaged in four new agreements without obtaining the relevant TDLC's approval.

84. In the breach of remedies' complaint, the FNE requested the TDLC an injunction, so that Latam was mandated to waive said agreements, as well as a fine of about US$ 4.2 million. This case is in the early stages of the proceeding before the TDLC.

(b) SMU

85. On June 30, 2014, the FNE issued a complaint against SMU, a retail supermarket chain, on the grounds that SMU had breached the remedies imposed by the TDLC in its Ruling No. 43, which in 2012 conditioned the merger between SMU and its former rival, Supermercados del Sur ("SdS").

86. In the Ruling, the TDLC established that the merged entity had to divest some of its retail stores and, within the intermediate period, to engage in match-pricing between the prices of its stores that did not face competition, and those in stores of nearby locations in which there were strong competition conditions; divest SMU's 40% minority shareholding in another supermarket chain, Montserrat; modify non-compete clauses agreed with the previous controllers of the chains acquired by SdS; set general contracting conditions with suppliers; and mandatory pre-merger consultation to the TDLC of operations within the supermarket industry in which SMU engages in the future.

87. According to the FNE, SMU infringed three conditions in breach of Ruling No. 43: i) it did not divest supermarket retail stores within the 8-month given time frame; ii) it did not engage in match-pricing between the prices of its stores that did not face competition, and those in stores of nearby locations in which there are strong competition conditions within the intermediate period before the divestiture; and iii) it did not divest its minority shareholding in a rival supermarket store, nor its related assets, within the 8-month time frame set in Ruling No. 43.

88. The FNE requested in its complaint that the merged entity was mandated to comply with the breached remedies, along with a fine of about USD $ 3.7 million.

89. It is noteworthy that after the FNE's complaint, SMU divested both the retail stores and the minority shareholding in its rival. The decision whether SMU will be fined by the TDLC for the delay in the remedies' compliance is still pending.

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

Recommendations of regulatory reform: new recommendations and new legislation that has taken into account on previous recommendations

(a) FNE

Stock Market

90. On February 2, 2015, the FNE filed a request to the TDLC, in the use of its power to recommend the President to amend a law or regulation whether there is a legal provision which may cause anticompetitive effects, particularly regarding the Chilean Stock Market Act in which the FNE detected two loopholes.

91. On one hand, there are three stock markets, which are not effectively connected. This produces a high level of market fragmentation, reduces liquidity and consolidates the dominant firm's market power. Each stockbroker can voluntarily offer the purchase or sale operation in the other stock markets only whether it was not matched in the origin market after three minutes. This affects a proper stock price formation, the principle of the better execution of the stock offers, as well as creates barriers to entry for a new stock market operator. The FNE requested the TDLC to recommend the amendment of the Stock Market Act in order to introduce an effective connection amongst stock markets with a binding, automatic ant instantaneous match of shares operations.

92. A second finding is that, in practice, there is a mutualized property of each stock market. This means that stockbrokers are required to hold shares in a given stock market in order to operate in it, even when the law allowed them to operate without being a shareholder. The FNE claimed it constituted a barrier to entry, regarding the high share prices and its limited availability in the three stock markets. The FNE proposed to amend the Stock Market Act in order to forbid the mutualization and to establish different guarantees from stockbrokers.

(b) Competition Tribunal

(a) DICREP

93. In November 2014, the TDLC issued a recommendation to the President of the Republic, to enact legal or regulatory provisions with the objective of improving competition in the market of pawnbrokers and secured loans. In Chile, this market is restricted by law to a state-owned institution –Dirección General de Crédito Prendario, "DICREP"–, and the creation of private pawnbrokers is forbidden by law. However, in practice, some companies offered a substitute for secured loans, in the form of purchases of jewelry with repurchase agreements. The Competition Tribunal considered that this market could benefit from being opened to private companies, as long as it was regulated regarding at least: (i) the companies interested in developing the pawnbrokers industry should have an operating licence and would be under the supervision of a control body; (ii) services provided by new entrants and Dicrep, should comply with the same uniform regulation refered at least to maximum interest rates and other charges; number of admissible renovations of the loans; maximum amount of loans per customer; limitation of the loan to a percentage of the pawned good; and maximum time limit of the loans. It was also recommended that jewelry purchasers with repurchase agreements should be subject of the same regulations; (iii) the sale of the pledge in case of default in the payment should not be made by the creditor, but by a public entity created by the legislator; (iv) the part of such price that exceeds the debt, interests and costs should be given to the debtor; (v) pawnbrokers should comply with informational duties; (vi) the compensation pawnbrokers should pay to clients in case of lost or destruction of the good should be regulated as it is for Dicrep; and, (vii) With

regard to non-regulated aspects, pawnbrokers should comply with the existing regulation applicable to standard credits.

94. Regarding another recommendation issued by the TDLC in April 2014, for improving competition in the market of fixed telecommunications in residential and office buildings, the Government issued a bill in January 2015 that took into account several of the recommendations. The bill was named "*Protects freedom of choice in cable television, internet or telephony services*". The bill states that every building project that considers several units, must have enough capacity in its cable ducts for more than one telecommunications operator to offer their services in competitive conditions. Also, the owner or leaseholder of a unit in one of these building projects will have the right to choose the provider or providers of telecommunication services freely. A registry of building projects was also created, so that telecommunications operators can obtain information of where they can offer their services.

(b) Transbank

95. Back in December 2013, the FNE filed an inquiry before the TDLC, requesting the revision of the authorization that was granted to banks in 1991, which allowed them to act jointly in the credit and debit card acquiring market –the banks created Transbank, a jointly owned Auxiliary Financial Company, after this authorization–. In April 2014, the Competition Tribunal declared the case inadmissible, arguing that some of the FNE's allegations corresponded to an adversarial proceeding, and others pertained to a request for the issuance of general instructions, which would affect any future participants of the market, instead of only the incumbent, Transbank. Because of this, the Competition Tribunal deemed that the appropriate course of action was a regulatory amendment proposal proceeding, which was initiated *ex-officio* by the TDLC in that month. This proceeding is still in process.

96. The FNE presented an appeal for reversal of the Competition Tribunal decision that declared the inquiry inadmissible. The Competition Tribunal stated that a claim before the Supreme Court does not proceed when the Competition Tribunal declares a case inadmissible. The FNE requested the Supreme Court to overrule this last decision and proceed with the review of the decision that declared the inquiry inadmissible. The Supreme Court considered that the decision that declared the inquiry inadmissible could be reviewed by means of appeal, but upheld TDLC's decision to close the proceeding, agreeing with the latter in that some of the allegations corresponded to an adversarial proceeding..

## 4. Resources of competition authorities

The FNE:

### *4.1 Resources overall (current numbers and change over previous year):*

*4.1.1 Annual budget (in your currency and USD):*

97. The annual budget assigned to the FNE is shown in the table below:

| Year | Chilean Pesos | USD* |
|---|---|---|
| 2012 | 4,220,158,000 | 7,403,786 |
| 2013 | 4,507,826,000 | 7,908,467 |
| 2014** | 4,675,937,000 | 8,203,398 |
| 2015 | 7,070,663,000 | 12,404,672 |

* Using average exchange rate for 2014, published by the Central Bank of Chile, USD 1 = CLP 570.0.

**Includes only operational budget. The total budget for 2014 is around USD 12,991,875 and includes the change of headquarters of the FNE.

*4.1.2 Number of employees (person-years):*

| Staff | 2012 | 2013 | 2014 | 2015 |
|---|---|---|---|---|
| Economists | 18 | 20 | 20 | 20 |
| Lawyers | 40 | 36 | 42 | 39 |
| Other professionals | 20 | 20 | 19 | 23 |
| Support staff | 13 | 14 | 15 | 10 |
| All staff | 91 | 90 | 96 | 92 |

***4.2 Human resources (person-years) applied to:***

| | 2013 | 2014 | 2015 |
|---|---|---|---|
| Enforcement against anticompetitive practices; | 36 | 45 | 33 |
| Merger review and enforcement; | 9 | 8 | 11 |
| Advocacy efforts. | 9 | 8 | 11 |
| Litigation | 13 | 12 | 18 |

***4.3 Period covered by the above information:***

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

The TDLC

***4.4 Resources overall (current numbers and changes over the previous year):***

*4.4.1 Annual budget (in your currency and US$)*

| Year | Chilean Pesos | USD* |
|---|---|---|
| 2012 | 1,117,052,000 | 1,959,740 |
| 2013 | 1,228,933,000 | 2,156,022 |
| 2014** | 1,434,228,420 | 2,516,190 |
| 2015 | 1,729,560,000 | 3,034,315 |

*Using average exchange rate for 2014, published by the Central Bank of Chile, USD 1 = CLP 570.0.

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

*4.4.2 Number of members (including staff members + judges)*

| | **Staff members + judges** |
|---|---|
| 2012 | 18 |
| 2013 | 21 |
| 2014 | 21 |
| 2015 | 22 |

*4.4.3 Informing separately for each year:*

| | **2012** | **2013** | **2014** | **2015** |
|---|---|---|---|---|
| Economists | 5 | 6 | 6 | 6 |
| Lawyers | 7 | 8 | 8 | 8 |
| Support staff | 6 | 7 | 7 | 8 |
| All staff | 18 | 21 | 21 | 22 |

***4.5 Period covered by the above information:***

99. The budget for the TDLC refers to the period of January to December of each year. Staff as of January 1st of each year.

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

(a) Study of Public Procurement of Pharmaceutical Drugs in Healthcare Facilities

100. On November 12, 2014, the FNE issued a report on public procurement regarding the healthcare sector, titled "Study of Public Procurement of Pharmaceutical Drugs in Healthcare Facilities". This study is part of the FNE's competition advocacy task.

101. The report analyzed 303 tenders conducted between January 2013 and January 2014 in several public hospitals throughout Chile. The data showed the tender bids contained certain clauses that could act as entry barriers or exclusion mechanisms over competitors that sell generic or similar drugs, therefore hindering competition in the public procurement market.

102. The FNE's study concluded there was room for improvements in the public procurement of pharmaceutical drugs, through tenders with a higher focus on criteria of efficiency and effectiveness. It proposed several suggestions to increase competition in the market, such as improving the exchange of information between actors in the public health sector, to standardize the tender bids executed by health facilities according to the type of drug that is being tendered and to promote centrally-executed purchases, intermediated by a public procurement entity (Cenabast).

(b) Fines in Competition Law

103. On November 12, 2014, the FNE issued a study on fines in competition law. This study was commissioned to the Centre for Law, Economics and Society at University College London ("UCL"). The study was conducted, among others, by professors Ioannis Lianos, Florian Wagner Von Papp and Frederic Jenny.