

# CHILEAN ANTITRUST POLICY: SOME LESSONS BEHIND ITS SUCCESS

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## I

### INTRODUCTION

Sixty years ago, the state played an active role in the Chilean economy. Since then, the country has undergone a failed attempt to introduce socialism through democracy, as well as a coup d'état that instated the Chicago School's market-based fiscal and monetary policies. Since 1990, the country has returned to a democratic path, correcting the economic model imposed by the military regime but without abandoning enforcement of competition policy. In fact, Chile introduced and established competition policy with steady advances and unusual success. It has been a bumpy road, but it has allowed competition agencies to find, prosecute, and fine more firms that infringe competition law. In the last decade, several cartels affecting consumers in markets such as poultry, pharmaceuticals, bus services, and healthcare have shifted the public opinion towards a strong repudiation of the most reprehensible anti-competitive practices.

The following pages attempt to determine the possible reasons for and lessons behind Chile's success, with a particular emphasis on analyzing anti-competitive practices and only brief mention of merger control. Accordingly, part II first explores the historical background of Chile's current competition law regime. This narration shows also how political support has helped and empowered competition agencies in Chile, especially in the last decade. These findings suggest that more than good rules and good institutional design are important to achieving good results in antitrust policy: political support is a key factor to its status. Without this support, results of competition policy enforcement would probably differ. Part III addresses the structure and description of Chile's current competition policy institutions. Part IV describes substantial issues in competition law in Chile that show that prohibited conducts are not limited to cartels and monopolization or abuse of dominance, but extend also to restrictions imposed by the Administration, which could endanger competition. Part V examines how public enforcement has focused since 2008 mostly to prosecute cartel cases, leaving private parties to prosecute by their own means residual

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cases of abusive practices—both exploitative and exclusionary. The public economic prosecutor has yielded a successful record, which has also contributed to the success of the system perceived by the public. After scrutinizing the enforcement of competition law in Chile, part VI provides a general assessment of the system and its implementation. Finally, part VII closes with some conclusions and possible lessons in competition policy to be drawn from a country with a unique history of economic development.

## II

### HISTORICAL BACKGROUND: GROWING POLITICAL SUPPORT FOR COMPETITION POLICY

Chile's first competition law was Law No. 13,305, enacted in 1959.<sup>1</sup> The law created an Antitrust Commission (*Comisión Antimonopolios*) comprised of a Supreme Court Justice and two chief financial regulators. In 1963, legal reform established the National Economic Prosecutor (NEP)<sup>2</sup> to represent the general interest of the economic community before the courts, including the Antitrust Commission.

Prior to 1959, the Klein-Saks Mission, an American consultancy hired by the Chilean government, issued a report that recommended establishing antitrust policy in the country.<sup>3</sup> The report was mostly devoted to financial and monetary issues, focusing on severe inflation in the country.<sup>4</sup> However, one of the few proposals of the Klein-Saks Mission that was not abandoned,<sup>5</sup> was a competition statute contained in a section of Law No. 13,305.<sup>6</sup> But that law had little influence on the Chilean economy, and in its early years, the NEP did not have an active role in the prosecution of anti-competitive conduct.<sup>7</sup>

In 1969, *Unidad Popular's* presidential program indicated that, if they won the election, the first economic measure would be to nationalize Chile's primary mineral wealth and resources, which were in the hands of foreign capitalists and

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1. Law No. 13,305, Apr. 6, 1959. Law No. 13,305 was a miscellaneous law, which dealt with economic and financial issues. In its section V, it contained the competition act.

2. Law No. 15,142, Jan. 13, 1963.

3. Klein & Saks, "El Programa de Estabilización de la Economía Chilena y el Trabajo de la Misión Klein & Saks" *Reformas económicas e Instituciones Políticas: la experiencia de la Misión Klein-Saks en Chile* 273 (J. Couyoumdjiam ed., 2011).

4. Ricardo Paredes, *Jurisprudencia de las Comisiones Antimonopolios en Chile* [Jurisprudence of the Antitrust Commissions], 58 ESTUDIOS PÚBLICOS 229 (1995).

5. Rolf Lüders, "La Misión Klein-Saks, los Chicago Boys y la política económica" *Reformas económicas e Instituciones Políticas: la experiencia de la Misión Klein-Saks en Chile* 215 (J. Couyoumdjiam, ed. 2011).

6. PATRICIO BERNEDO, *HISTORIA DE LA LIBRE COMPETENCIA EN CHILE 1959–2010* [HISTORY OF COMPETITION POLICY IN CHILE 1959–2010] 39 (2013).

7. Org. for Econ. Cooperation & Dev., *Exámenes inter-pares de la política y del derecho de la competencia en América Latina: Un seguimiento Argentina, Brasil, Chile, México y Perú* [Peer Reviews of Politics and Competition Law in Latin America: A Look at Argentina, Brazil, Chile, Mexico and Peru] 15 (2007).

“internal monopolies.”<sup>8</sup> As expressed by Patricio Meller, before Salvador Allende’s socialist government came into power in 1970, left-wing parties characterized the Chilean economy as, among others, monopolist and capitalist.<sup>9</sup> The *Unidad Popular*’s response was not state-run competition policy, but rather a wave of expropriations and nationalizations of privately owned firms.<sup>10</sup> In fact, to the Chilean left, even before *Unidad Popular*’s program, competition legislation had failed as a solution to the problem of cartels and the abuse of monopolies.<sup>11</sup>

The *Unidad Popular*’s plans were ultimately frustrated by the Military Junta’s 1973 coup d’état. In contrast to the position of the *Unidad Popular* government, the value of economic freedom was primordial in the eyes of the Junta. The founding document of the Junta’s economic program—known as *El Ladrillo*, or “The Brick”—posited that it was crucial to establish competitive markets<sup>12</sup> and minimal state regulation in order to prevent rent-seeking practices.<sup>13</sup> The liberalization process would go even beyond deregulating markets and privatization policies.<sup>14</sup> According to Meller, after 1973, “the market and private sector became the answer to everything.”<sup>15</sup>

The Brick eliminated most price control regulations, limiting them to public utilities, and encouraged the use of antitrust law as a means to attack cartels.<sup>16</sup>

8. Unidad Popular, Programa básico de gobierno de la Unidad Popular [Basic Program of the Government of the Unidad Popular] 20 (1969) [hereinafter “Unidad Popular”].

9. PATRICIO MELLER, UN SIGLO DE ECONOMÍA POLÍTICA CHILENA (1890–1990) [A CENTURY OF CHILEAN POLITICAL ECONOMY (1890–1990)] 111 (3d ed. 2007).

10. Unidad Popular, *supra* note 8, at 19.

11. See generally Ricardo Lagos, La Concentración del Poder Económico. Su Teoría, Realidad Chilena [The Concentration of Economic Power. Its Theory and Chilean Reality] (1962) (“And the truth is that the great [wealth] concentration that exists in Chile, this real monopoly extends to all activities and won’t be destroyed with small amendments, or ‘antitrust’ laws, as we know, which are used against bakeries, fruit shops owners, butchers, etc.”) (“Y la verdad es que esta gran concentración que existe en Chile, este verdadero monopolio que alcanza a todas las actividades no va a poder ser destruido con pequeñas modificaciones, o con leyes “antimonopólicas” como las que en la actualidad conocemos entre nosotros, y que se aplican a los panaderos, a los dueños de verdulerías, a los matarifes, etc. etc.”) [translation by author].

12. In this way, in the following years, several market solutions were introduced in Chile in areas such as higher education, electricity, and water markets.

13. In its early years, the economic program of the Junta was known as *El Ladrillo* (“The Brick”) and was elaborated by conservative economists during Allende’s government. The Brick became public only in 1992. See generally SERGIO DE CASTRO, “EL LADRILLO”: BASES DE LA POLÍTICA ECONÓMICA DEL GOBIERNO MILITAR CHILENA [“THE BRICK”: BASIS OF THE ECONOMIC POLICY OF THE CHILEAN MILITARY GOVERNMENT] (Centro de Estudios Públicos ed. 1992).

14. According to Andrés Solimano, it was also an attempt to introduce new values and change the culture of Chilean society as a whole. ANDRÉS SOLIMANO, CAPITALISMO A LA CHILENA: Y LA PROSPERIDAD DE LAS ÉLITES [CHILEAN CAPITALISM AND THE PROSPERITY OF THE ELITE] 65 (2012).

15. Meller, *supra* note 9, at 331. See also Tomás Moulian, Chile actual. Anatomía de un mito [Chile Today. Anatomy of a Myth] 197–200 (1997); Gabriel Salazar & Julio Pinto, Historia Contemporánea de Chile. Vol. III. La Economía: Mercados, Empresarios y Trabajadores [Contemporary History of Chile. Vol. III. The Economy: Markets, Industries and Workers] 50–53 (2002).

16. DE CASTRO, *supra* note 13, at 89.

The decision to reinforce competition law soon followed. Thus, shortly after the military coup, in December 1973, the Junta enacted Decree-Law No. 211.<sup>17</sup>

In 1974, the Military Junta explicitly rejected intervention techniques such as central state economic planning in its Declaration of Principles (*Declaración de Principios*).<sup>18</sup> However, the Military Junta admitted some planning in the economy, but recognized the key role of private-property rights and subsidiarity—a principle that presupposes “the right to free initiative in the economic field.”<sup>19</sup> The Junta further stated that, “it is [the State’s] mission . . . to adopt the measures that effectively ensure competition [policy] and the necessary control of private parties, to avoid any form of abuse or monopoly.”<sup>20</sup> The 1980 Constitution did not explicitly refer to this principle with respect to the state, but it did establish the individual-centred right to develop any economic activity—the freedom of enterprise.<sup>21</sup> At the time, the adoption and promotion of competition policy and liberalization of markets was not a contentious issue as might be expected, because the military regime closed media and established press censorship as soon as they rose to power,<sup>22</sup> and many opponents of a market economy were exiled from the country. Universities, that could have been critical of the economic model, suffered state-intervention, and dissident economic academics were fired. The crudest example of this occurred in 1976 in Washington, D.C., when the Chilean secret police assassinated Orlando Letelier, Allende’s former ambassador to the United States. A couple of weeks before his assassination, Mr Letelier had linked the Chicago Boys’ market-based policies and repression.<sup>23</sup> Naomi Klein has argued that this assassination could be connected to Letelier’s critical assessment of the economic reforms.<sup>24</sup>

Decree-Law No. 211 established the foundations of modern competition law in Chile, substantially reforming the rarely enforced Law No. 13,305. Decree-Law No. 211 created a different institutional setting from the one designed in Law No. 13,305. On a regional level, Decree-Law No. 211 created the Central and thirteen Regional Preventive Commissions, which were mostly consultative bodies, in order to push the heavily regulated economy towards a more liberalized market

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17. Decree-Law No. 211, Dec. 22, 1973 [hereinafter Decree-Law 211 (1973)].

18. Declaración de Principios de la Junta de Gobierno [Declaration of the Principals of the Government Junta], Mar. 11, 1974.

19. *Id.*

20. *Id.*

21. Constitución Política de la República de Chile [C.P.] art. 19 (1980).

22. Junta de Gobierno, Bando No. 15. Censura y clausura de medios [Proclamation No. 15. Censorship and media closing] Sept. 11, 1973.

23. Orlando Letelier, *Economic ‘Freedom’s’ Awful Toll; The ‘Chicago Boys’ in Chile*, 8 REV. OF RADICAL POL. ECON. 44–52 (1976).

24. Naomi Klein, *Orlando Letelier: el que lo advirtió*, in ORLANDO LETELIER: EL QUE LO ADVIRTIÓ: LOS CHICAGO BOYS EN CHILE [ORLANDO LETELIER: HE WHO WARNED: THE CHICAGO BOYS IN CHILE] 35–36 (Miguel Lawner & Hernán Soto eds., 2011) (“it is difficult not to think that [Letelier’s] murder was an act of vengeance for the text that you have now in your hands”) (“es difícil no pensar que el asesinato fue un acto de venganza por el texto que ahora usted tiene en sus manos”) [translation by author].

economy.<sup>25</sup> The Preventive Commissions could also conduct *ex officio* proceedings, requesting the NEP's Office (NEPO) to investigate possible infringements of competition law.<sup>26</sup> This role was crucial in the early years of the military government, which was a time of transition towards competitive markets.<sup>27</sup> Indeed, the Central Preventive Commission continued to be an active institution until its dissolution in 2003,<sup>28</sup> issuing more than 1,200 decisions in thirty years.<sup>29</sup> The initial promotion of competition policy in an economy that was moving from a socialist revolution to a capitalist one, needed more and better competition institutions.

On a national level, Decree-Law No. 211 created the five-member Resolutive Commission (*Comisión Resolutiva*).<sup>30</sup> Like the Preventive Commissions, the Resolutive Commission could start *ex officio* inquiries or pursue NEPO's or private claims. Additionally, it could issue general regulations, propose legal or regulatory amendments, and request criminal sanctions.<sup>31</sup> However, even until 2003, both the Central Preventive Commission and the Resolutive Commission held their respective sessions in the same area at NEPO's offices in Santiago, and lacked of budget and staff.<sup>32</sup> Members of Preventive Commissions and the Resolutive Commission worked *ad honorem* in their antitrust duties.<sup>33</sup> The members of these commissions were appointed and lacked sufficient independence from political authorities. Before the 2003 reform, the institutional design for competition authorities in Chile resembled a bifurcated administrative model. In it, NEPO investigated and submitted cases before another administrative agency—court—a regional preventive commission, the Central Preventive Commission, or the Resolutive Commission.

After almost twenty years of continuing work and success in regulated markets,<sup>34</sup> the institutional design started to show cracks and the need of reform. Thus, in the mid-nineties, a well-reputed economist—and former member of the Central Preventive Commission—argued that the appointment of two of the members of the Commissions by the politicians could present probable

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25. Decree-Law No. 2760, July 3, 1979.

26. Decree-Law 211 (1973), *supra* note 17, at art. 6, art. 8(d).

27. Law No. 19,911, CREACIÓN DE TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA, Aug. 20, 2002, (Presidential Bill of Law creating Competition Tribunal).

28. *See generally* BERNEDO, *supra* note 6.

29. For data see *Decisiones Comisiones Antimonopolio: FISCALIA NACIONAL ECONOMICA*, <http://www.fne.gob.cl/jurisprudencia-en-libre-competencia/decisiones-comisiones-antimonopolio/>.

30. Decree-Law 211 (1973), *supra* note 17, at art. 16.

31. *Id.* at art. 17.

32. Org. for Econ. Cooperation & Dev., Chile—Peer Review of Competition Law and Policy 28 (2004).

33. Decree-Law 211 (1973), *supra* note 17, at art. 30.

34. Ronald Fischer & Pablo Serra, *Efectos de la privatización de servicios públicos en Chile*, in BANCO INTERAMERICANO DE DESARROLLO, SERIE DE ESTUDIOS ECONÓMICOS Y SOCIALES CSC-07-009 (2007); Ronald Fischer & Pablo Serra, *Evaluación de la regulación de las telecomunicaciones en Chile*, 6 REVISTA PERSPECTIVAS 1 (Departamento de Ingeniería Industrial, Universidad de Chile 2002).

interferences by the Executive.<sup>35</sup> Other Chilean academics shared this critical assessment.<sup>36</sup> In the late-nineties, a presidential commission devoted to assessing reforms to economic and competition regulators, proposed the creation of a Competition Commission, a body with national jurisdiction that would hear cases regarding competition law, unfair trade practices, and antidumping measures.<sup>37</sup> Its decisions would be appealable to a specialized tribunal, the National Economic Tribunal.<sup>38</sup>

In 1999, future President Ricardo Lagos explicitly endorsed a program that would strengthen competition policies—despite having rejected competition policy as a tool against wealth concentration in the early sixties.<sup>39</sup> His program included recommendations regarding competition law, specifying the need for institutional reforms.<sup>40</sup>

At the same time, *Libertad y Desarrollo*, a conservative think tank, proposed the creation of a specialized tribunal in competition affairs because of new enforcement powers the NEP gained in 1999.<sup>41</sup> Thus, according to this think tank, the 1999 legal reform evidenced the need to create an independent tribunal that could counterbalance the NEPO with specialized and permanent judges, including both economists and lawyers in its composition.<sup>42</sup> This proposal led to a growing consensus among specialists of the need to establish an independent competition tribunal.<sup>43</sup> Hence, political support in the field of antitrust and competition policy translated into constant and growing support for legislative reform. The creation of a Competition Tribunal gained definite momentum in 2001,<sup>44</sup> after a policy was proposed by one of the largest business associations in Chile to the Chilean government.

Thus, in the early 2000s, Lagos' government promoted the creation of the *Tribunal de Defensa de la Libre Competencia* or Competition Tribunal, eliminating both the Preventive Commissions and the Resolutive Commission

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35. Paredes, *supra* note 4, at 232.

36. Alberto Hurtado University, *Institucionalidad Antimonopolios* [Antitrust Institutions] Informe Tasc 81, 82 (1997).

37. Comisión Presidencial de Modernización de la Institucionalidad Reguladora del Estado. Informe final (“Informe Jadresic”) [Presidential Commission of Modernization of the Regulatory Institutions of the State. Final Report (“Jadresic Report”)] 126 (1998).

38. *Id.* at 130.

39. LAGOS, *supra* note 11.

40. Ricardo Lagos, *Para crecer con igualdad* [To Grow with Equality] 5 (1999).

41. Law No. 19,610, May 19, 1999.

42. María de la Luz Domper & Pablo Kangiser, *Comisión Antimonopolios: Reformas pendientes al Decreto Ley 211 y la Defensa de la Libre Competencia* [Antitrust Commission: Pending Reforms to Decree-Law 211 and Competition Policy], 95 *LIBERTAD Y DESARROLLO, SERIE INFORME ECONÓMICO* 11 (1998).

43. Patricio Rojas & Félix Berríos, *Competencia en Chile: Cuánto se ha avanzado*, 255 *SERIE INFORME ECONÓMICO* 32 (2016).

44. The Agenda Pro Crecimiento [Pro-Growth Agenda] was proposed by SOFOFA—a business trade association—to Ricardo Lagos, then President, in the Annual Dinner of the Industry. Specifically, the proposal contained macroeconomic and microeconomic initiatives, which tried to increase competitiveness and sustain growth.

and reinforcing the autonomy and independence of the competition authorities from the NEPO and political actors.<sup>45</sup> In the justification of the draft bill the government argued that the over-all consensus was that even though the regional preventive commissions and the Resolutive Commission did not fulfil requirements of administrative independence, specialization, dedication, and human and budgetary resources, they had accomplished their tasks successfully during the first thirty years of Decree-Law 211.<sup>46</sup> However, a more globalized economy and critical comments from the private sector demanded regulatory reform, making way for a new institutional framework for competition law in Chile.<sup>47</sup>

The frequently cited example of intervention is the 2003 resignation of a member of the Resolutive Commission appointed by the Executive who voted against a proposal of a telecommunications company filed at the Commission.<sup>48</sup> It is said that the member who resigned was subjected to strong verbal pressures from the Chilean government.<sup>49</sup> Notwithstanding that the resignation occurred after the Competition Tribunal's bill of law was sent to Congress in 2002, the publicity of the situation may have spurred the reform. The 2003 reform also decriminalized all anti-competitive conducts, including cartels.<sup>50</sup> Since 1973, cartels were only once criminally prosecuted, and many argued that the criminal prohibition was unconstitutional. Besides a case of a taxicab cartel in 1994,<sup>51</sup> the Resolutive Commission has requested criminal prosecution on one occasion—the banking nationalization case.<sup>52</sup> The constitutionality issue could have been a problem if the general criminal offense would have been challenged at the Constitutional Court. Another reason mentioned by a legal advisor of the Ministry of Economy was the null dissuasive effect of the criminal offense.<sup>53</sup> So technical reasons existed for eliminating the general criminal antitrust offense, though it could have been limited to a cartel offense. To counterbalance the elimination of the criminal offense, higher fines would be imposed on anti-competitive practices.<sup>54</sup>

Subsequently, just after the creation of the Competition Tribunal in 2004, several pages of Michelle Bachelet's 2005 government program were devoted to new reforms regarding competition policy matters, especially cartel prosecution

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45. Law No. 19,911, *supra* note 27.

46. *Id.*

47. *Id.*

48. BERNEDO, *supra* note 6, at 161.

49. Daniel Matamala, *Las presiones de Lagos para favorecer a empresas españolas*, CIPER CENTRO DE INVESTIGACIÓN PERIODÍSTICA (Feb. 25, 2016) <http://ciperchile.cl/2016/02/25/las-presiones-de-lagos-para-favorecer-a-empresas-espanolas/> [<https://perma.cc/3THP-HZV2>].

50. Law No. 19,911, *supra* note 27, at art. 1, no. 1.

51. RESOLUTIVE COMMISSION, Ruling 413 (May 5, 1994).

52. RESOLUTIVE COMMISSION, Ruling 14 (May 18, 1975).

53. Enrique Sepúlveda Rodríguez, *Nuevo Tribunal de defensa de la libre competencia y su importancia para el sector eléctrico*, 12 REVISTA DE DERECHO ADMINISTRATIVO ECONÓMICO 147 (2004).

54. Law No. 19,911, *supra* note 27.

and leniency, among others.<sup>55</sup> The case for reform was, in part, due to the demand for a more independent Competition Tribunal.

More significantly, the amendments were in response to a demand for more vigorous cartel prosecution. Therefore, new enforcement powers were given to the NEPO.<sup>56</sup> This was a consequence of the 1999 reform, which had not given sufficient intervention powers to the NEPO, and because the 2003 reform had not addressed the issue.<sup>57</sup>

A 2009 event spurred a large shift in Chilean society's approach to cartels and competition law: the *Pharmacies* cartel case.<sup>58</sup> The *Pharmacies* case involved a cartel between the three largest pharmacy chains in Chile, which comprised over 90% of the market and involved more than 200 products.<sup>59</sup> After NEPO brought an accusation to the Competition Tribunal, one of the accused firms, FASA, agreed to settle. FASA confessed its executives and managers' participation in the cartel.<sup>60</sup> FASA's admission of anti-competitive activity resulted in a public outcry.<sup>61</sup> Competition law may have been unfamiliar to the common Chilean before the case, but since the *Pharmacies* case, both "cartel" and "collusion" are words commonly and correctly used in daily conversation. The scope of products involved in this cartel and the number of affected consumers produced a relevant shift in the political support for competition law reforms.

In 2009, after three years of slow discussion in Congress, and after one of the firms of the *Pharmacies* case settled and confessed its participation in a cartel, congressional representatives from both conservative and progressive sectors swiftly approved a bill promoted by Bachelet's government, which introduced leniency and intrusive powers in cartel cases.<sup>62</sup>

In the same year, and with the *Pharmacies* proceedings fully underway, Bachelet's government amended a draft bill criminalizing cartels,<sup>63</sup> despite the decriminalization reform carried out in 2003 under Lagos's government. This was also a shift from Bachelet's program, which had not considered criminalization of cartels, but rather only increasing civil fines, as a policy tool. This change of

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55. Michelle Bachelet, *Estoy contigo*, Programa de Gobierno 2006–2010 [I am with You, Government Program 2006–2010] 42–44 (2005).

56. Presidential Bill of Law that amends Decree by force of Law N° 1, from the Ministry of Economy, Development and Reconstruction, Bulletin N° 4234-03 (June 20, 2006).

57. See generally Law No. 19,911, *supra* note 27; Law No. 19,610, May 19, 1999.

58. Fiscalía Nacional Económica, Dec. 9, 2008, "Requerimiento de la Fiscalía Nacional Económica contra Farmacias Ahumada, Cruz Verde y Salcobrand" (Chile) [hereinafter *Pharmacies*].

59. *Id.*

60. Acuerdo de conciliación Fiscalía Nacional Económica y Farmacias Ahumada S.A. 2 [Agreement between NEPO and Farmacias Ahumada S.A.] March 13, 2009 (Chile).

61. BERNEDO, *supra* note 6, at 185.

62. Law No. 20,361, July 13, 2009 [hereinafter Decree-Law 211 (2009)].

63. Michele Bachelet, Indicación sustitutiva al proyecto de ley que impone penas por delitos que atentan contra la libre competencia [Substitutive amendment to the bill of law that criminalizes infringements to competition law], Bill of Law No. 6438-03, June 10, 2009.



the political attitude towards the criminal offense was a result of the public anger after the *Pharmacies* cartel and also of limiting the scope of the offense to cartels.

The presidential program of President Piñera also advocated for deepening competition in the markets. Notwithstanding, his proposal was limited to improving the selection mechanism of the Prosecutor, advocating for the Senate's participation in the appointment process.<sup>64</sup> While this legal reform was ultimately not promoted by President Piñera, in 2011, after the NEPO alleged collusion against three poultry meat companies in the *Poultry Producers* case,<sup>65</sup> he created a presidential advisory committee for competition matters, which studied the criminalization of cartels and other legal changes. Piñera's government did not implement any of the reforms proposed by the presidential advisory committee in 2012, probably after a split vote on criminal prosecution.<sup>66</sup> However, after the Supreme Court decision in the *Pharmacies*' case, the National Consumer Agency (*Servicio Nacional del Consumidor*) filed a *parens patriae* civil action for damages caused by the cartel.<sup>67</sup> This lawsuit was a highly controversial due to the agency's standing,<sup>68</sup> and the difficulty of effectively compensating affected consumers. But it showed that a different agency could take action on cartel damages on behalf of consumers.

After the *Pharmacies* and *Poultry Producers* cases, members of Congress became constant promoters of competition reform. Thus, since 2009, almost twenty bills of law have been submitted to the Chilean Congress featuring proposals ranging from the criminalization of collusion to the legitimization of consumer class actions for pursuing damages in competition matters.<sup>69</sup>

More recently, in the latest presidential elections, the government programs of the main candidates focused on the protection of competition and the repression of practices incompatible with consumer protection. In this manner, the right-wing candidate's program affirmed that "consumers will be respected, there will be more competition and safeguards because we want a country without room for abuses."<sup>70</sup> For her part, President Bachelet's government program also sought to protect competition in specific markets, indicating that

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64. Sebastián Piñera, Programa de Gobierno para el cambio el futuro y la esperanza Chile 2010–2014 [Government Program for Future Change and Chilean Hope 2010–2014] 31 (2009).

65. Fiscalía Nacional Económica, Dec. 1, 2011, "Requerimiento FNE en contra de Agrosuper y Otros" (Chile).

66. Comisión Asesora Presidencial para la Defensa de la Libre Competencia [Presidential Advisory Committee for Competition Law] July, 2012.

67. Servicio Nacional del Consumidor [National Consumer Agency], Feb. 1, 2013, "Servicio Nacional del Consumidor con Cruz Verde S.A. y otros", rol de la causa C 1940-2013.

68. Francisco Agüero & Nicolás Rojas, Legitimación del SERNAC para demandar colectivamente los daños causados a los consumidores por conductas Anticompetitivas [Legal standing of the Consumer Protection Service to sue damages in class actions for the damages caused to consumers by anticompetitive practices], Santiago, 2013.

69. To search the number of bills filed by representatives in the Chilean Congress between January 2009 and February 2016, see CAMARA DE DIPUTADOS DE CHILE, [www.camara.cl](http://www.camara.cl).

70. Evelyn Matthei, Un siete para Chile, Programa Presidencial Evelyn Matthei 2014–2018 [A Seven for Chile. Evelyn Matthei Presidential Program 2014–2018] 7 (2013).

the NEPO would assess markets with persistent failures or that suffered from the impact of competition regulations, regulating when market failures justified it and amending unjustified restrictions to correct the operation of competitive markets.<sup>71</sup> Additionally, reforms were promoted to strengthen the institutional features of the NEPO and the Competition Tribunal, raise maximum fines, and disqualify persons convicted of anti-competitive behavior from serving on company boards and holding positions in trade associations.<sup>72</sup>

The government program also sought to reinforce regulations against collusion, studied the criminalization of the most damaging cartels, and established a merger control regime.<sup>73</sup> The proposed law was enacted in 2016, following two accusations brought by the NEPO to the Competition Tribunal regarding cartels dealing with tissue paper<sup>74</sup> and supermarkets.<sup>75</sup> These two cartels produced significant outcry in public opinion, including consumer-organized boycotts against the supermarkets.<sup>76</sup>

With the political anger against these cartels—involving one of the richest Chilean fortunes—Law No. 20,945 was enacted in August 2016.<sup>77</sup> Besides establishing criminal fines for hard-core cartels, this reform allows the NEP to prosecute cartel offenses at a criminal court only after a condemning decision of the Competition Tribunal (TDLC),<sup>78</sup> thereby coordinating the effects of leniency applications and criminal prosecution. The law also incorporates interlocking prohibitions,<sup>79</sup> higher fines for anti-competitive practices (up to 30% of the sales of the products associated with the infringement),<sup>80</sup> a merger review system with an administrative procedure and a possible review of remedies at the Competition Tribunal,<sup>81</sup> and ability to file anti-competitive damages lawsuits at the TDLC.<sup>82</sup> The TDLC is a specialized competition law tribunal constituted by lawyers and economists with competition policy background, which decides lawsuits and administrative petitions brought for its decision, with separate proceedings for competition law infringement cases and other related matters (including, merger review and rulemaking, among others).

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71. Michelle Bachelet, Chile de todos. Programa de Gobierno Michelle Bachelet 2014–2018 [Chile of All. Government Program for Michelle Bachelet 2014–2018] 61 (2013).

72. *Id.*

73. *Id.*

74. Fiscalía Nacional Económica, October 27, 2015, “Requerimiento en contra de CMPC Tissue S.A. y SCA Chile S.A.” (Chile) [hereinafter CPMC Tissue].

75. Fiscalía Nacional Económica, January 6, 2016, “Requerimiento en contra de Cencosud S.A., SMU S.A. y Walmart Chile S.A. (supermercados)” (Chile).

76. Alta adherencia en redes sociales al “boicot ciudadano” contra supermercados (Jan. 8, 2016), LaTercera.com.

77. Law No. 20,945, Aug. 30, 2016 [hereinafter Decree-Law No. 211 (2016)].

78. Decree-Law No. 211 (2016) at art. 62–64.

79. *Id.* at art. 3, (d).

80. *Id.* at art. 26.

81. *Id.* at art. 46–61.

82. *Id.*, at art. 30.

Because of these cartel accusations, support for reforms to the competition law is wide and transversal. Even congressional representatives of the Communist Party voted for the creation of an Investigation Committee in the Chamber of Representatives for cartels and the causes that could have favored them.<sup>83</sup> Thus, politicians have made competition policy reform a central part of their agenda, showing an unusual area of regulatory consensus between liberalized market promoters and robber-baron prosecutors.

Naturally, not all Chileans shared the Junta's devotion to markets and competition. Even at its inception, some conservative authors opposed the imposed free-market model, naming it an "anti-state system."<sup>84</sup> Although the end of the military regime in 1990 marked a political shift toward a social market economy, a quarter of a century later, support for competition policies and repression of cartels transcends political party lines and is not solely a monopoly of the right. Such policies even receive the recent and explicit support of the Communist Party, at least in the prosecution of cartels.<sup>85</sup> Despite the consensus in favor of a market-based economy, there are differences in the suggested means of implementing reforms. On the one hand, conservative think tanks have played a relevant role promoting institutional reforms such as the Competition Tribunal,<sup>86</sup> though paradoxically in other cases they have argued against increasing fines or criminal punishment for anti-competitive practices.<sup>87</sup> On the other hand, and even before the return of democracy in 1990, liberal and progressive think tanks were instrumental in promoting free markets while emphasizing the state's role in regulating markets.<sup>88</sup> The system is a legacy of the dictatorship, but it is strongly accepted, showing how a "culture of competition" has grown and nurtured in Chile, between the private and public sector and throughout the political spectrum.<sup>89</sup>

Consequently, there is an important political push to improve the institutional character of competition law, elevating it to the highest international standards and seeking greater independence for the bodies that defend it. Legal reform coupled with such political support helps obtain positive and efficient results.

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83. *Bancada PC-IC valoró creación de comisión investigadora por colusión del papel tisúes*, CAMARA DE DIPUTADOS DE CHILE (Nov. 4, 2015), [https://www.camara.cl/prensa/noticias\\_detalle.aspx?prmId=127905](https://www.camara.cl/prensa/noticias_detalle.aspx?prmId=127905) [hereinafter *Bancada PC-IC*].

84. Mario Góngora, *Ensayo histórico sobre la noción de Estado en Chile en los siglos XIX y XX* [Historical essay on the notion of State in Chile, during the XIX and XX centuries] 134 (1981).

85. *Bancada PC-IC*, *supra* note 59.

86. Domper & Kangiser, *supra* note 42.

87. *Libertad y Desarrollo, Colusión: ¿Sanción Penal? [Cartels: Criminal Offense?]*, 915 TEMAS PÚBLICOS 4 (2009).

88. MANUEL GARATE, *LA REVOLUCIÓN CAPITALISTA DE CHILE (1973–2003)* [THE CAPITALIST REVOLUTION IN CHILE (1973–2003)] 362 (2012).

89. Umut Aydın & Tim Büthe, *Success and Limits of Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 9–12.

### III STRUCTURE AND PROCEDURE OF THE CHILEAN COMPETITION POLICY REGIME

#### A. Structure and Appointments of the National Economic Prosecutor's Office

According to Decree-Law 211, the NEPO is a decentralized public service, with legal personality and assets of its own, independent from any other entity or service, and subject to the surveillance of the President of the Republic, through the Ministry of Economy, Development and Tourism.<sup>90</sup>

The NEPO is headed by the National Economic Prosecutor (NEP), who is appointed by the President through a selection process of senior public officials provided by Law 19,882.<sup>91</sup> Exceptionally, the NEP remains in office for four years and may be re-appointed only once. He can only be removed as ordered by the President, with the approval of the Supreme Court, upon request of the Ministry of Economy, Development and Tourism. The removal must be issued by the Supreme Court's plenary, convened to that effect and must garner the vote of the majority of its members in cases of mental incapacity or manifest negligence in the performance of his duties.<sup>92</sup>

This law provides a mechanism for selection of civil servants that is meritocratic but also has a political component, since the NEP is eventually appointed by the President, after a Civil Service proposal. For example, the current NEP, Felipe Irarrázabal (appointed in 2010, and reelected in 2014 until 2018) is a Fulbright scholar, and prior to his appointment was a partner at a top Chilean law firm and professor of economic law at one of the best Chilean universities.<sup>93</sup> The former NEP, Enrique Vergara, was appointed by the President in 2006 through a different process, and after leaving the NEPO in 2010, worked shortly in a medium-size law firm, before being appointed to the Competition Tribunal in 2012.<sup>94</sup>

The staff and personnel of the NEPO must provide exclusive dedication to performing their positions, which are incompatible with all other duties in the Administration of the State, except university lecturing.<sup>95</sup> The prosecutor's staff has a special system of compensation, which is higher than the scheme for the Chilean Public Administration but equivalent to economic utility regulators.<sup>96</sup>

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90. Decree-Law No. 211 art. 33, Nov. 14, 2003 [hereinafter Decree-Law 211 (2003)].

91. *Id.*

92. *Id.*

93. The profile of the current NEP is available online. *See, e.g.*, Biography of Felipe Irarrázabal Philippi, *Who We Are*, FISCAL NACIONAL ECONÓMICO, <http://www.fne.gob.cl/fne/organigrama/fiscal-nacional-economico/> [https://perma.cc/7AJQ-2LKE].

94. *See* Biography of Enrique Vergara V, TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA, <http://www.tdlc.cl/tdlc/enrique-vergara-v/> [https://perma.cc/3P4Q-UCQQ].

95. Decree-Law 211 (2003), *supra* note 90, at art. 38.

96. Decree-Law 211 (2003), *supra* note 90, art. 36–37.

According to the law, the NEP is independent from the authorities and tribunals and has broad powers to investigate competition law infringements.<sup>97</sup> This independence extends even to the ability to prosecute public officers and regulators.<sup>98</sup> The NEP represents the general interest of the economic community before courts.<sup>99</sup> Therefore, the NEP may defend the interests entrusted to him or her, in the manner deemed lawful, according to his or her own assessment.<sup>100</sup>

## B. Investigations And Administrative Procedure

The NEP has the power to conduct investigations deemed appropriate to prove infringement of Decree-Law No. 211, and may provide notice of its initiation to the affected party.<sup>101</sup> However, with the knowledge of the President of the Competition Tribunal, the NEP may determine that the investigations conducted ex officio or by virtue of complaints are restricted or confidential, which could be the case with cartels.<sup>102</sup> The NEP also may act as a party representing the general interest before the TDLC and the courts of justice, with all duties and powers vested in that role.<sup>103</sup> Criminal investigations and causes of that nature are excluded from the NEP. This is especially relevant due to the re-criminalization of cartels—participating in a cartel was once a criminal offense, was de-criminalized in 2003, and it became a criminal offense again in 2016.<sup>104</sup> During investigations, the NEP may request the TDLC to adopt precautionary measures regarding the investigations the NEPO is undertaking.<sup>105</sup> The NEPO may request any information from public agencies and private parties for ongoing investigations.<sup>106</sup> During investigations, the NEP may also summon for or request a written declaration from legal representatives, administrators, consultants, or dependents of the entities or people that could have knowledge of facts, acts, or conventions that are the subject of the investigations.<sup>107</sup>

In that sense, the NEPO does not have to prosecute all private complaints. Since 2009, the NEPO must to receive and investigate, according to its duties, the complaints made by private parties with respect to actions that could infringe the norms of the present law. But the NEPO may determine if an investigation must be made or the complaints formulated dismissed within a sixty-day period. The

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97. *Id.* at art. 39.

98. See generally Nicole Nehme, *Aplicación de las normas de defensa de la competencia a los Organismos de la Administración del Estado* [Competition Law applied to Administrative Bodies], in LA LIBRE COMPETENCIA EN EL CHILE DEL BICENTENARIO, [COMPETITION LAW IN BICENTENNIAL CHILE] 318 (2011).

99. Decree-Law 211 (2003), *supra* note 90, at art. 39(b).

100. *Id.*

101. *Id.* at art. 39(a).

102. *Id.*

103. *Id.* at art. 39(b).

104. Decree-Law 211 (1973), *supra* note 17, at art. 1; Decree-Law 211 (2003), *supra* note 90 at art. 1; Decree-Law 211 (2016), *supra* note 77 at art. 62.

105. Decree-Law 211 (2003), *supra* note 90 at art. 39(c).

106. *Id.* at art. 39(f)–(h).

107. *Id.* at art. 39(j).

NEPO may also determine whether to summon background or declarations from private parties that may have knowledge related to an alleged violation.<sup>108</sup>

Regarding intrusive measures, it was only after legal reform in 2009 that the NEP could request from the TDLC and the corresponding Minister of the Court of Appeals authorization for dawn-raiding public or private premises for evidence of a cartel infringement. With the abovementioned authorizations, the NEPO can wiretap communications and order any telecommunications company to provide copies and records of transmitted or received communications made.<sup>109</sup>

In prosecuting cartels, the NEPO must receive leniency applications from private applicants,<sup>110</sup> and may later file a claim before the TDLC. If the Tribunal considers that the cartel conduct alleged by the NEPO is proven, it cannot fine the leniency applicant unless the applicant was the organizer of the illicit conduct, coercing the others to participate in the collusion.<sup>111</sup>

The NEPO oversees compliance with judicial decisions regarding competition law including general rules issued by the TDLC and merger remedies, among others.<sup>112</sup> The NEPO issues reports requested by the TDLC where the NEP is not acting as a party.<sup>113</sup> The NEPO may also sign extrajudicial agreements or settlements with agents involved in investigations for safeguarding competition in the markets.<sup>114</sup>

After the NEPO files a claim at the Competition Tribunal, it has the same rights and duties as a private party litigating before that Tribunal. It has been recognized by the Competition Tribunal that it prosecutes the case in equivalent terms as any other party with no procedural privileges towards the NEPO.<sup>115</sup>

### C. Structure And Appointments Of The Competition Tribunal

The Competition Tribunal was established in 2004 after Law No. 19,911 was enacted, amending the Chilean competition law created by Decree-Law No. 211 of 1973. The TDLC is a specialized and independent jurisdictional body, subject to the steering, correctional and economic oversight of the Supreme Court and whose purpose is to prevent, correct, and punish infringements to competition

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108. Decree-Law 211 (2009), *supra* note 62, at art. 41.

109. *Id.* at art. 39(n).

110. *Id.* at art. 39 bis.

111. *Id.* at art. 39(b).

112. *Id.* at art. 39(d).

113. *Id.* at art. 39(e).

114. *Id.* at art. 39(ñ).

115. Org. for Econ. Cooperation & Dev., Directorate for Financial and Enterprise Affairs: Competition Committee, *Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings 2010* 343, n.2 (2011) [hereinafter OECD Procedural Fairness] (“If it submits charges, the FNE prosecutes the case in the adversarial procedure before the Competition Tribunal, representing the public interest, but in equivalent terms as any other party, with no particular procedural privileges.”).

law.<sup>116</sup> Its judges are appointed through a public contest. The TDLC's judges have two possible professional backgrounds: three are lawyers, two are economists. The President is also an attorney, proposed by the Supreme Court to the President of the Republic.

A mixed composition of judges (lawyers and economists) is unusual for Chilean tribunals. The TDLC's model seems to be successful, because it was followed as a model for the Environmental Tribunals.<sup>117</sup> However, the mixed composition is tributary of the mixed composition of the Commission established in 1959, and of the Resolutive Commission in 1973. On the one hand, the presence of economists as judges has been helpful and provided robust economic justification in TDLC'S decisions. Since there are two members, there are cases of split votes with good economic arguments on both sides. On the other hand, the presence of judges in the TDLC with no formal legal training may produce different or contradictory decisions in evidentiary or procedural issues.<sup>118</sup> The elimination of a Supreme Court judge sitting as TDLC's President, which was the model since 1959 until 2003, was proposed in the draft bill that allowed the TDLC to continue. This proposal was rejected during the congressional debate, due to reasonable arguments about Supreme Court review, the lack of competition law experience of Supreme Court justices, and necessary specialization of judges,<sup>119</sup> leading the way to a system where the Supreme Court proposes five candidates to the President of the Republic.

The Competition Tribunal's budget is approved annually pursuant to the Public Sector Budget Law.<sup>120</sup> Several public bodies may intervene in the process for selecting judges. The President of the TDLC is appointed by the President of the Republic from a roster of five candidates compiled by the Supreme Court via a public examination and selection process. Two of the judges are appointed by the Council of the Central Bank. The other two members, also one from each professional area, will be appointed by the President of the Republic, based on two nominations of three candidates, one for each appointment, compiled by the Council of the Central Bank. In both cases, the judges are appointed or proposed via an examination and selection process.<sup>121</sup>

The Competition Tribunal also has two alternate members, one an attorney and the other an economist. A sort of revolving-door restriction has been set, limiting the chance that a former NEP or person holding any other management position in the NEPO in the year before the initiation of the selection process is appointed, whether as a permanent or alternate member of the Tribunal.

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116. Decree-Law 211 (2003), *supra* note 90, at art. 5.

117. Law No. 20,600 (2012).

118. Francisco Agüero & Santiago Montt, *Chile: The Competition Law System and the Country's norms*, in THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES 149, 182–83 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

119. Law No. 19,911, *supra* note 27.

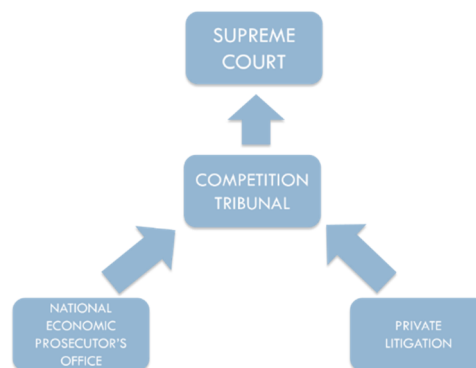
120. Decree-Law 211 (2003), *supra* note 90, at art. 44(a).

121. *Id.* at art. 6.

The members of the TDLC are subject to a regime of prohibitions. Therefore, being a member of the Tribunal is incompatible with being a public employee, administrator, private company manager or employee, or advisor in matters related to competition law for persons under the Tribunal's jurisdiction.<sup>122</sup> However, until recently, there has been consistent debate about the compatibility of TDLC's judges and other professional work exempted from the mentioned prohibitions. In fact, at least two former judges continued working in their law firms while serving as judges at the TDLC. Other competition law practitioners believed these judges had a conflict of interest, and also had a comparative advantage in their private practice. This possibility will cease in 2016, after the enactment of Law No. 20,945. Notwithstanding, being a member of the Tribunal is compatible with academic positions.<sup>123</sup> Besides deciding on competition law infringements and mergers, the Competition Tribunal may issue regulations or instructions, which must be observed by private individuals executing or entering into acts or contracts that are related to or that could infringe upon free competition.<sup>124</sup> The Tribunal may also propose the amendment or derogation of any law or regulation which the Tribunal deems contrary to competition law, as a constitutional review.<sup>125</sup> The laws and regulations to be examined are chosen by the TDLC after a petition from the NEPO, a private party, or ex officio by the Tribunal. The TDLC may also issue special reports to rate-setting regulators regarding competitive conditions in specific markets including telecommunications, electricity, water, sewage, and natural gas.<sup>126</sup>

Private litigation before the TDLC has a broad scope, and the TDLC must hear, upon request by any party or the NEPO, complaints about conduct that could violate competition law. Private lawsuits or requests can be brought at the TDLC, whether in adversarial or non-adversarial procedures.

The following figure describes the institutional arrangement in Chile:



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122. *Id.*

123. *Id.*

124. *Id.* at art. 18.3.

125. *Id.* at art. 18.4.

126. *Id.* at art. 18.5.



Thus, the 2003 legal reform established “a bifurcated model of competition policy institutions, having on the one hand the NEPO, a specialized competition investigative body filing claims, and on the other, the Competition Tribunal, a specialized competition law tribunal that decides the claims and lawsuits brought for its decision.”<sup>127</sup> Under this bifurcated judicial system, an administrative agency (NEPO) investigates and submits cases before a tribunal (Competition Tribunal) that performs functions that are jurisdictional in nature (deciding conflicts with *res judicata* effect). For its part, the bifurcated judicial model constitutes a form of competition governance that privileges the rights and freedoms of potentially affected parties by requiring the decisionmaking to be conducted in the form of a judicial instead of purely administrative proceeding. Given that there can be a compromise or trade-off between justice and efficiency, or between adjudication and implementing public policies,<sup>128</sup> efficiency and implementation are sacrificed to safeguard justice and adjudicatory rights. Nevertheless, it is important to note that if the bifurcated judicial model is accompanied by legislation that is open and undetermined, the judicial body winds up in a position as “commerce regulator.” The Tribunal will add content to the law by resolving individual cases, where such Tribunal is the entity that ultimately adopts the decisions of public policy that are relevant in terms of competition.<sup>129</sup> This has led to the conclusion that in Chilean law the TDLC is actually a commerce regulator.<sup>130</sup> This conclusion follows from the fact that Article 3 of Decree-Law No. 211 is, in fact, a “blank check,” where the authority to define Competition Law and Policy remains delegated to the TDLC mainly through the channel of resolving disputes jurisdictionally,<sup>131</sup> but retaining several administrative powers, such as the power to issue general regulations. In that sense, the Competition Tribunal is a judicial body, able to adjudicate in cases of anti-competitive practices prosecuted by the NEPO or a private party, and in cases of its consultative power. The TDLC will now also adjudicate as a tribunal when it awards damages and reviews NEPO’s decisions in mergers. However, this Tribunal has powers that are more than unusual for a judicial body, such as its regulatory powers. Those cases demand a different approach because TDLC’s decisions are not subject to *res judicata* effects.

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127. Francisco Agüero & Santiago Montt, *supra* note 118, at 153.

128. See JERRY L. MASHAW, BUREAUCRATIC JUSTICE 1 (1983) (“In a legal culture largely oriented toward court enforcement of individual rights, ‘administration’ has always seemed as antithetical to ‘law’ as ‘bureaucracy’ is to ‘justice.’ Law focuses on rights, administration on policy.”).

129. It can be argued that the TDLC is not a *tribunal* but a *court*, a difference not clear in Chilean jurisdiction. This difference resembles administrative law in the United States or Canada, where tribunal members are part of an adjudicating system where a special knowledge is relevant.

130. See *generally* Santiago Montt, El TDLC como Ente Regulador del Comercio [The TDLC as Trade Regulation Agency] (2009).

131. After the amendment through Law No. 19,911, the jurisdictional quality of the TDLC is beyond doubt.

#### D. Judicial Procedures

Prosecution may be initiated before the TDLC at the request of the NEP or by a lawsuit filed by a private party. Once the TDLC admits a complaint, it must notify the affected party, which may reply within a fifteen-day period or ask for an extension.<sup>132</sup> After the term to reply has expired, the TDLC may summon the parties to a conciliation hearing on competition law infringements.<sup>133</sup> If the Tribunal does not deem it pertinent, or if the conciliation procedure fails, the TDLC can set a twenty-day period for the submission of evidence.

All evidence and background is admissible for Tribunal fact-finding purposes.<sup>134</sup> The Competition Tribunal may also decree *ex officio* evidentiary procedures it deems convenient in any stage of the proceedings and even after the hearing, when it is indispensable to clarify precise facts that seem obscure and doubtful.<sup>135</sup>

Once the evidentiary period expires, the TDLC must set the date and time for the public hearing where the parties' attorneys may file and argue pleadings.<sup>136</sup> When issuing its decision in a case, the TDLC considers both counterfactual evidence and alternative scenarios based on evidence gathered in the process, filed and produced in accordance with due process of law, in light of OECD and ICN guidelines and legal and economic literature.<sup>137</sup>

In its final decision, besides acquittal, the TDLC may adopt the following measures if the claimed parties are found guilty: (1) modification or termination of acts, contracts, covenants, systems, or agreements that infringe competition law; (2) modification or dissolution of partnerships, corporations and other legal persons of private law that could have intervened in such acts, contracts, covenants, systems, or agreements; or (3) imposition of fines for fiscal benefit up to an amount equivalent to thirty percent of the sales of the infringement period or double the economic benefit created by the infringement.<sup>138</sup> The fines can be levied on the corresponding legal person, its directors, administrators, and all persons that participated in the performance of the respective act.<sup>139</sup> The fines levied on natural persons cannot be paid by the legal entity in which he or she conducts duties or by the shareholders or partners thereof.<sup>140</sup> To determine the fines, the following circumstances, among others, are to be considered: the economic benefit obtained because of the violation; severity of the conduct;

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132. Decree-Law 211 (2003), *supra* note 90, at art. 20.

133. *Id.* at art. 22.

134. *Id.*

135. *Id.*

136. *Id.* at art. 23.

137. OECD, *Procedural Fairness*, *supra* note 115, at 344.

138. Decree-Law 211 (2009), *supra* note 108, at art. 26.

139. *Id.* at art. 26(c).

140. *Id.*

recidivism; and, for the purposes of lowering the fine, cooperation with the NEPO before or during the investigation.<sup>141</sup>

The TDLC uses a special nonadversarial and administrative-like procedure for other matters, including merger review cases (until 2016), issuing rules, proposing law reforms, and generating sectorial law reports. After receiving a request for a report or merger analysis, the TDLC opens the procedure with a decree published in the Official Gazette and on the TDLC website. NEPO, public authorities who are directly affected, and economic agents who are related to the matter must be notified of the opening decree so that they may provide information and economic evidence before the TDLC.<sup>142</sup> Once the period for information collection expires, those who have filed a request may evaluate the NEPO's recommendations and communicate their agreement in writing to the Tribunal. The TDLC must then summon a public hearing, so that those who contributed information may express their opinion. After the public hearing, the TDLC issues its final decision.<sup>143</sup>

All TDLC decisions, except for final rulings, are susceptible to challenge before the same Tribunal.<sup>144</sup> All final rulings of the Competition Tribunal are subject to appeal for reversal before the Supreme Court, whether in adversarial or non-adversarial proceedings.<sup>145</sup> The appeal before the Supreme Court is heard with preference given to non-competition issues.<sup>146</sup> The filing of an appeal does not suspend the execution of the ruling, except in relation to the payment of fines. The Civil Procedure Code is supplementary to the special procedure contained in Decree-Law No. 211, regarding all that is compatible with it.<sup>147</sup>

There is an old debate about the extension of the Supreme Court's decisions when it reviews a Competition Tribunal decision, with the *recurso de reclamación*. The debate started after Law No. 19,911 but has continued after Law No. 20,361, due to the effect to TDLC's decisions in judicial and non-judicial cases.<sup>148</sup> The term used in the law—*reclamación*—has not been defined, and the Supreme Court's jurisdiction is not clear either. The term *reclamación* is used in different statutes in cases of judicial ability to review adjudicative bodies' administrative decisions.<sup>149</sup> For Supreme Court Justice Milton Juica, the problem is that the term *reclamación* does not mean an appeal or an annulment, so both

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141. *Id.* at art. 26.

142. *Id.* at art. 31.

143. *Id.*

144. *Id.* at art. 27.

145. *Id.* at art. 27, 31.

146. Decree-Law 211 (2003), *supra* note 90, at art. 27.

147. *Id.* at art. 29.

148. Agüero & Montt, *supra* note 118, at 118; Elina Cruz & Sebastián Zárate, *Building Trust in Antitrust: The Chilean Case*, in COMPETITION LAW AND POLICY IN LATIN AMERICA, 157 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

149. Milton Juica, *Aspectos orgánicos en la jurisdicción del Tribunal de Defensa de la Libre Competencia y recursos procesales en el Decreto Ley N° 211 de 1973*, in TRES DÉCADAS: TESTIMONIOS Y PERSPECTIVAS SOBRE EL EJERCICIO DEL DERECHO 37–38 (Hernán Díaz ed., 2011).

purposes must be fulfilled, allowing the Supreme Court to decide both law and facts, as it has done in practice.<sup>150</sup>

Tapia and Montt have expressed concerns that the Supreme Court's deference towards the Competition Tribunal's decision is only superficial, because the Court has examined the standing of parties to request review, scope of the Competition Tribunal's powers, quality of the fact analysis, interpretation of substantive law, and remedies imposed.<sup>151</sup> However, a self-report by the NEPO and the Competition Tribunal recognizes that the Supreme Court has a high level of deference for the TDLC's rulings, which are usually not reversed.<sup>152</sup> But deference is lower in decisions that involve industry-specific regulators, where the Supreme Court has quashed decisions that review administrative policymaking.<sup>153</sup> Experts and practitioners usually cite a case where the Supreme Court quashed a predatory pricing decision issued by the TDLC without solid economic reasoning.<sup>154</sup> But that decision has been overruled, and increasingly, the Supreme Court has devoted lengthy arguments to confirming cartel decisions issued by the Tribunal (such as *Pharmacies* and *Poultry Producers*). Though in some limited cases, where the TDLC has limited parties' access to proceedings, the Supreme Court has admitted the standing of parties banned from participating in the TDLC. Nevertheless, these cases can be identified easily due to the public policy and administrative law issues perceived by the Supreme Court, because the chamber that hears the case is specialized in public law.

#### E. Increasing Role Of Transparency And Participation In Procedures

After the 2005 constitutional reform that established the transparency of all State decisions—including NEPO's and TDLC's—concern for the right to information has been a key issue for competition law bodies, even a hallmark of their behavior.<sup>155</sup> The NEPO has a website where most of its decisions are made public,<sup>156</sup> and where the meetings with lobbyists are posted, after the enactment of the Lobbying Act.<sup>157</sup> The TDLC created its website in 2006, making all files and decisions accessible to the public.<sup>158</sup> In 2015, the TDLC changed its website, facilitating access to decisions, files, and evidence presented in its proceedings.

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150. *Id.*

151. Javier Tapia & Santiago Montt, *Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust*, in *THE GLOBAL LIMITS OF COMPETITION LAW* 141 (D. Sokol & Ioannis Lianos eds., 2012).

152. OECD, *Procedural Fairness*, *supra* note 115, at 348.

153. *Id.* See also Agüero & Montt, *supra* note 118, at 173.

154. *Id.* at 175–76.

155. Competition Tribunal, *Sexta Cuenta Pública del Presidente del Tribunal de Defensa de la Libre Competencia* Don Eduardo Jara Miranda 8 (2010).

156. FISCALIA NACIONAL ECONOMICA, [www.fne.cl](http://www.fne.cl) [<https://perma.cc/NB47-8L6H>].

157. Law No. 20,730 (2014).

158. For records and claims, see TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA, [www.tdlc.cl](http://www.tdlc.cl) [<https://perma.cc/4LSG-Z5UT>].

The NEPO has consulted with the public about some of its guidelines, which is a rare practice in Chile. Since 2009, the NEPO has issued several competition law guidelines for leniency,<sup>159</sup> compliance and ethics programs,<sup>160</sup> trade associations,<sup>161</sup> public procurement,<sup>162</sup> merger review,<sup>163</sup> vertical restraints,<sup>164</sup> and public administration.<sup>165</sup> These guidelines provide useful tools for practitioners predicting how the NEPO may interpret the law.

The TDLC has also adopted the policy of public consultation about some of its regulations that must be applied by lawyers litigating in that tribunal.<sup>166</sup> As a result of these policies and guidelines, practitioners have a clear understanding that the TDLC has higher transparency than other tribunals in Chile.<sup>167</sup>

#### IV

#### SUBSTANTIVE ISSUES: ANTI-COMPETITIVE PRACTICES AND CASES OF ABUSE OF DOMINANT POSITION

Law No. 13,305, which contained the first competition law in Chile, established an exemplary catalogue of prohibited conduct,<sup>168</sup> but the language was vague and made it possible to successfully accuse a firm of conduct not specifically prohibited or listed.<sup>169</sup> These regulations were in force until 1973, when Decree-Law No. 211 was enacted. Decree-Law No. 211 preserved the broad prohibitive regulation of Law No. 13,305<sup>170</sup> and maintained the scheme of

159. Fiscalía Nacional Económica, “Guía de Delación Compensada,” (Oct. 2015) (replacing guideline issued in October 2009).

160. Fiscalía Nacional Económica, “Programa de Cumplimiento de la normativa de Libre Competencia,” (June 2012).

161. Fiscalía Nacional Económica, “Asociaciones Gremiales y Libre Competencia,” (Aug. 2011).

162. Fiscalía Nacional Económica, “Compras Públicas y Libre Competencia,” (Apr. 2011).

163. Fiscalía Nacional Económica, “Guía Interna para el Análisis de Operaciones de Concentración Horizontal,” (Oct. 2012).

164. Fiscalía Nacional Económica, “Guía para el Análisis de Restricciones Verticales,” (June 2014).

165. Fiscalía Nacional Económica, “Sector Público y Libre Competencia,” (June 2012).

166. *See, e.g.*, Competition Tribunal Internal Regulation No. 12/2009 (regarding the relevant information for the preventive control of mergers).

167. Agüero & Montt, *supra* note 118, at 179.

168. Law No. 13,305, art. 173, April 6, 1959.

. . . price-fixing agreements or production, transport, or quota allocations, or allocation of market areas; whether through agreements, bargaining or associations in order to obtain production reductions or paralisations; whether through exclusive dealing, done by a single person or by a firm, of different producers of the same specific good . . .

. . . convenios de fijación de precios o repartos de cuotas de producción, transporte o de distribución, o de zonas de mercado; sea mediante acuerdos, negociaciones o asociaciones para obtener reducciones o paralizaciones de producción; sea mediante la distribución exclusiva, hecha por una sola persona o sociedad, de varios productores del mismo artículo específico . . .

[translation by author].

169. OSCAR ARAMAYO, RÉGIMEN LEGAL DE LA INDUSTRIA MANUFACTURERA EN CHILE [LEGAL REGIME OF THE MANUFACTURING INDUSTRY IN CHILE] 27 (1970).

170. *See* Decree-Law 211 (1973), *supra* note 17, at art. 1 (“Whoever executes or signs, individually or collectively, any event, act or contract tending to impede free competition in the production or in the

the exemplary list.<sup>171</sup> Notwithstanding, the list of conduct specified that it was not restrictive in nature and rounded out with a broad prohibition of: “[i]n general, any other discretion whose purpose is to eliminate, restrict or hinder competition.”<sup>172</sup> Even a layperson with no legal training understands that the expression “any event, act or agreement” amounts to a general prohibition of human activities that could restrict competition.

The most recent version of Decree-Law No. 211 provides for sanctions against “[t]he person that performs or enters into, individually or collectively, any event, act or agreement that impedes, restricts or hinders competition, or that tends to produce such effects . . . .”<sup>173</sup> Subsequently, Article 3 lists three categories of prohibited conduct, such as anti-competitive agreements between competitors (cartels or collusive practices), abuse of dominant position, and predatory or unfair trade practices seeking to reach, maintain, or increase a dominant position.<sup>174</sup> Nevertheless, these paragraphs are preceded by Article 3, paragraph 2, which provides that: “[t]he following, *among others*, shall be considered as events, acts or agreements that impede, restrict or hinder competition or that tend to produce such effects.”<sup>175</sup> Consequently, Decree-Law No. 211 allows the NEPO, private litigants, and the TDLC to interpret unlawful conducts broadly, preserving an unusual and wide scope of application, albeit with greater uncertainty.<sup>176</sup>

Efforts have been made to reduce the law’s vagueness. These include trying to include a stated purpose in the law to guide TDLC decisions.<sup>177</sup> Besides the

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internal or external trade”) (“El que ejecute o celebre, individual o colectivamente, cualquier hecho, acto o convención, que tienda a impedir la libre competencia en la producción o en el comercio interno o externo”) [translation by author].

171. *See id.* at art. 2:

For the purposes specified in the preceding article, the following, among others, shall be considered acts or contracts tending to impede free competition: a) Those referred to production, such as quota distribution, reductions or paralisations; b) Those referred to transport; c) Those referred to trade or distribution, whether wholesale or retail, such as quota distribution or allocation of market zones or exclusive distribution, by a single person or entity, of the same article of several producers; d) Those relating to the determination of prices of goods and services, such as agreements or imposition to others.

Para los efectos previstos en el artículo anterior se considerarán, entre otros, como hechos, actos o convenciones que tienden a impedir la libre competencia, los siguientes: a) Los que se refieran a la producción, tales como el reparto de cuotas, reducciones o paralizaciones de ellas; b) Los que se refieran al transporte; c) Los que se refieran al comercio o distribución, sea mayorista o al detalle, tales como el reparto de cuotas o la asignación de zonas de mercado o de distribución exclusiva, por una sola persona o entidad, de un mismo artículo de varios productores; d) Los que se refieran a la determinación de los precios de bienes y servicios, como acuerdos o imposición de los mismos a otros.

[translation by author].

172. *Id.* at art. 2(e).

173. Decree-Law 211(2003), *supra* note 90, at art. 3.

174. *Id.* at art. 3(a)–(c).

175. *Id.* at art. 3 (emphasis added).

176. ALF ROSS, *SOBRE EL DERECHO Y LA JUSTICIA* [ON LAW AND JUSTICE] 149 (1997).

177. Bill of Law No. 2944-03, *supra* note 27.

guidelines issues by the NEPO, whose defensive value is not clear, it is generally accepted that the Competition Tribunal's previous decisions build a body of jurisprudence useful for scrutinizing possible infringements. A realist vision of law led the Chilean Congress to carry out such an approximation by eliminating the purpose that could contain the vagueness of expressions and prohibitions of Article 3 of Decree-Law No. 211.

Decree-Law No. 211 considered a mechanism to reduce such vagueness: a consultative power allows the Competition Tribunal to issue a binding opinion concerning a consultation made by an interested party of an event, act, or agreement that could breach competition.<sup>178</sup> A TDLC decision thereby lifts the prohibition and authorizes the event, act, or agreement in question, exempting the consulting party from any antitrust liability. The vagueness and indetermination in matters involving anti-competitive unlawful acts can be overcome, by way of a favorable consultation opinion, which gives a party "legal certainty" with respect to the conduct.

Unfortunately, Article 3 of Decree-Law No. 211 subsists with its indeterminate reference to passive subjects ("any"), and also with the reference to dominance or market power of competitors and economic agents ("the person that").<sup>179</sup> This does nothing but extend the application of Decree-Law No. 211 to persons without economic power or those that are not economic agents, such as public persons or administrative authorities, including judicial authorities.<sup>180</sup>

Decree-Law No. 211 states that its objective is to promote and defend free competition in the markets,<sup>181</sup> but some academics have considered this statement imprecise and vague.<sup>182</sup> The Resolutive Commission—the Competition Tribunal's predecessor—determined that the mandate of competition law was not only to take care of consumer interests, but to also consider the economic freedom of all participants in economic activities including producers, entrepreneurs, and consumers, in order to benefit the society as a whole.<sup>183</sup> Accordingly, it stated that "the purpose of competition law is the

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178. Decree-Law 211 (2003), *supra* note 90, at art. 18.2.

179. *Id.* at art. 3.

180. For a review of the state of the discussion, *see generally* Francisco Agüero, *Derecho de la Competencia y Concesiones de Servicio Público. El Caso de las Plantas de Revisión Técnica* [Competition Law and Public Utilities Licences: The Technical Plant Review Case] (2013).

181. Decree-Law 211 (2003), *supra* note 90, at art. 1. Neither the NEPO's nor the Competition Tribunal's mandates extend to consumer protection nor utilities regulation. In those areas, specialized regulators exist. In general, regulators do not have in their respective acts rules regarding competition law nor competition policy mandates. Regulators usually do not file claims or initiate consultation before the Competition Tribunal.

182. DOMINGO VALDÉS, *LA DISCRIMINACIÓN ARBITRARIA EN EL DERECHO ECONÓMICO* 96 (1992); Francisco Agüero, *Nuevos elementos para el debate sobre el bien jurídico libre competencia* [New elements in the debate of the ends of competition law], 19 *BOLETÍN LATINOAMERICANO DE COMPETENCIA* [LATIN AMERICAN COMPETITION BULLETIN] 127–29 (2004); Pablo Fuenzalida & Mario Valderrama, *La potestad consultiva del Tribunal de Defensa de la Libre Competencia: ¿Jurisdiccional o administrativa?*, *REV. DE DER. ADMIN. ECON.* No. 13 182 (2004); Jorge Streeter, *Modificación de la Ley de Defensa de la Competencia* [Competition Law Modification] 26 (Working Paper, 2001).

183. RESOLUTIVE COMMISSION, Ruling 90, §17 (Jan. 28, 1981); Ruling 93, § 12 (Apr. 1, 1981); Ruling

interest of the society in [producing] more and better goods, at lower prices, which can be obtained ensuring liberty to all participants in economic activities.”<sup>184</sup> The Competition Tribunal has not substantially modified this statement, although some tension has been introduced in cases when the Public Administration is the accused party.

Paradoxically and simultaneously with the legislative discussion of Law No. 19,911, the United States–Chile Free Trade Agreement provides that “[e]ach Party shall adopt or maintain competition laws that proscribe anti-competitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.”<sup>185</sup> The usefulness of this statement is debated and considered to have only “symbolic meaning” because the competition policy chapter of the Agreement has no formal enforcement mechanism.<sup>186</sup> However, the TDLC has acknowledged its use in the Chilean legal system.<sup>187</sup> The statement, hence, is useful. Accordingly, the importance of the juridical good—fair competition—arises as a guide for scrutinizing conducts that could breach Decree-Law No. 211.

Law No. 13,305 of 1959 contained a prohibition on granting monopolies to private persons, admitting that, through law, monopolies could be passed on to public bodies if they concerned industrial or business activities.<sup>188</sup> Granting monopolies was prohibited in Decree-Law No. 211, of 1973 in one of its “whereas” clauses,<sup>189</sup> although the law simultaneously recognized that there can indeed be efficient monopolies—state monopolies, curiously.<sup>190</sup> Later, despite

171, § 15 (Apr. 10, 1984); Ruling 368, § 2 (Apr. 7, 1992).

184. *Id.*

185. United States–Chile Free Trade Agreement art. 16.1, Jan. 1, 2004.

186. See generally D. Daniel Sokol, *Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI-KENT L. REV. 231, 270 (2008).

187. Tribunal de Defensa de la Libre Competencia [Competition Tribunal], “FNE c. Servicios Pullman Bus Costa Central S.A. y otros,” Rol de la causa: 224–11, § 127 (Jan. 15, 2014).

188. See Law No. 13305 art. 172, Apr. 6, 1959 (“Only by law it may be reserved to fiscal, semi-fiscal, public, independent bodies, or local councils, the monopoly of certain industrial or commercial activities.”) (“Sólo por ley podrá reservarse a instituciones fiscales, semifiscales, públicas, de administración autónoma o municipales el monopolio de determinadas actividades industriales o comerciales.”) [translation by author].

189. See Decree Law No. 211 (1973), *supra* note 17, at art. 1 (“That monopoly and monopolistic practices are against a healthy and effective competition in the supply of markets, since through control of supply or demand it is possible to fix artificial prices which damage consumer interest.”) (“Que el monopolio y las prácticas monopólicas son contrarias a una sana y efectiva competencia en el abastecimiento de los mercados ya que mediante el control de la oferta o demanda es posible fijar precios artificiales y lesivos al interés del consumidor.”) [translation by author].

190. See *id.* at 4 (“That, however, the production of goods and services may or must, in certain circumstances, be made through bodies with monopoly and state structure, if the goals prosecuted benefit the community and its creation, operation and safeguards are foreseen in a law.”) (“Que, sin embargo, cierta producción de bienes y servicios puede o debe, en determinadas circunstancias, realizarse a través de organizaciones de estructura monopólica estatal, siempre que los fines perseguidos redunden en beneficio de la comunidad y su creación, funcionamiento y resguardos se prevean mediante una ley expresa.”) [translation by author].



opinions adverse to monopolies granted by law,<sup>191</sup> the Constitution only prohibits State monopolies in media.<sup>192</sup>

The general prohibitions, together with the prohibition of specific conduct such as forming cartels and abusing a dominant position, have made the spectrum of complaints that can be heard by the TDLC broad. This broad interpretation of the general prohibitions is a result of a vague text in the law, but also built upon several decisions made by the TDLC and its predecessors (like the Resolutive Commission) in the early seventies. A decision that prohibited the nationalization of banks attempted by Allende's government,<sup>193</sup> and decisions against the Chilean Central Bank provide specific examples.<sup>194</sup> This was also a consequence of other legislative decisions of the Junta. For instance, Decree-Law No. 807, a law affecting the Department of Education, declared that the Chilean government should promote competition policy in all possible issues, recognizing that rules and regulations could affect this state policy.<sup>195</sup> In similar terms, a law for leasing public land for agriculture tried to encourage competition between farmers.<sup>196</sup> This has caused the State Administration itself and other governmental bodies to refrain from breaching competition. Private parties know that not only they, but also the State, can be involved in anti-competitive practices. This topic is controversial and deals with the scope of competition law if interdictions are broad. Here, the comparative approach goes from no-immunity of State acts to competition law, with a doctrine of a state action immunity, as in the United States,<sup>197</sup> to a broader approach, as the one seen in Chile.

## V

### PUBLIC AND RESIDUAL PRIVATE ENFORCEMENT

As stated by Hovenkamp, the most flagrant anti-competitive conduct should be prosecuted because the total elimination of market power in the economy is "neither attainable nor desirable."<sup>198</sup> So far, the prosecution of exclusionary and exploitative practices represents sixty-six percent of the Competition Tribunal's

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191. Streeter, *supra* note 182.

192. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 19, no. 12, ¶ 1 (1980) ("In no circumstance may the law establish a State monopoly over the media of mass communication.").

193. RESOLUTIVE COMMISSION, Ruling 14 (May 18, 1975). For a historical description of the conflict, see BERNEDO, *supra* note 6, 53-58.

194. RESOLUTIVE COMMISSION, Ruling 33 (Aug. 3, 1977) and Ruling 239 (Aug. 26, 1986).

195. Decree-Law No. 807, Dec. 21, 1974.

196. Decree-Law No. 956, Apr. 19, 1975. In similar terms, Decree-Law No. 1341, Jan. 28, 1976.

197. See Eleanor M. Fox, *Competition Policy: The Comparative Advantage of Developing Countries*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 72 (comparing U.S. distrust of government with prevalence of state-owned business entities in developing countries).

198. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 95 (2006).

caseload.<sup>199</sup> However, this majority is underrepresented in relation to the share of cartel enforcement, which represents fifteen percent of the caseload.<sup>200</sup>

In light of the difficulty of proving cartel practices without sufficient evidence of a secret agreement or disguised cartel between competitors, private disputes normally seek compensation for damages only after a court or tribunal has declared the existence of the cartel. Although the 2003 reform clarified that antitrust damages could be litigated after the Competition Tribunal's decision in a follow-on lawsuit, some private actions had previously been filed in abuse cases.<sup>201</sup> More recently, private parties have sued for damages after TDLC's decisions in abuse cases,<sup>202</sup> where these parties have prosecuted the case. Consumers have rarely tried to sue for damages caused by cartels, and have had mixed results.<sup>203</sup> In that case, follow-on lawsuits have come only after public enforcement.

NEPO's prosecutions in the past years have focused mainly on cartels. Since the legal reform of 2009, which granted the NEPO investigative powers like dawn raids and wiretapping, together with establishing a mechanism of leniency,<sup>204</sup> there has been a rise in prosecution of collusive conduct. Namely, the NEPO has learned how to use the new tools to detect and prosecute cartels. Prior to acquiring these tools, the NEPO's record in cartel prosecution was poor, dealing mostly with tacit collusion cases or accusations of cartels without hard evidence.<sup>205</sup>

This is how the NEPO experienced a major shift with respect to prosecutions, veering from charges of abuse of dominant position, which constituted the majority of the NEPO's claims filed at the TDLC until 2008, toward charges of collusion. Moreover, since 2009, the NEPO has also moved to prosecuting and sanctioning non-compliance with merger remedies,<sup>206</sup> failure to comply with the

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199. Data obtained from the 2016's statistics provided at the Competition Tribunal's website, <http://www.tdlc.cl/tdlc/wp-content/uploads/Estadisticas/agosto16/Contenciosas-Conductas.pdf> [<https://perma.cc/ZK3W-BQE2>].

200. *Id.*

201. Supreme Court "Alex Pivcevic y otros con Lan Chile y otros," rol 5835-2004, (Dec. 26, 2006); 10° Santiago Civil Court, "Servicios Audiovisuales Profesionales Sound Color S.A. con United International Pictures Chile Ltda.," rol C-782-2004, (Dec. 30, 2005).

202. 4° Talca Civil Court, "Constructora Independencia Ltda. c. Nuevosur S.A.," rol C-6134-2010; 22° Santiago Civil Court, rol C-20891-2013, "OPS Ingeniería Limitada con Telefónica Móviles Chile S.A.," (June 30, 2015); 8° Santiago Civil Court, "Interlink con Telefónica Móviles", rol C-42913-201; 20° Santiago Civil Court, rol C-24288-2012, "Etcó S.A. con Telefónica Móvil de Chile S.A.," (Apr. 28, 2015); Court of Appeals of Santiago, "Phillip Morris con Compañía Chilena de Tabacos," rol 1520-2010, (Nov. 8, 2011); 26° Santiago Civil Court, "Cementa S.A. con James Hardie Fibro.," rol C-13272-2007, (Apr. 24, 2009).

203. 3 Talca Civil Court, "Luis Orlando Opazo con Asociación Gremial de Buses Interbus," rol N° 2646-2009, (Jan. 4, 2012); 11° Santiago Civil Court, "Arévalo y otros c. Farmacias Ahumada S.A.," rol 6.046-2009, (Dec. 23, 2010).

204. Law No. 20,361, July 13, 2009.

205. Agüero & Montt, *supra* note 118, at 173.

206. Fiscalía Nacional Económica, June 8, 2015, "Requerimiento contra de LATAM Airline Group S.A." (Chile); Fiscalía Nacional Económica, June 30, 2015, "Requerimiento de la FNE contra SMU" (Chile).

TDLC's general instructions—especially regarding telecommunications matters<sup>207</sup>—and failure to comply with judgments.<sup>208</sup> These cases represent seven percent of the Tribunal's caseload.<sup>209</sup> The public prosecution of abusive practices has focused on litigation of vertical restrictions, in cases against as Coca-Cola bottlers,<sup>210</sup> fire-matches<sup>211</sup> or Unilever.<sup>212</sup> The NEPO has retained some prosecution of exploitative practices, mostly price discrimination or excessive pricing cases, in services provided by utilities such water utilities<sup>213</sup> or electric distribution companies.<sup>214</sup>

Between the creation of the TDLC in 2004 and the reform in 2009, the NEPO filed thirty-one actions before the TDLC. Of these legal actions, only nine were targeted against cartels. The lack of direct evidence impeded the sentencing of several accused companies in cases against asphalt insurance companies,<sup>215</sup> liquid oxygen,<sup>216</sup> shipping agencies,<sup>217</sup> ambulances,<sup>218</sup> cold asphalt.<sup>219</sup> The NEPO encountered defeats in terms of cartel prosecution, both at the TDLC and the Supreme Court before it obtained the intrusive powers from Law No. 20,361, in 2009.<sup>220</sup> Hence, evidence of effective cartel prosecution came after new investigative powers were given to the NEPO.

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207. Fiscalía Nacional Económica, July 15, 2014, “Requerimiento contra Telefónica Móviles Chile S.A.” (Chile); Fiscalía Nacional Económica, May 5, 2014, “Requerimiento contra Movistar” (Chile); Fiscalía Nacional Económica, Jan. 29, 2014, “Requerimiento contra Claro S.A.” (Chile).

208. Fiscalía Nacional Económica, Aug. 6, 2013, “Requerimiento FNE en contra de Empresa de Ferrocarriles del Estado (EFE)” (Chile); Fiscalía Nacional Económica, Oct. 27, 2011, “Requerimiento FNE contra la Dirección General de Aguas” (Chile).

209. Data obtained from the 2016's statistics provided at the Competition Tribunal's website, <http://www.tdlc.cl/tdlc/wp-content/uploads/Estadisticas/agosto16/Contenciosas-Conductas.pdf> [<https://perma.cc/SLL6-Y4N5>].

210. Fiscalía Nacional Económica, Apr. 19, 2011, “Requerimiento contra Embotelladora Andina y Coca Cola Embonor” (Chile).

211. Fiscalía Nacional Económica, June 20, 2008, “Requerimiento contra Cía. Chilena de Fósforos” (Chile).

212. Fiscalía Nacional Económica, Apr. 3, 2013, “Requerimiento de FNE contra Unilever Chile” (Chile).

213. Fiscalía Nacional Económica, Dec. 14, 2006 “Requerimiento contra Essbío, Essal y otras sanitarias” (Chile).

214. Fiscalía Nacional Económica, Dec. 5, 2008, “Requerimiento contra Empresa Eléctrica Atacama” (Chile); Fiscalía Nacional Económica, Oct. 17, 2007, “Requerimiento contra Empresa Eléctrica de Magallanes” (Chile).

215. Fiscalía Nacional Económica, Nov. 26, 2005, “Requerimiento contra Isapres ING, Vida Tres, Colmena y otras” (Chile).

216. Fiscalía Nacional Económica, Aug. 3, 2005, “Requerimiento contra Air Liquide, Indura y Praxair, productoras de oxígeno líquido” (Chile).

217. Fiscalía Nacional Económica, June 5, 2005, “Requerimiento contra Ultramar, Agunsa y otras agencias marítimas” (Chile).

218. Fiscalía Nacional Económica, June 3, 2008, “Requerimiento contra Bertonati Vehículos Especiales y otros” (Chile).

219. Fiscalía Nacional Económica, July 13, 2007, “Requerimiento contra MK y otras empresas productoras de asfalto” (Chile).

220. Agüero & Montt, *supra* note 118, at 173.

This shift from unsuccessful to successful prosecution of cartels took place only as of 2009, and was driven by the *Pharmacies* case.<sup>221</sup> Subsequently, TDLC findings<sup>222</sup> and the Supreme Court recognized that collusion was the greatest breach of competition:

Collusion constitutes of all conducts breaching competition the most reproachable, the most serious, because it entails the coordination of a competitive behavior of the companies. The probable outcome of such coordination is a price increase, the restriction of production and with it the increase of benefits obtained by the participants.<sup>223</sup>

In its cartel prosecution, the NEPO has relied not only on intrusive measures but also on leniency accorded to domestic and foreign companies. The first case of leniency was between foreign companies.<sup>224</sup> Subsequently, the information provided to the NEPO in exchange for leniency toward companies has been used to prosecute cartels in industries such as ground transportation, marine transport,<sup>225</sup> asphalt,<sup>226</sup> and tissue paper.<sup>227</sup> Since the implementation of the leniency program, the NEPO has issued guidelines clarifying the criteria in 2009 and 2015.<sup>228</sup> A difficulty that has appeared recently is that the Competition Tribunal may reject the leniency requested by the NEPO after finding that the leniency applicant and organizer of the cartel coerced the other members. A firm argued this coercion defense in a recent cartel case.<sup>229</sup> Another problem might be the coordination between the competition law trial at the TDLC and the possible cartel offense trial afterwards, partially treated in Law No. 20,945. The NEPO has used dawn raids and wiretapping to prosecute cartels in the poultry,<sup>230</sup> ground transportation,<sup>231</sup> tissue paper,<sup>232</sup> and supermarket industries.<sup>233</sup>

221. *Pharmacies*, *supra* note 58.

222. Tribunal de Defensa de la Libre Competencia [Competition Tribunal], Jan. 7, 2010, “FNE c. Sociedad de Transportes Central Ltda. y otros,” Rol de la causa: 149-07.

223. Corte Suprema de Justicia [Supreme Court], Dec. 29, 2010, “FNE c. Sociedad de Transportes Central Ltda. y otros,” Rol de la causa: 1746-2010.

224. Fiscalía Nacional Económica, July 29, 2010, “Requerimiento en contra de Whirlpool SA y Tecumseh do Brasil Ltda.” (Chile).

225. Fiscalía Nacional Económica, Jan. 27, 2015, “Requerimiento en contra de Compañía Chilena de Navegación Interoceánica S.A. y Otros” (Chile).

226. Fiscalía Nacional Económica, July 13, 2007, “Requerimiento contra MK y otras empresas productoras de asfalto” (Chile).

227. *See* CMPC Tissue, *supra* note 74.

228. *See* Fiscalía Nacional Económica, Oct. 2009, “Guía interna sobre beneficios de exención y reducción de multas en casos de colusión” (Chile); *see also* Fiscalía Nacional Económica, Oct. 2015, “Guía Interna sobre Delación Compensada en Casos de Colusión” (Chile).

229. Fiscalía Nacional Económica, Oct. 27, 2015, “Requerimiento en contra de CMPC Tissue S.A. y SCA Chile S.A.” (Chile).

230. Fiscalía Nacional Económica, Dec. 1, 2011, “Requerimiento FNE en contra de Agrosuper y Otros” (Chile).

231. Fiscalía Nacional Económica, June 3, 2013, “Requerimiento en contra empresas de transporte público de Copiapó” (Chile).

232. Fiscalía Nacional Económica, Oct. 27, 2015, “Requerimiento en contra de CMPC Tissue S.A. y SCA Chile S.A.” (Chile).

233. Fiscalía Nacional Económica, Jan. 6, 2016, “Requerimiento en contra de Cencosud S.A., SMU S.A. y Walmart Chile S.A. (supermercados)” (Chile). It should be noted that in the *Pharmacies* case, the

Furthermore, the NEPO has focused its prosecution efforts on fewer cases filed before the TDLC. During the seven-year period between 2009 and 2015, the NEPO has filed less than thirty lawsuits before the TDLC, sixteen of which refer to collusion charges and only six to proper abuse charges.<sup>234</sup> Meanwhile, between 2004 and 2008, the NEPO lodged a similar number of charges before the TDLC, including nine cartel charges.<sup>235</sup> The NEPO has reduced the number of claims it processes before the TDLC (from an average of over six to a little over four per year), focusing on cartel prosecution and abandoning prosecution of abuse cases by companies with dominant positions. The massive repudiation of anti-competitive practices by the general public, represented by cartels, makes NEPO's focus rational.<sup>236</sup>

The main effect stemming of the NEPO's change in enforcement is that the prosecution of abusive conducts has fallen upon private parties. Private parties have prosecuted several cases of abuse of dominant position and unfair trade practices that also affect competition policy, even without the support of the NEPO, or even after archival decisions of NEPO's investigations.<sup>237</sup> Private prosecution has led to follow-on lawsuits by the same parties trying to obtain damages awards.

Some industries in Chile are known for having mostly private enforcement. The pharmaceutical industry—with the exception of the *Pharmacies* cartel—is one such example. In addition, private parties have repeatedly litigated government practices they have considered anti-competitive in sectors such as private-public partnerships (concessions), state aid, enforcement, and regulation.<sup>238</sup> In these cases, the NEPO has usually refrained from intervening, with some exceptions in cases dealing with state-owned firms like railways<sup>239</sup> or local councils adjudicating waste management sites infringing competition policy and public procurement regulation.<sup>240</sup>

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FNE reached a judicial agreement (conciliation) with one of the accused companies (FASA), which decided to collaborate and admit the charges brought before the Competition Tribunal.

234. See generally FISCALIA NACIONAL ECONOMICA, [www.fne.cl](http://www.fne.cl) [<https://perma.cc/DL7T-HDGP>].

235. *Id.*

236. Chilean citizens have associated cartels to abuse and competition policy. A comparison of the search results for the terms “collusion,” “abuse,” and “competition” with Google Trends for Chile shows a noticeable correlation, with significant peaks especially after a cartel accusation filed at the Competition Tribunal. <https://www.google.com/trends/explore?date=all&geo=CL&q=colusi%C3%B3n,competencia,abuso> [<https://perma.cc/BYQ8-QVGE?type=image>].

237. *E.g.*, Silcosil Ltda., Mar. 17, 2015 “Demanda de Metalúrgica Silcosil Ltda. contra Masisa S.A. y Otra”; Fiscalía Nacional Económica, June 12, 2015 “Informe de archivo sobre denuncia contra Masisa Componentes SpA.” (Chile). See also TVI, July 6, 2016 “Demanda de TVI contra VTR Comunicaciones SpA”; Fiscalía Nacional Económica, May 26, 2016 “Informe de archivo sobre denuncia contra VTR Comunicaciones SpA” (Chile).

238. See generally Agüero, *supra* note 182.

239. Fiscalía Nacional Económica, Aug. 6, 2013, “Requerimiento FNE en contra de Empresa de Ferrocarriles del Estado (EFE)” (Chile).

240. Fiscalía Nacional Económica, July 31, 2008, “Requerimiento contra la I. Municipalidad de Antofagasta” (Chile); Fiscalía Nacional Económica, Aug. 6, 2007, “Requerimiento contra la I. Municipalidad de Curicó” (Chile); Fiscalía Nacional Económica, June 2, 2005, “Requerimiento contra

## VI

## ASSESSMENT OF CHILEAN COMPETITION POLICY

General assessments of Chile's competition policy system show positive and efficient results. A 360° appraisal published in 2013, based on data from 2011 suggests a positive outcome.<sup>241</sup> Recent studies reveal that consumers may shift their consumption habits after a cartel is discovered, punishing the cartel members<sup>242</sup> or even organizing boycotts. In effect, some mistrust of the institutional design of the Chilean competition law system existed in the last decade.<sup>243</sup> The general opinion of practitioners seems favorable, despite some complaints.<sup>244</sup> A recent survey shows mistrust of enforcement agencies that deal with consumer abuse.<sup>245</sup> And the survey identifies the existence of three cartels—*Pharmacies*, *Poultry Producers*, and *Tissue Paper*—as one of the eight most severe situations of mistrust of business. This survey also shows high understanding of the benefits of competition policy, such as lower prices; but also a high perception of consumer abuse by large firms.<sup>246</sup> Moreover, ninety-seven percent of those surveyed knew factual details of NEPO's accusation in the *Tissue Paper* case.<sup>247</sup> These results show how competition policy has become a key issue for consumers in Chile, and that consumers understand the risks of threats to competition. This success comes after a long history of legal reforms, modernizing institutions, and increasing enforcement.

From the perspective of competition law practitioners, surveys done for the NEPO suggest that the NEPO's effectiveness in detecting cartels has increased significantly from 2012 to 2014.<sup>248</sup> Lawyers also recognize the useful value of guidelines issued by the NEPO. Despite the vagueness of the text of the competition law, specialists value efforts to clarify it.

The history of competition law in the last fifty years shows governments and Congresses pushing competition law forward, in constant progress. The laws have been reviewed repeatedly in the last two decades, with major reforms in 1999, 2003, 2009, and 2016. Successive reforms have tried to fill the gaps and deficits left by previous ones. Progressive reform accompanied by political support seems to have improved institutional design and the enforcement of competition policy.

Coinca y la I. Municipalidad de San Bernardo" (Chile).

241. Agüero & Montt, *supra* note 118, at 183–85.

242. Cadem, Segundo Estudio sobre Libre competencia: "Salvando al capitalismo de los capitalistas", Nov. 2015, <http://www.cadem.cl/wp-content/uploads/2015/11/SACDLCII.pdf> [https://perma.cc/4QC9-DMPB].

243. Elina Cruz & Sebastián Zarate, *Building Trust in Antitrust: the Chilean Case*, in COMPETITION LAW AND POLICY IN LATIN AMERICA 157 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

244. Agüero & Montt, *supra* note 118, at 184.

245. Cadem, *supra* note 242, at 242.

246. *Id.*

247. *Id.*

248. Deloitte, 2° Estudio sobre la percepción del efecto disuasivo de las acciones de la Fiscalía Nacional Económica [Second study of the perception of the dissuasive effect of the National Economic Prosecutor's Office enforcement], [http://www.fne.gob.cl/wp-content/uploads/2014/11/Estudio\\_percepcion.pdf](http://www.fne.gob.cl/wp-content/uploads/2014/11/Estudio_percepcion.pdf) [https://perma.cc/NB32-FY37].

Since the early 1970's competition law has not only been a way of controlling private power, but also state economic power. Success has come with political compromise with competition policy, whether by a democratically elected government or by a dictatorship.

The vast majority of the legal reforms in the last two decades have favored public enforcement, enhancing investigative powers. But the fact that private prosecution has been residual to NEPO's recent focused prosecution of hard-core cartels has been an incentive for privately enforcing competition law and suing for damages. On this topic, the reform of Law No. 20,945 allows the Competition Tribunal to hear damages cases, so private parties may be more successful than they have been so far suing in civil courts. Hence, an unexpected effect of Law No. 20,945 may be a new incentive to private enforcement of competition law, because private parties could be more successful in this area. Enforcement of competition law is not exclusively a matter of public prosecution. Since public enforcement could be biased, allowing private enforcement to private parties offers a chance to punish other anti-competitive practices.

The separation of roles stated in Decree-Law No. 211 has favored independence of the NEPO and the TDLC and made the transition easier. The two agencies can differ in procedures and decisions and may even amend each other's mistaken decisions. The NEPO appears to be an independent, effective, and technical prosecutor.<sup>249</sup> This autonomy may be less apparent when the NEPO has to deal with or investigate administrative regulators.<sup>250</sup> The TDLC has had an important role in areas covered by sector-specific regulators and in topics such as public policy, state-aids, state-owned enterprises, public procurement, and regulations. In these conducts more comprehensive analysis is needed, because the Chilean practice is expansive compared to other jurisdictions. In this specific area, the Court has quashed TDLC's judgments based on public law topics.<sup>251</sup>

In terms of results, the NEPO and the Competition Tribunal have achieved excellent outcomes in cartel cases and abuse prosecution. Private enforcement has prospered in areas that complement the NEPO's focus, despite recent reforms, which have not promoted such litigation—or at least have remained neutral. Political support has increased in the last years, favoring updates of competition law and providing resources—public funding—for investigations and prosecutions.

## VII CONCLUSION

This article attempted to uncover possible lessons from competition policy enforcement in Chile. Such a task is usually difficult because countries do not follow the same historical patterns. In that regard, Chile transitioned in the last

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249. *Id.*

250. Agüero & Montt, *supra* note 118, 183–84.

251. *Id.* at 173.

forty years from a frustrated socialist revolutionary government established by democratic elective mandate to a market-based economy established by a Military Junta, and later ratified by a democratically elected government. Some legitimacy issues in that respect—for instance, imposition of a market system by military force—have been defeated by the strength of the results seen by the public when competition thrives, steadily creating a culture of competition. Since 2009, the public has started to realize that cartels threaten the core of the economic system. Citizens may ideologically disagree with the Chilean economic model, but they share an understanding that cartels are the greatest threat to the economy. A consensus between right and left wing politicians about the harm caused by cartels has benefited the institutional system of competition law. Substantive law has mattered, creating clear prohibitions of anti-competitive practices like cartels and abusive practices, but also providing an open-ended statutory scope of possible anti-competitive practices.

The institutional reform has worked and provided results, with a public prosecutor and a specialized-tribunal, but also leaving space for private prosecution.

After 2009's legal reforms, focused enforcement has proven successful in prosecuting and fining cartel members. A virtuous cycle started more than half a century ago, with legal and institutional reforms, political support, and vigorous prosecution, showing that success is not fortuitous, but built after legal reforms that steadily improve the institutional setting and investigative powers, backed by political and public support.

If cartels are the greatest infringement to competition law, revealing and prosecuting them successfully shows that a system is achieving its ends and that competition policy is working for consumers and society.