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I. INTRODUCTION

Chile is one of the countries that have pioneered the introduction of market reforms since the end of the seventies. Market reforms have transformed the country's landscape in the last 35 years, together with increase in population, and have contributed to increases in *per capita* income.² Competition policy has been an integral part of these reforms, the Competition Act being enacted in 1973.³

Competition policy, as understood today by most jurisdictions, is served by two major tools: competition law enforcement and competition advocacy.⁴ The boundaries of the enforcement of competition law are relatively clear, since enforcement actions should abide by the principles of rule of law, due process guarantees, and so on. As to competition advocacy, the case is different. A competition policy not clearly and explicitly defined may mean different things to different people.⁵

Thus, a major challenge of positioning competition policy is to promote a consensus around a conception of competition in each of the instances where such a conception is disputed; a consensus that defines certain benefits that can outweigh all the potential downsides of competition. Such a challenge, when the instruments used are those of outreach and advocacy, implies deploying efforts in segmenting audiences.

Considering different competition outreach and advocacy initiatives undertaken by the Fiscalía Nacional Económica ("FNE") in recent years, it appears that segmenting audiences has been crucial in all of them.

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² In 1977, GDP per capita was around USD\$ 2,500. In 2011, it had increased up to USD\$ 16,000. Sources available online at: <http://www.cepal.org/deype/cuaderno37/esp/index.htm> and <http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx>. Population in 1977 was around 10 m, in 2011 it has increased up to 17 m. Source available online at:

http://www.ine.cl/canales/chile_estadistico/demografia_y_vitales/proyecciones/Informes/Microsoft%20Word%20-%20InforP_T.pdf.

³ The Chilean Competition Act, known as Decree Law N° 211 or DL 211, was first enacted in December 1973. Previously, competition provisions had been included for the first time in a miscellaneous economic law in 1959.

⁴ International Competition Network, *Advocacy and Policy Report* (2002). Available online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>.

⁵ "There is no single, all purpose definition of competition advocacy because competition authorities around the world need to use advocacy to deal with a variety of challenges. In general, it means the promotion of competition market principles in policy discussion and regulatory processes, OECD, *Competition Law and Policy in Chile. A Peer Review*, p. 56 (2004). Available online at: <http://www.oecd.org/dataoecd/43/60/34823239.pdf>.

Following, we will briefly describe some of these initiatives with references to the target audience and the core message in each case. Short references to the use of alternative dispute resolution mechanisms in order to avoid litigation costs, are addressed before the concluding remarks.

II. CREATING A CULTURE OF COMPETITION

In 2004, according to an OECD report, the sketch of competition advocacy initiatives in Chile was as follows:

The competition institutions have not engaged in a wide range of competition advocacy, but they have done important work, particularly with respect to infrastructure monopoly sectors. Chile's institutions have used their broader law enforcement authority to order some of the kinds of regulatory reform that OECD competition agencies could only advocate [...]

For developing countries without well established competition regimes, promoting competition principles to the general public is an ongoing task, and indeed perhaps the most important task, at least at first.⁶

On the basis of the above diagnosis, the FNE realized that competition authorities might have a role to play in creating a culture of competition, i.e., increasing and disseminating awareness on the benefits of competition. For this specific purpose, an annual seminar labeled "The Competition Day" was launched for the first time in 2003.

The Competition Day seminar has played a crucial role in positioning competition law and policy in the legal and business communities and has benefited several times from the attendance of foreign speakers.⁷

Besides this annual outreach activity, also in 2003 significant efforts began to enhance the institutional web site by increasing the amount of relevant information available.⁸ In recent years, for instance, every internal investigation report is made publicly available on the FNE's website, with due safeguards regarding confidential information, with the purpose of explaining the FNE's criteria when adopting decisions on its investigations.

In addition, the FNE has made significant improvements in its communications policy and in handling its interactions with the media.⁹ It is not unusual today to see discussions about competition policy and law issues in the written press and even on television—for instance, when heads of regulatory authorities are interviewed, when the FNE submits a complaint, or when

⁶ *Id.*

⁷ An overview of the agendas and presentations of the last versions of this event is *available online*: <http://www.fne.gob.cl/english/competition-advocacy/competition-day/>.

⁸ The FNE's website is *available at*: www.fne.gob.cl. An English version is also *available at*: www.fne.gob.cl/english

⁹ A delegate from the FNE presented these developments in the FNE's communications strategy in an ICN Advocacy Working Group teleseminar on *Explaining the Benefits of Competition to the Media* in November 2011. Agenda *available online at*:

<http://www.internationalcompetitionnetwork.org/uploads/advocacy%20teleseminars/awg%20benefits%20project%20teleseminar%203%20-%20media%20-%20flyer.pdf>.

competition judges issue a ruling. These changes in the coverage of competition matters by the press are amazing and reflect pro-competitive cultural changes.¹⁰

III. INVOLVING PUBLIC PROCUREMENT OFFICIALS IN AN ANTI-BID-RIGGING TASK FORCE

In May 2008, the FNE brought together several public bodies and an association of public procurement officers to create a team labeled *Comité Anti-Colusión entre Oferentes en Licitaciones de Abastecimiento Público* (hereinafter, the Interagency Taskforce). This team included representatives of the Bureau of the General Comptroller, the Public e-Procurement Bureau (the body in charge of modernizing public contracting through electronic purchases), the Ministry of Public Works, and the Council for Internal Auditing of Government and Redaba (an association of officers and staff in charge of procurement areas of different public bodies). Delegates of the Department of Housing and Urban Planning, the Transport supervisor, and the Pensions regulator later joined the group. This Interagency Taskforce held 10 work meetings between May 2008 and April 2010.¹¹

Due to this initiative, seminars and training activities took place, producing bilateral relations among the taskforce members and also, as a byproduct, installing “risk of collusion among bidders” as a topic in the agendas of such bodies. Nearly 1000 public procurement officers attended these activities during a 2-year period.

However, involving public procurement officials regarding competition issues concerning tenders is not an easy task. The problems of preventing corruption, and of timely expending institutional budgets, seem to have greater priority for this audience; a prioritization structurally grounded in the corresponding legal frameworks.¹²

IV. INVITING THE BUSINESS COMMUNITY TO ABIDE THE COMPETITION LAW UNDER THE THREAT OF EFFECTIVE ENFORCEMENT

Enforcement is strengthened by an active advocacy, and advocacy is less effective in the absence of enforcement powers or when enforcement lacks credibility.¹³

The FNE is aware of the complements between enforcement and advocacy and has tried to reach an appropriate balance between these instruments, prioritizing enforcement when

¹⁰ Assessing the impact of changes in communications’ policy is not an easy task. However, according to data provided by *Litoralpress monthly reports*, the presence of the FNE in the media has improved when comparing the second semester of 2010 and the second semester of 2011: the total number of media coverage events has increased from 728 to 1962 (a 170 percent increase). The percentage of positive and neutral coverage events has increased from 95.8 percent to 97.8 percent and the percentage of negative coverage events has been reduced from 4.2 percent to 2.2 percent.

¹¹ Details regarding this initiative were reported in a contribution by Chile to an OECD Roundtable on Collusion and Corruption in Public Procurement that took place in the Global Forum of Competition in February 2010. Available online at:

<http://www.oecd.org/dataoecd/35/16/46235399.pdf>, pp. 91 and ff.

¹² A recently approved OECD Recommendation on Bid Rigging in Public Procurement explicitly acknowledges the need of an appropriate frame of incentives for public procurement officials to take due care of competition issues.

¹³ Advocacy and Policy Report, *supra* note 4 at iv.

advocacy activities have performed well and reinvigorating advocacy on the basis of successful enforcement experiences.

Once the 2009 legal reform was passed, and the FNE was empowered to effectively fight hard-core cartels,¹⁴ a relative pressure existed to implement such new provisions and prove their effectiveness against cartels. Thus, cartel law enforcement became a priority. After achieving some good law enforcement experiences, the FNE began again to deploy efforts in competition advocacy, issuing documents on Trade Associations and Competition (2011)¹⁵ and regarding Compliance programs (2012).¹⁶

These advocacy materials were the outcome of participative processes that included a period for public comments. At the same time, however, the FNE's discourse inviting the business community to abide the competition law was backed not just by the content of these materials but also by effective enforcement actions that had taken place in recent times, consistent with the guidelines messages. Without these enforcement actions, institutional messages would have been less strong and credible.

It is only by arranging these complements between enforcement and advocacy actions that it becomes reasonable to expect changes in business behavior.

V. WARNING THE PUBLIC SECTOR ABOUT THEIR DECISIONS' POTENTIAL EFFECTS ON COMPETITION

A major particularity of the Chilean competition system is the broad scope of competition law, allowing enforcement actions against public entities. Private plaintiffs have been the most common enforcers of competition law with respect to public bodies' infringements. But there are no legal restrictions preventing the FNE from initiating an enforcement action *ex-officio*, and a totally different picture appears when it is the public prosecutor, the FNE, which is submitting a complaint against a regulator.

In *FNE vs. DGA*, the FNE charged the regulator of water rights of violating a competition authorities' order that obliged the water regulator to provide periodic information regarding acquisitions and transfers of water rights.¹⁷ The case was finally settled and the DGA¹⁸ committed

¹⁴ On October 13, 2009, Law No. 20.361 entered into force and reinforced competition law, mainly in the area of hard-core cartels, by incorporating a provision regarding the benefits of exemption (full immunity from antitrust prosecution) or reduction of fines in the case of hard-core cartels (Article 39 bis); special powers of investigation (raids, seizures, interception, and wiretapping of communications) (Article 39 letter n)); an increase in the statute of limitations term from 2 to 5 years in the case of hard-core cartels (Article 20); an increase in maximum fines (using today's exchange rate,) from approximately USD\$20 million to USD\$ 30 million (Article 26); and changes to the wording of the legal provision referring to cartels (Article 3 letter a)). The law also underwent some modifications outside of the scope of hard-core cartels.

¹⁵ Some preparatory documents and the text of the final document are *available online at*:

<http://www.fne.gob.cl/english/competition-advocacy/advocacy-material/> (most of them in Spanish only).

¹⁶ The advocacy material on Compliance Programs is available in Spanish, at:

<http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf>.

¹⁷ The FNE's complaint is *available online at*:

<http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20de%20la%20FNE%20contra%20la%20Direcci%20General%20de%20Aguas.pdf>.

¹⁸ Acronym for *Dirección General de Aguas*.

to abide the infringed order.¹⁹ This enforcement action paved the way to another advocacy initiative targeting public bodies' officials, once again showing the complements between enforcement and advocacy actions.

VI. PREVENTING AND ALERTING ON ANTICOMPETITIVE EFFECTS OF REGULATIONS AND PROMOTING PRO-COMPETITIVE REGULATIONS

In 2012 the FNE issued advocacy material on the Public Sector and Competition.²⁰ This had two purposes.

On the one hand, it aimed at clarifying the scope of public bodies' activities that can be reached by an FNE enforcement action. By and large, FNE's enforcement powers may reach those public bodies' anticompetitive activities performed under the umbrella of discretionary powers. On the other hand, if the anticompetitive activity responds to strict compliance with the corresponding public body's legal mandate, then the rule of law protects the activity from an enforcement action and, for the FNE, suggesting and persuading for an amendment to the anticompetitive regulation is the sole power that remains.

The other purpose sought by this advocacy material was to supply government officials with some basic tools for analyzing the real or potential anticompetitive effects that their activity may trigger. During the drafting of this advocacy material, we realized that it was not easy to get public officials involved in a complete, deep, and technically unchallengeable competition assessment of their activities, due to public officials' different priorities and backgrounds.

Thus, we opted for including in this advocacy material some very simple criteria inspired by the OECD methodology on competition assessment. Under this framework, public officials are invited to: a) define the objectives and goals of their actions and inquire about different alternatives, b) identify the markets actually and potentially affected by their actions, and c) analyze the impact of their actions in those markets. Under a cost-effective criteria, they are invited to choose the alternative which is less harmful to competition and, in the case where a harm of competition is unavoidable, to implement appropriate mitigation measures in order to minimize that harm.

VII. TACKLING COMPETITION PROBLEMS IN SPECIFIC SECTORS

The FNE has undertaken additional advocacy and outreach actions concerning sensitive sectors of our economy such as agriculture and transport services.

Regarding agriculture, a dedicated unit was created in October 2010. Its mission aims at developing regular meetings with agricultural producers, agents, and public bodies linked to the agriculture sector; lead investigations in this sector; and implement a collaboration agreement between the FNE and the Ministry of Agriculture in matters of competition in the agricultural sector, all according to an annual work plan. A leaflet containing information on agricultural sector and competition law was issued by the FNE aimed at informing the sector members

¹⁹ The settlement and its approval are both *available online at*:
<http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2901>.

²⁰ An english version of this advocacy material is *available online at*:
<http://www.fne.gob.cl/english/wp-content/uploads/2012/07/Guia-final-sector-publico-ENG.pdf>

regarding the activities performed by competition authorities and giving them notice of the kind of relief they may expect from competition law in case of competition law infringements.

As to transportation services, after several successful enforcement actions against regional transportation companies, in which different degrees of participation of the sectoral regulator in facilitating anticompetitive practices were proven, the FNE launched an outreach initiative. They presented various decisions of the TDLC concerning agreements between competitors within the sector with the aim of preventing authorities from facilitating these types of agreements. These presentations were given by high officers of the FNE in working meetings organized jointly by the FNE and the transports regulator.

Finally, when approaching specific sectors, another strategy the FNE has explored has been to sign cooperation agreements with other public bodies. By this means it has disseminated competition principles in the intellectual property agency, in the e-procurement agency, and the general comptroller's office, among others.²¹

VIII. THE USE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Another set of tools the FNE has been using more frequently is alternative dispute resolution mechanisms, which may be considered neither strict enforcement nor advocacy.

By these means the FNE has settled cases before initiating formal proceedings before the competition judges; settlements that are subject to the competition judges' approval.²² For instance, by virtue of an extrajudicial agreement between the FNE and the SMU Company, the latter committed to adjust reproached non-compete clauses contained in several regional supermarket chains acquisitions to the criteria set by the FNE in terms of material, geographical, and temporary scopes.²³ In another case involving the suppliers of required school supplies, the FNE obtained the companies' engagements to cease their aggressive commercial strategies favoring specific brand products which limited free choice by students' parents.²⁴

The FNE has also initiated proceedings before competition judges aimed exclusively at the issuing of a formal recommendation of regulatory amendments.²⁵ For instance, the FNE used

²¹ These agreements are *available online at*:

<http://www.fne.gob.cl/promocion-de-la-libre-competencia/acuerdos-de-cooperacion/>.

²² According to the Competition Act, article 39 letter ñ), the "National Economic Prosecutor" (head of the FNE) shall have the power to sign extrajudicial agreements with economic agents involved in his investigations, in order to protect free competition in the markets. The Tribunal shall review the agreement in a single hearing, summoning the parties for that purpose, within five working days after receiving the information. During this proceeding, the Tribunal may hear pleadings by the parties. The Tribunal shall approve or reject the agreement within fifteen working days, counted from the date of the hearing. Once rendered, these resolutions shall be binding on the parties that appeared for the agreement, and only an objection before the same Tribunal may be brought against them."

²³ The approving resolution *can be found at*:

[http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20ñ\)_Resolucion_02_2010.pdf](http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20ñ)_Resolucion_02_2010.pdf).

²⁴ A press release about this settlement *is available at*:

<http://www.fne.gob.cl/english/2012/05/09/the-competition-tribunal-granted-its-approval-to-a-settlement-between-the-fne-and-torre-s-a-libesa-ltda-and-fabrica-internacional-de-lapices-y-afines-chile-ltda/#more-1193>.

²⁵ According to the Competition Act, article 18 N° 4: The Competition Tribunal shall have the power to "propose to the President of the Republic, through the relevant State Minister, the modification or derogation of any

this formal proceeding to recommend the abrogation of a legal exemption of shipping conferences from competition law enforcement.²⁶

Another tool the FNE has used has been to request the Tribunal to use its powers to determine whether price regulation is justified based on market conditions of services provided in regulated sectors.²⁷ The FNE has used this tool in regards to several electricity distribution services that were proven to have been provided at excessive prices.²⁸

Finally, when filing a case with no further action, the FNE issues a “filing resolution” which is made publicly available on its website after its communication to the concerning parties. The FNE often uses this opportunity to send a “warning message” to the corresponding party or parties, or to inform the general public about engagements the parties committed in order to avoid further prosecution and favor competition. For instance, when filing a complaint against the Ministry of the Economy reproaching informal negotiations with the industry concerning a draft regulation, the FNE alerted the public that initiatives such as assembling competitors to negotiate jointly may have significant risks for competition and may constitute a competition law infringement.²⁹

These alternative mechanisms allow the FNE to benefit from significant cost-savings versus an otherwise expensive litigation proceeding, disseminating at the same time a competition message stronger than the one achieved through mere competition advocacy.

IX. FINAL REMARKS

Achieving an appropriate equilibrium between enforcement and advocacy activities is an art form. Competition policy and institutions have been positioned in Chile in the last years as a combination of activities belonging to the broad palette of tools available to competition authorities.

At the end of the day, the most important societal shift is cultural by nature. In this sense, changes in broader government discourses—allowing more space for pro-market reforms and changes in the perceptions of community members that find competition law and institutions to be one of the bridles to keep market excesses under control—have also contributed to the relevant position of competition in today’s public discourse.

legal and regulatory precept that the Tribunal deems contrary to free competition, as well as the dictation of legal and regulatory precepts necessary for promoting competition or regulating the exercise of certain economic activities that are provided in non-competitive conditions.”

²⁶ Details of this proceeding, in Spanish, *are available at*:

<http://www.fne.gob.cl/2012/05/03/fne-solicita-modificacion-de-la-ley-de-marina-mercante-que-establece-excepcion-a-la-normativa-de-libre-competencia/#more-61756>.

²⁷ According to sectoral regulation (electricity, telecommunications, and gas), the Competition Tribunal has the duty of reporting whether a service in these sectors is provided on competitive or non-competitive terms in order to determine whether price regulation regarding the specific service is or is not justified.

²⁸ Details of this proceeding, in Spanish, *are available at*:

[http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2902&GUID=.](http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2902&GUID=)

²⁹ FNE’s, filing resolution April 26th, 2012, docket n° 1976-11, *Denuncia por Acuerdo de Denominada Mesa Pesquera*. Available in Spanish from: <http://www.fne.gob.cl/defensa-de-la-libre-competencia/investigaciones-de-la-fne/>.

We have certainly moved forward significantly, but this is still a movement in process.