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DEVELOPMENT BANK

COMPETITION LAW AND POLICY IN CHILE

A PEER REVIEW

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FOREWORD

"Peer review" has been a core element of OECD co-operation since the organisation was founded. Co-operation has always been founded upon the willingness of OECD countries to submit their laws and policies to questioning by other members. This peer review process promotes transparency and mutual understanding for the benefit of all, while giving the reviewed country valuable insights about possible improvements. Such co-operation has had remarkable success in the area of competition law and policy. In competition law enforcement, OECD countries have become partners in seeking to halt harmful international cartels and mergers. And the OECD's Competition Committee also played a major role in assessing and demonstrating the usefulness of applying competition policy principles in the process of reforming regulatory systems.

The success of peer review in promoting co-operation and voluntary convergence among OECD countries encouraged the IDB and OECD to include peer review as part of their joint Latin American Competition Forum. This Joint OECD/IDB programme will develop under the aegis of the OECD Centre for Co-operation with Non-Members, which promotes a mutually beneficial dialogue with OECD members and non member economies. The overall goals of IDB/OECD co-operation programme concluded in this area are to help promote economic growth and employment, greater economic efficiency, and a higher average standard of living in the medium to long term. There is increasing consensus that sounds competition laws and policies are important to the achievement of these goals, and the IDB and OECD can best promote these laws and policies by combining their resources and taking advantage of each institution's comparative advantage.

In order to include a peer review in the Latin American Competition Forum, it was of course necessary for a competition authority to volunteer to receive a review. Fortunately, Chile's competition authority had already expressed interest in being peer reviewed after hearing about the process at a meeting of the OECD Global Forum on Competition. When plans for the Latin American Competition Forum came together in August 2002, Chile

volunteered to be reviewed at the Forum's first meeting on 7-8 April 2003. By all accounts, the peer review was the most successful part of that meeting, and Peru has now volunteered to be peer reviewed at an upcoming Forum meeting.

The peer review report that follows includes an update that explains steps that Chile and its competition authority have taken since the April 2003 peer review session. Even before the peer review was scheduled, Chile was considering important amendments to its competition law. The report and comments by Forum participants generally supported the proposed amendments, which have now been adopted. In addition, the competition enforcement authority has adopted four internal changes to deal with issues raised in the report.

We would like to renew our thanks to the Research Department of the IDB for helping create the Forum and financing Chile's peer review and to Chile for being the first country reviewed in the Forum, and to the many competition officials whose written and oral contributions to the Forum are so important to its success.

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AN UPDATE ON DEVELOPMENTS SINCE APRIL 2003

This report on competition law and policy in Chile is an edited version of the report that provided the basis for the peer review that was conducted at the IABD/OECD Latin American Forum on 8 April 2003 at OECD Headquarters in Paris, France. Some updates, such as Supreme Court affirmation of two competition decisions, have been incorporated into the text of the report. In addition, several reforms since then merit separate treatment. First, as anticipated, the proposed competition law that is described in the report has been enacted. Second, Chile's competition enforcement authority, the National Economic Prosecutor, has adopted four reforms that implement the report's recommendations.

Amendments to the competition law

Chilean Law No. 19.911, published on 14 November 2003, amends the prior competition law by creating a new Competition Tribunal and introducing a number of other reforms. The law will go into effect six months from its publication date.

As proposed, the Tribunal will be an independent entity that has judicial powers but is not formally part of the judiciary. It will have five members. The President of the Tribunal, who must be a lawyer with at least ten years of experience in the competition law field, will be appointed by the President of the Republic from a list of five nominees established by the Supreme Court through a public competition. The other members (two lawyers and two economists) will be chosen as follows. One lawyer and one economist will be chosen by the President from a list of three nominees established by the Central Bank (Council of Governors), also through a public competition. The other lawyer and economist will be appointed directly by the Central Bank from candidates selected by this same public competition. The Tribunal will also have four surrogate members, selected by the President of the Republic and the Central Bank from the same lists of nominees. All candidates are requested to have expertise in competition issues.

The members of the Tribunal have terms of six years, and may serve more than one term. During their terms, they can only be removed for cause. Neither public servants nor officers or employees of publicly held corporations (or their affiliates) are eligible. Members of the Tribunal will receive fixed remuneration plus a fee that will vary depending on the amount of work. (By law, the Tribunal must meet at least twice per week, but it is expected to meet at least three times per week.) The Tribunal will also have its own staff.

Other changes clarify how particular kinds of anticompetitive conduct should be considered and ban “unfair competition” only when the conduct is intended to gain, maintain, or increase a dominant position. The law now provides a limited “settlement” procedure. Imprisonment is eliminated as a sanction, but the amount of fines is raised, to US$ ten million. The head of the competition enforcement entity, the National Economic Prosecutor, is given new powers, including the authority to sign agreements with domestic agencies and foreign entities.

Reforms by the competition enforcement agency

The National Economic Prosecutor has adopted four reforms that address issued raised by the peer review. First, the Prosecutor has created a new unit within the Economics Department that is responsible for considering the competitive effects of proposed mergers. Chile still does not have a premerger notification programme and does not regard such a programme as necessary, but the creation of this merger unit is very important as an official and public statement of intention to assess mergers.

Second, the Prosecutor has created a new unit within the Legal Department whose function is to review proposed legislation and proposed regulations that could harm competition. In short, Chile has taken a significant step towards having a systematic programme of competition advocacy.

Third, the Prosecutor has adopted an internal order on how investigators write the “reports” that constitute their findings. For example, the order requires that investigators must always include information about the relevant markets and must co-ordinate their reports with the Legal Department to ensure the legal sufficiency of the analysis.

Fourth, the Prosecutor has taken steps to make the business community and the public more aware of competition law matters. On 30 November, the Prosecutor held Chile’s first “Competition Day” – an event that brought together about 250 lawyers and others to hear about the newly enacted amendments to the competition law and other relevant matters. Among the

speakers was Mr. Fernando Sanchez Ugarte, President of Mexico's Federal Competition Commission, who had chaired the peer review of Chile at the April 2003 meeting of the IABD/OECD Latin American Forum. Echoing the peer review report, he congratulated Chile for being a pioneer in competition policy, stressed competition policy's central role in economic regulation, supported the proposed amendments, and suggested further action in some areas to reduce Chile's vulnerability to international cartels and anticompetitive mergers.

SUMMARY

Over the last thirty years, Chile has been a quiet pioneer in the field of competition law and policy in South America and among developing countries. In the application of competition policy principles in some infrastructure sectors, Chile and its competition institutions have been in the forefront. This review examines Chile's competition law and policy using the approach that the OECD Competition Committee uses in peer reviews of OECD Members. It describes the current system, considers reforms that Chilean officials are considering or implementing, and recommends additional actions that should be considered in order to maximise competition policy's contribution to Chile's economic efficiency and growth.

Chile's current competition law was adopted in 1973 as part of a program to roll back the previous government's steps towards a government-owned and planned economy. Enforcement resources were initially small, and enforcement was neither particularly vigorous nor a major part of Chile's reform program, which emphasised trade liberalisation, privatisation, and deregulation. However, due in part to its relatively low key approach and in part to its consistency with Chile's general free-market orientation, competition law enforcement has become an accepted, if not central, part of Chile's legal and economic regulatory system. Although competition law and policy have experienced setbacks in some Latin American countries, Chile's centre-left government has recently proposed a major "pro-growth agenda," developed by the government and the private sector, in which pro-competitive regulatory reform is the first agenda item and improving competition law enforcement is the first part of that agenda item. Other elements include regulatory reform in key areas, such as telecom and electricity, and reforms in areas such as capital markets that could also benefit competition and efficiency. The competition law part of this proposal is expected to be enacted this year.

The proposed amendments to the competition law relate primarily to the creation and funding of a new Antitrust Tribunal. The new Tribunal would be independent and would have its own staff. Its members would be chosen for their competence and would be paid for 2-3 days of work per week. This is a very important reform. The institutions it would replace appear to have operated productively and independently, but there were significant handicaps, as some members were from Ministries, all were unpaid, and they worked only one half-day per week. It will be critical that every effort be made to reinforce and safeguard the Tribunal's independence in practical terms. Even representatives of Chilean business interests seem to believe that the competition institutions need more funding so that they can act more promptly without sacrificing the quality of their analysis. Chile should also consider whether additional legislative changes are necessary to reduce Chile's vulnerability to anticompetitive mergers.

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SUMMARY (Cont)

The competition institutions have been particularly impressive in their work with infrastructure monopolies. Chile’s Antitrust Commission once prohibited the telecom regulator from allocating spectrum to two firms it had chosen and ordered the regulator to hold an auction instead. Regulators in the telecom and electricity sectors are not authorised to set tariffs unless the Commission has found a market to be not competitive. A Commission ruling that local telephony services were not competitive laid out six provisions aimed at creating a genuinely competitive market.

In traditional law enforcement against firms operating in markets that could and should be competitive, the record is not as strong. In part, the difference is the result of the focus on infrastructure monopolies, a priority which may so far have been better for Chile’s economy as a whole. In part, however, the difference appears to reflect other considerations, many of which are being addressed but which merit further attention. For example, although Chile’s competition institutions, like most of their foreign counterparts, are increasingly basing their policies and decisions on economic principles, the decisions of the Antitrust Commission and the Supreme Court have provided little explanation of the impact of economic principles on the legal standards that are applicable to particular forms of conduct or to such central issues as defining “product and geographic markets” and deciding whether a firm has a dominant or monopoly position. Clarifying the applicable legal standards and increasing predictability should be a priority, particularly since the proposed amendments would abolish the Preventative Commissions, whose decisions have provided the most explanation. Chile’s enforcement authority, the National Economic Prosecutor’s Office, is taking some important steps to decrease uncertainty. Summaries and the full text of all Preventative Commission and Antitrust Commission decisions will be on the Office’s website by year’s end, and the Office’s own decisions will eventually be added. Given the current uncertainty and the conclusory nature of many Commission decisions, however, the Prosecutor’s Office should consider issuing nonbinding enforcement guidelines or policy statements or finding some other way to set forth its position on the elements of particular kinds of violations, to clarify the overall framework for its interpretation of the law and to provide guidance regarding its approach to key issues in competition analysis and procedure

Competition law and policy are not likely to make their maximum contributions to Chile’s productivity unless enforcement addresses a wider range of industries and becomes more proactive and aggressive in challenging all forms of conduct – mergers, monopolisation, and cartels – with substantial actual or likely anticompetitive effects. The competition institutions’ cautious approach seems to have helped facilitate the gradual acceptance of competition enforcement. But the tradition of caution, including an apparent reluctance to find violations and to impose fines, has in part reflected a view in Chile that economic offences against the public are not serious and that the costs of monopoly may not exceed the

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SUMMARY (Cont)

costs of competition law enforcement. A combination of general competition advocacy explaining the cost of monopoly and cartels with enforcement guidelines explaining the Office's increased focus on economic efficiency should help reassure academics, the private sector, and policymakers that the benefits of vigorous competition enforcement in Chile will far exceed the costs.

Chile's competition institutions have been very active in competition advocacy concerning infrastructure industry monopolies, and Chile is in the early stages of developing a broader programme. Notably, the Ministry of Economy's Market Development Division also operates as a competition advocate (and provides members of Chile's competition-related Commissions). Chile should move towards providing the Prosecutor's Office and the Tribunal the authority and the capacity to serve as an advocate for using competition policy in the analysis of all national law and all national and local regulations that restrict competition. The value of this advocacy role as a complement to the enforcement role is recognised in the recommendations of the OECD's 1997 Report on Regulatory Reform. The goal is not to promote competition over other values, but to ensure that the protection of other values does not unnecessarily interfere with firms' ability to respond efficiently to consumer demand. For their part, the Prosecutor's Office and eventually the Tribunal should seek to demonstrate to government entities, the public, and the business community the value of having a competition policy perspective even in assessing existing or proposed laws or rules that on their face do not appear to be about competition.

For now, the Prosecutor's Office should actively seek to identify situations where regulations cause significant anticompetitive effects, the Office has some relevant expertise, and a letter, report, speech, submission testimony, or other intervention by the Office could either support the reform efforts of others or explain why some reform is important. For example, the pro-growth agenda is proposing to reduce the harm caused by slow and non-transparent licensing and other procedures, particularly at the municipal level, by enacting a law decreeing that all requests not acted upon within a certain time period are deemed to be approved. One way this "red tape" causes economic harm is by creating unjustifiable entry barriers. Explaining this aspect of the problem and supporting the effort to reduce it may continue to be a relatively inexpensive piece of competition advocacy that is useful in its own right and as a demonstration that competition policy is not anti-business. The Office (and eventually the Tribunal) should also consider devoting significantly more attention to explaining how competition law and policy benefits consumers, businesses, and the economy as a whole. In view of the Chilean government's concern about equity issues, including social protection, education, and health, the advocacy program could include emphasis on how competition policy can serve as a tool to help policymakers pursue equity goals as efficiently as possible.

1. The economic and political context

1.1 Current economic context

Chile is a relatively small South American economy with 15 million inhabitants. It is also a very open economy; almost thirty years of consistent trade liberalisation have recently been manifested in a number of free trade agreements. During the 1990s, Chile experienced strong GDP growth, averaging almost 7 per cent annually, which was driven mainly by exports and a strong investment cycle in the natural resource sector (copper mining, salmon, and forestry). After the Asian economic crisis, growth rates declined to 2-3 percent and unemployment rose to nearly 10 percent. Chile's economy has been quite stable, however, especially in comparison with neighbouring countries. Interest rates are low, fiscal responsibility has been maintained, and Moody's has given its banking system the highest rating in South America. Moreover, the national government has moved to increase transparency, fight corruption, and develop stable institutions – steps that have given it a favourable rating in world-wide transparency and competitiveness rankings. Implementation of such reforms may have been facilitated by the fact that Chile is not a federation of sovereign states, but a national state. Chile also benefits from its legal system, which is regarded as one of South America's best.

Since 1997, Chile has responded to the economic slowdown in a number of ways, including capital market liberalisation in 2000-2001. Almost all state-owned enterprises have been privatised, and public ownership of the copper mining firm CODELCO is not maintained for competitive reasons but rather to protect Chile's future by being an asset that the government cannot spend.[1] Despite its small size Chile is often seen by multinational firms as a platform from which to enter South America because of its economic and political stability. Chileans encourage this process but sometimes fear that it may lead to monopolisation of Chilean markets by the foreign firms (such as Spanish banks). In any event, the current pro-growth agenda embraces improved competition enforcement as means of stimulating greater efficiency and growth.[2] Private sector representatives helped create the agenda, including the competition law aspects, but also criticize the government for hindering entrepreneurship and labour market flexibility.

1.2 Historical context

State intervention into Chile's economy became widespread following the 1925 adoption of a Constitution that greatly increased the power of the executive branch. The government's promotion of and engagement in

preferred forms of economic activity became more pronounced in 1931, when the worldwide economic depression led to a short-lived takeover of Chile's government by socialist-leaning military leaders. Over the next two decades, the state pursued policies of import-substitution industrialisation through various means, including the creation of the Production Development Corporation, commonly known as CORFO, which by 1950 owned shares in eighty of Chile's largest firms and a majority share of 39 of them. These policies created closer links between government and big business, and together with high tariffs they isolated Chile from international markets. By the end of the 1950s, the policies of the past were seen as having run their course, but there was no consensus on what new course to take.

1.3 Chile's first competition law

Chile's first competition law was enacted in 1959, one year after an international mission recommended abandoning price controls, enacting a competition law, and managing customs tariffs when prices rose too much. The law prohibited the state from granting monopolies to private parties and provided that acts or agreements tending to prevent free competition were civil (administrative) and criminal violations. The law was enforced by a Commission whose members were a Supreme Court Judge, the Superintendent of Corporations, Insurance and Stock Markets, and the Superintendent of Banking. The Commission could investigate cases, decide whether to recommend criminal cases, issue rulings in non-criminal cases as well as general rules, and decide whether a monopoly concession could be issued. These are strong powers, but it never became a strong agency. There are conflicting reports on the number of matters the Commission handled during 1959 – 1972. Whatever the number, most were completed in the first two years. From 1963 to 1972 the agency had only seven cases, all minor. In fact, since Chile's government fixed the prices of many products and services throughout this period, it seems doubtful that the 1959 competition law was ever expected to play a major role in preventing enterprises from restricting output and charging monopoly prices.

1.4 General economic policies, 1970 – 1973

Chile's economic policies changed dramatically in 1970, after a Socialist with Marxist leanings was elected president. The government increased hiring and wages, froze prices, and took ownership or control of farms and firms. Meanwhile, inflation soared, productivity shrank, and shortages (and long lines) became commonplace. In September 1973, military leaders overthrew the government and established a new one that immediately began reversing the policies of the past three years.

1.5 Chile's current competition law

Chile's current competition law – the "Law for the Defence of Free Competition" – was adopted in December 1973 as part of the military government's program. A new enforcement agency was in place two weeks later. The new law was and is substantively similar to its predecessor, but it created a new institutional system that remains in place today. The institutions included an enforcement agency, now called the National Economic Prosecutor's Office, an important quasi-judicial body often referred to as the Antitrust Commission, and a number of Preventative Commissions (one Central and various regional). Pending legislative proposals would abolish the Antitrust Commission and the Preventative Commissions and replace them with a new Antitrust Tribunal. Before discussing how enforcement of the competition law has developed since 1973, it is useful to review the economic context in which that development took place. That thirty year period may be broken down into four phases.

1.6 Economic policies since 1973

The military government's major reforms occurred or at least had their beginnings during the period from 1973-1982. At first, the government focused on undoing what its predecessor had done by reducing public sector employment (eventually by 20 percent), returning property that had been illegally seized, and liberalising pricing. (At the outset, the competition law and institutions may have been created largely as a political gesture aimed at calming consumers' fears about price increases.) The government also began a more general liberalisation programme, including unilateral tariff reduction, which by 1975 had evolved into a programme led by a group of civilian "technocrat" economists who were known as "the Chicago boys" for their youth, their ties to the University of Chicago, and their sometimes extreme faith in market mechanisms. By 1982, the government had eliminated all price controls except for natural monopolies, liberalised capital markets, and privatised most tradable goods and some services, including banking. Competition policy was given little weight during this stage of the privatisation program, which led to some problems that are still being addressed, but the competition institutions were reportedly able to build some popular support by striking down economic privileges granted to or by the state. Towards the end of this period, bad loans resulting from an over-valuation of the peso and an almost complete lack of banking supervision led to a serious financial crisis, which apparently persuaded some policymakers that deregulation can be harmful.

From 1985 to, 1990, the government became more pragmatic on economic policy issues, but liberalising of the economy continued. There was more privatization, including in the electricity, telecommunications, and

steel production sectors. Eventually, the competition institutions began playing a more important role in some infrastructure sectors. Although economic reforms were quite successful, the social safety net continued to weaken because of government austerity programs and what was viewed by many as excessive deregulation. It has been suggested that since the government was weakening the safety net while deregulating in order to promote competition, some in Chile incorrectly associate competition policy with laissez-faire economics and hostility to welfare programmes.

In 1990, the military government was replaced by the first in a series of elected civilian governments. Although leaders of these governments had criticised aspects of the economic liberalisation programme, the basic programme has continued, albeit with what is seen as a more balanced approach (e.g., seeking to promote competition but not following a laissez-faire approach). Privatisation began to focus on air and rail transportation, mining, and electricity. Patricio Aylwin Azocar, who was elected President in 1989, took the position that "within an efficient economy there is no room for price controls," and "[t]he market cannot be replaced as a mechanism for consumers to articulate their preferences." Eduardo Frei Ruiz-Tagle, who was elected President in 1993, pursued similar economic policies. Economic growth of almost 7 percent per year facilitated efforts to rebuild the social safety net. Competition law was part of the rules of the game, but enforcement was not a priority, and few resources were allocated to it. However, the competition institutions continued to play an increasingly important role with respect to the activities and regulation of natural monopolies.

Since 1997, economic policy has focused on producing faster growth. Privatisation continued and is almost complete. Attracting capital was difficult, which led to a greater focus on investment and productivity, which in turn led to capital market reform and to a 1999 law that almost doubled the staff of the Prosecutor's Office (to about 60 people) while also increasing salaries and relaxing civil service requirements so the Office could obtain a more professional workforce.3 The new amendments proposed by President Ricardo Lagos Escobar, who was elected in January 2000, indicate that competition law enforcement has again become more of a priority, and in the future Chile's competition institutions could become much more important contributors to the country's economic efficiency and the overall welfare of its citizens.

2. The goals of Chile's competition law

Chile's government regards the principal goal of its competition law as being to promote economic efficiency with the expectation that in the long run this maximises consumer welfare. The law does not express this (or any other) goal, though, and it contains one provision that implies a non-efficiency goal. For at least the first fifteen years, Chile's enforcement institutions gave decisive weight to a variety of values other than efficiency and consumer welfare. The absence of specific goals in the law, combined with a shift toward emphasis on efficiency in practice, is a pattern found in many OECD countries. One of the proposed amendments would add a statement of purpose to the law, that its objective is the "protection of competition."[4] Stating that goal explicitly would tend to make it more difficult for parties to invoke goals that are unrelated to competition or efficiency.

Both the shift in emphasis and the continuing relevance of non-efficiency goals are important. Three key issues are:

- whether the standards for assessing allegedly unlawful conduct have shifted to reflect the new efficiency orientation;
- whether and when non-efficiency goals change the normal analysis; and
- whether the business and the public are fully aware of the current interpretation of the law's goals and the legal standards applicable in different kinds of cases.

THE GOALS OF COMPETITION POLICY; CONSISTENCY WITH OTHER SOCIAL GOALS

This report focuses on the goals of Chile's competition law, as contrasted with the goals of its competition policy. In applying their laws, countries have differing priorities and non-efficiency goals, but in a fundamental sense the core goals of competition policy do not vary.

The term "competition policy" is used in different ways. Sometimes it is a synonym for competition law, and sometimes it refers to a set of policies of which competition law is a part. Often, and in this report, it refers to an approach to government regulation – an alternative to central planning, laissez-faire, and command-and-control – whose essence is that laws and regulations should not contain restrictions on competition and consumer choice that are not necessary to achieve their goals. Competition policy in this sense is complementary to competition law, but distinct from it. Some countries have formalised this sense of "competition policy." A notable example is Australia, whose explicit National Competition Policy, overseen by a National Competition Council, provides that regulations should not restrict competition unless it can be shown that the benefits of the restriction to

the community as a whole outweigh the costs, and the regulatory objectives can only be achieved by restricting competition.

There is broad international consensus that the "core" goals of competition law and policy are promoting and protecting the competitive process for the benefit of economic efficiency and consumer welfare. Discussion of this topic at the February 2003 meeting of the OECD Global Forum on Competition also disclosed, however, that countries with developing economies may find it important to pursue non-efficiency goals, at times giving them primacy. For example, some argued that small economies should pay particular attention to claims that a merger will permit realisation of economies of scale, but others said that in developing economies it may be preferable to give more weight to preserving a competitive market structure, even at the cost of some efficiencies. In addition, most OECD countries are tending to eliminate "public interest" goals, such as export competitiveness, promoting small business, or maintaining employment levels, but it is not uncommon to find such goals in the laws of developing economies.

Applying competition law can create conflicts with other policies, if it prohibits conduct that the other policy goal would permit or even require. To avoid a conflict, the competition law must provide for exemption or exclusion. By contrast, competition policy does not present a conflict with other societal goals such as protecting consumers from unsafe products or providing for disadvantaged members of society. Competition policy does not elevate competition over other values, maximise competitive rivalry at the expense of other goals, or prevent government regulation that promotes other values. Instead, it aims at maximising the welfare of society by preventing the economic inefficiency and waste that is caused when laws and regulations *unnecessarily* limit the ability of enterprises to respond efficiently to consumer demand. While individuals and societies often differ on what restrictions are in fact necessary to serve other social goals, there is no real disagreement with competition policy's goal of increasing society's welfare by increasing efficiency and competition and decreasing economic waste and misallocation of resources.

By calling attention to the costs that overly broad government restrictions impose on society, competition policy is a tool that can help policymakers choose an efficient regulatory system whenever they conclude that some restrictions on competition are necessary because of market failure or other factors. Several examples may help make this point.

–In Canada the Competition Commissioner pointed out, in support of electrical industry restructuring, that market-oriented reform could be done in a way that was not only consistent with environmental objectives, but could actually help to achieve them.

–Although licensing requirements and government standards can be beneficial when health or safety is involved, they can harm consumers if they are so broad that they ban efficient conduct. In the United States, competition policy showed that bans on providing optometry services in commercial settings such as shopping centres raised costs without providing offsetting benefits.

Competition policy can help strengthen the "safety net" for the disadvantaged. Chile's competition-oriented approach to telecom provides service efficiently and at lower cost, leaving consumers and the government more resources to spend on other essentials. And as a

sort of "applied microeconomics," competition policy might be useful in reforming aspects of Chile's health regulations, which reportedly create perverse incentives that unduly limit care.

The terms "economic efficiency" and "consumer welfare" typically refer to "consumer surplus," as opposed to "total surplus" or to a subjective measure of consumers' interests. Here, "consumer welfare" is conceived in terms of the overall benefits to consumers as a group. Efficiencies may benefit the group as a whole even though they have differential impacts and may put some particular consumers in a less advantageous position. This conception is a useful reference point, although there is no consensus definition of economic efficiency or consumer welfare. Express or implied goals that have some relationship to competition, but not necessarily to economic efficiency, can include protecting small business, preserving consumer choice, preventing increases in concentration, or ensuring that firms have freedom to compete. Treating such goals as decisive can permit anticompetitive conduct or prevent the realisation of efficiencies that would benefit consumers. For example, consumer choice and freedom to compete are both general competition policy goals, but they may sometimes be inconsistent with the use of efficient vertical restraints.

In Chile, for at least the first fifteen years of enforcement, the competition institutions apparently considered the freedom to compete more important than economic efficiency. During that period vertical restraints such as exclusive dealing and exclusive territories were essentially *per se* illegal because they prevent other firms from serving as distributors. There was no consideration of whether the restraints had efficiency justifications and so might benefit competition and consumers.[5]

Chile's original approach recognised the importance of economic freedom as a value in Chile. The competition law bans restraints on "free competition in business activities," and a 1979 amendment added a ban on restricting the "freedom to work," which seems to have been intended to ban requirements that a professional join an organisation in order to work. Similarly, like the constitutions of many European countries, the 1980 Constitution gives citizens a right to exercise any economic activity. Most competition enforcers around the world at that time put substantial – sometimes decisive – weight on the goal of preventing restrictions on firms' autonomy. Chile's recent enforcement record contains examples of a more efficiency-oriented approach, which focuses on the impact of a restraint on the market rather than its effect on one or more firms. Nonetheless, the Constitutional and statutory emphasis on freedom suggests that Chilean competition cases may continue to give special weight to this value, perhaps even when doing so might seem counterproductive to advocates of a strict efficiency-based approach.[6]

In addition to competition-related goals, some countries either assign other "public interest" goals to competition law or permit competition law's economic efficiency and consumer welfare goals to be over-ridden in order to protect a policy objective unrelated to competition. These public interest goals, many of which are elements of "industrial policy," include promotion of employment, regional development, national champions (sometimes couched in terms of promoting an export-led economy or external competitiveness), national ownership, economic stability, anti-inflation policies, social progress or welfare (measure by some standard other than consumer welfare), poverty alleviation, the spread of ownership (or wealth) to historically disadvantaged persons, and national security. Including them in competition laws or permitting them to override decisions in competition cases reduces predictability and certainty, though, and their ambiguity facilitates invoking them to favour politically strong special interests, despite their "public interest" description. Moreover, mechanisms other than competition policy are generally more efficient and effective in achieving these goals.

Chile's competition law contains one unusual provision implying a non-efficiency goal. In 1979, the law's list of acts that tend to restrain free competition was amended to recognise the freedom of workers to unionise and to "bargain within each company." Thus, it became a competition law violation to interfere with unionisation or intra-firm collective bargaining. Because unionisation and collective bargaining restrict competition among labourers and could be considered cartels that lacked an efficiency justification, but they are valued for their role in promoting social goals, most competition laws specifically exempt them. The provision may have been intended to distinguish bargaining within a company from industry-wide bargaining. By implication, interfering with industry-wide bargaining might not violate the competition law.

Chile's competition institutions have sometimes given decisive weight to non-efficiency goals that are not mentioned in the law. For example, the military government's unilateral tariff reductions in 1974 and the economic crisis of 1982 both created widespread concern about unemployment, and at least in merger cases the competition institutions reportedly considered the prevention of unemployment, local hardship, bankruptcy, and "the public interest" to be factors that might justify an anticompetitive merger. Sometimes, this was done by the Prosecutor's Office or the Commissions, apparently with little or no explanation of how these different interests were being balanced. On other occasions, the law's special exclusion process was used, with an executive decree and Antitrust Commission report finding that an otherwise illegal merger was necessary for the stability or development of domestic investments.

The competition institutions have clearly moved away from these non-efficiency, non-competition goals. Indeed, some statements seem to imply that economic efficiency is not merely the principal priority, but the only real goal of the law. Thus, innovation and consumer welfare are regarded not as goals in themselves but as the expected result of efficiency, while unfair competition is a priority only if it affects the market as a whole, and market structure matters only if it relates to conduct that harms the market as a whole. Protecting small business is said not to be a priority. Under this description, this is as "pure" an efficiency-based system as exists anywhere today.

On the other hand, one cannot help but suspect that non-efficiency goals have continued to play a role. They may help explain why Chile has brought relatively few challenges to potentially anticompetitive mergers. They may also help explain the result in some of the cases. For example, in 1994 the Antitrust Commission considered an appeal by Chile's two largest airlines of a Preventative Commission decision that their merger would be anticompetitive. The combined firm would have close to 85 per cent of all domestic passenger traffic. The airlines did not offer a conventional failing firm defence, with claims or evidence of imminent bankruptcy or even of unprofitability. Rather, they claimed that their long run sustainability was in danger because they could not achieve scale economies, apparently without offering evidence concerning these economies. The Antitrust Commission's decision said that the merger would produce efficiencies, but did not explore the issue or consider whether efficiencies would offset deadweight loss. Instead, the Commission apparently permitted the merger on the ground that the market was contestable and that potential entry would be sufficient to prevent the merged firm from exercising market power.[7] But the Commission ordered the firm to set up a "self-regulatory" pricing system that tied its tariffs on noncompetitive routes to those on competitive ones, suggesting that the Commission was not confident that potential competition would keep pricing competitive. That ambivalence implies that industrial policy may explain this result better than competition policy. Interestingly, three years later, the Antitrust Commission fined the merged firm and one other for engaging in predatory pricing to drive out a small airline by offering large discounts on the one route on which the small airline was competing with them.

The competition institutions' handling of recent mergers in the banking sector also led some to question the institutions' view of the law's goals. A merger of two large Spanish banks that also operate in Chile gave the merged firm 27 per cent of the national market. The Prosecutor's Office challenged the merger as anticompetitive. The action led to a dispute over whether Chile's bank supervision laws created an implied exclusion from

the competition law. The Antitrust Commission found that it had jurisdiction to consider the merger, but also found that the merger was not anticompetitive. This outcome may have been influenced by the enactment of legislation permitting easier entry for by banks. Shortly thereafter, two large Chilean banks merged, creating a bank with 20 per cent of a national market in which the top five firms have a 70 per cent share. The competition authorities' failure to challenge this merger led to some to suggest that the Prosecutor's Office was applying a looser standard to the mergers of domestic banks.

A provision in a law to protect free speech is perceived as a statement that competition law has a special role in preventing undue media concentration. The Preventative Commissions are required to be consulted on all mergers or acquisitions involving the transfer of television and radio stations, and they must decide within 30 days whether the transfer would be anticompetitive. Special rules or standards are commonly found in many countries, in part because there is no consensus on how (or whether) competition law can provide a principled way to address these issues.

Another non-efficiency goal, fairness, may underlie the recent "general instructions" on price discrimination in the marketing and distribution of pharmaceuticals by laboratories, central distribution warehouses, importers, and drug stores. The government lowered entry barriers and eliminated price caps and maximum mark-ups, which led to a period of vigorous price competition characterised in part by secret discounts. After bringing several specific price discrimination cases, the competition institutions issued a "general instruction" requiring all market participants to make, and adhere to, public and non-discriminatory price lists. The instruction placed a restriction on firms' freedom to offer secret discounts, and did so in a competitive market in which (presumably) none of the firms had market power. Therefore, in this situation, it appears that fairness concerns (a dislike for secret discounts) prevailed over both economic freedom and economic efficiency. (The Prosecutor's Office is currently seeking fines against a number of firms that failed even to create and maintain published price lists. Such follow-up on compliance with Commission orders is very valuable as a means of establishing credibility as a strong enforcement institution).

The evolution of Chile's position toward an emphasis on efficiency has not been clearly and consistently explained. Some business representatives and academics say that they are uncertain concerning the proper means of assessing dominance and the legal standards applicable to some kinds of conduct, and there appear to be grounds for their position. Competition officials note that Chile is a civil law country, but it should be possible to reduce uncertainty in such a setting. Competition law enforcement in Chile

has reached the point at which clarification of the applicable legal standards seems very important to the country's productivity. The Prosecutor's Office should consider preparing and issuing nonbinding enforcement guidelines that explain the Office's views on the law's goals and applicable legal standards. The new Tribunal should clarify applicable legal standards by writing decisions that articulate the elements of a violation (and the probative value of particular forms of evidence) in terms that relate to the law's goals. Enforcement guidelines – or policy statements, articles, speeches, etc. – could serve an important competition advocacy function, as well as increasing transparency, if they sought to explain the law's primary policy goals, how competition enforcement promotes those goals, the key components of the analytical framework used by the Prosecutor's Office for deciding whether firms' conduct or mergers are illegal, how efficiency considerations are weighed, and how the legal standards relate to achieving the law's goals.

3. The content of the competition law

3.1 The competition institutions

The 1973 law created a tripartite institutional framework – an enforcement agency (the Prosecutor's Office), a special tribunal (the Antitrust Commission), and a number of largely advisory Preventative Commissions. Proposed amendments would replace the Antitrust and Preventative Commissions with an independent Antitrust Tribunal.

The National Economic Prosecutor heads the agency that investigates and brings enforcement cases. The Prosecutor, who must be a lawyer, is appointed by the President of Chile and may be removed by him at any time. For budget purposes, the Prosecutor's Office ("Office") is part of the Ministry of the Economy, but the Prosecutor independent of the Ministry. By law, he is subject to the supervision of the President through the Ministry of Economy, and is directed by law to "discharge its duties independently," to "defend the interests entrusted to him . . . based on his own discretion," and to represent "the general economic interests of the community." There is also a tradition of independence by the Prosecutors. Despite the current move to replace the Commissions with an independent Tribunal, there has been no call for greater independence for the Prosecutor's Office.

The Office has not been powerful, although most of the Prosecutors have been highly respected and influential individuals. Until 1999, when the Office was able to nearly double its size (to about 60 people) and pay higher salaries, the Office was generally seen as a "second-tier" agency and had insufficient resources because its mission was not considered sufficiently important. There is wide agreement that the Office did not at first take advantage of its new resources to become as strong as it could be, but that recent management changes and reorganisation may now make that possible. The current Prosecutor, appointed in August of 2001, is a well-respected career civil servant, a lawyer and sometime law professor who was Head Counsel in Chile's Securities and Exchange agency, served as a member of the Antitrust Commission in 1994 – 1996, and worked briefly for the old Antitrust Commission in 1972.

The Prosecutor has reorganised the Office, which now has three main enforcement departments. A new Legal Department is mainly responsible for conducting investigations. There is also an Economics Department with seven economists who mainly work with lawyers on the investigations. A new Regulated Markets and Technical Analysis Department is composed mostly of "industrial engineers" – economists with special training in regulated industries – who work on regulatory issues generally, but also perform some day-to-day case work. Reflecting the Office's increased

interest in competition advocacy and in participating in international co-operation, a new Department of Studies and International Affairs has been created. Another Department serves as the Secretariat to the Commissions. One person in each region serves part-time as Region Economic Prosecutor, a position that would be abolished by the proposed amendments. A Deputy Prosecutor assists the Prosecutor in overseeing the operations of these Divisions and individuals.

The Preventative Commissions (Comisiónes Preventivas) are the most unusual element in Chile's institutional structure. Often described as consultative organs, these Commissions were charged with answering questions and determining how individuals, firms, and government entities had to deal with activities that restrict competition. They also can direct the Prosecutor's Office to conduct investigations and may issue orders to halt any conduct they find illegal. In addition, at the request of the Prosecutor's Office, they can (a) issue interim orders that for 15 – 30 days suspend anticompetitive agreements or set maximum prices, and (b) request any governmental entity to exercise its regulatory powers to prevent harm from conduct that is under investigation. The Central Preventative Commission, which has jurisdiction over Santiago and matters involving more than one region, consists of a representative of the Ministry of the Economy (who serves as chair), a representative of the Ministry of the Treasury, two university professors (a lawyer and an economist) appointed by the "Rector's Council of Chilean Universities," and a representative of the Neighbourhood Associations. It meets one half-day per week. There are 11 Regional Preventative Commissions, some of which have not taken any decisions in recent years. All commission members serve without pay.

The Antitrust Commission (or "Resolving Commission": "Comisión Resultiva") is the highest body in the Chilean competition system. Its nature is that of a special court. It is not an organic part of the judiciary, but is chaired by a judge from the Supreme Court and is subject to the Court's supervision. Its other members are Chiefs of Service from the Economy and Treasury Ministries, a law school dean, and a dean of an economics department. The Commission's main function is to decide cases brought by either the Prosecutor's Office or private complainants. (When a case is initiated by a private complaint, the Prosecutor's Office may choose whether to participate as a party, though the Commission can ask the Office for a report.) In addition, the Commission may (but rarely does) open an investigation on its own initiative, and it may in appropriate cases call upon police assistance in "lock-forcing" and executing search warrants. It also decides appeals concerning the Prosecutor's information requests and the Preventative Commissions' decisions. It has the broadest remedial powers; its remedies may involve fines, cease and desist orders, dissolving or

restructuring businesses, and disqualifying individuals from holding office in professional and trade associations. Commission members meet one half-day per week. The members of this Commission too serve without pay.

The Commission also has other, less judicial powers. Sometimes an investigation by the Prosecutor's Office does not lead to a legal challenge, but rather to a report that discusses competitive conditions in a market and urges the Commission to propose the modification or abolition of laws or regulations that are creating competition problems. Also, in addition to issuing binding orders to entities found to have violated the law, the Commission may issue "general instructions" – binding rules that direct all members of an industry to act in particular ways in order to avoid restraining free competition. The previously mentioned general instruction against price discrimination in the pharmaceuticals industry is one example. In another recent situation, acting on a request by the Central Bank, the Commission "instructed" department stores and other suppliers of retail credit to adhere to the same interest rate disclosure rules that the Superintendency of Banks imposes on financial institutions within its jurisdiction. The rationale for the instruction appears to be the prevention of unfair competition by providers of credit that are not covered by the Superintendency's rules.

In addition, the Antitrust Commission currently plays a role in determining when the normal competition rules do not apply, though this system is proposed to be abolished by the new law. A "well-founded positive report" by the Antitrust Commission is required before the state may confer a monopoly on a private party or authorise conduct prohibited by the competition law. Similarly, the laws regulating the telecom and electricity sectors provide that the regulator may set tariffs only when the Antitrust Commission finds a lack of competitive conditions. The exercise of these powers is described in more detail below.

As a result of orders it has issued in cases involving government procurement and licensing, the Commission has jurisdiction to oversee aspects of those processes. In 2001, the Commission had five cases in which it reviewed whether requests for bids meet the standards laid down in an earlier Commission decision.

Resources

The Prosecutor's Office's budget is funded almost entirely by the allocation it receives each year in Chile's Budget Law. For budget purposes, the Office is part of the Ministry of Economy, but it has a separate budget line. Until 1999, the Office was never authorised to have more than about 35 posts. In 1999, legislation intended to improve competition enforcement increased the number of posts to 60 and authorised higher salaries, while also liberalising civil service rules so that the Office could hire qualified

employees. The Office's resource levels in the last five years are set forth in Annex A, Table A-1.

There is no budget for the Antitrust Commission or the Preventative Commissions. The Commissioners are not paid for their work. A separate Department in the Prosecutor's Office serves as the Secretariat for the Commissions. Under the proposed amendments, the Tribunal would become a separate, independent body with its own budget and staff.

Procedures

The Prosecutor's Office must investigate all legally valid complaints and may open investigations *ex officio*. The latter used to make a substantial share of the Office's workload, but the percentage of such investigations has fallen significantly in the last few years. The decline in *ex officio* investigations could be problematic if it develops that the Office does not aggressively look for indications of possible illegal conduct. Upon notice to the chair of the Antitrust Commission, the Prosecutor may declare investigations confidential and may obtain police assistance. The Prosecutor must ordinarily provide notice to the target of an investigation, but the Antitrust Commission may waive this requirement when notice would jeopardise the investigation. The Prosecutor has the power to compel the production of documents and the co-operation of public agencies, state-owned entities, private firms, and individuals. Public officials must keep confidential all information they obtain by reason of their duties, except that such information may be used in enforcement activities and in proceedings before the Commissions or courts. Interference with an investigation by the Prosecutor's Office is punishable by imprisonment for up to 15 days.

The results of investigations by the Prosecutor's Office are usually set forth in a "report" – essentially an administrative decision – that is delivered to a Preventative Commission or the Antitrust Commission. If the Office decides that an official proceeding should be begun, the report is accompanied by a "*requerimiento*" – a formal charge seeking a fine or other remedy. The report is a matter of public record.

Preventative Commission and Antitrust Commission procedures are governed by the competition law and other laws, with Antitrust Commission procedures being more detailed and formal. A complaint by the Prosecutor's Office or a private party to the Antitrust Commission must be answered within 15 days. Thereafter, although the procedure is primarily a written one, there is generally a 10-day "discovery" period; during the first two days of this period, interested parties may designate up to four people to testify under oath on specified "points of proof," and other forms of evidence may be submitted throughout the period. A single Commissioner hears the testimony. Even with a limited number of witnesses, this initial taking of

testimony may take weeks, because it seldom takes place more than one half-day per week. The testimony is transcribed and becomes part of the record of the case, together with the parties' documentary submissions and any evidence the Commission obtains on its own. Eventually, the Commission calls for a "hearing," which consists of oral argument by counsel for the parties. In theory, the Commission then issues a decision within 45 days, but this limit is often extended; in two ongoing cases, the time period has been extended for very long times.

Proceedings can take a long time, because of the part-time nature of the process and because there can be long periods between the designation of witnesses and the taking of testimony, between the taking of testimony and the "hearing," and between the hearing and the final decision. Casework sometimes continues during these periods, but in private cases long periods may go by in which little or nothing is happening. Even cases brought by the Prosecutor's Office are sometimes subject to long delays. It is possible, though, for cases to proceed more rapidly. In July 2002, a mall complained that another mall's restrictions on its tenants' activities were illegal. In December, the Prosecutor's Office decided that the restrictions were illegal and presented the case to the Antitrust Commission. There was no discovery period, oral argument was held in January 2003, a decision was issued in mid-March, and the decisions was affirmed by the Supreme Court before the end of the year.

Individuals may make complaints to the Prosecutor's Office without being represented by counsel. As a legal matter, complaints to the Preventative Commissions may be made by individuals, but by tradition they are made by counsel. By laws, all complaints to the Antitrust Commission must be made by counsel. Overlaps in the authority of the different competition institutions to open investigations, together with a complex set of rules about taking appeals from negative decisions by the different institutions, have created a situation in which experienced practitioners engage in "forum shopping" to gain advantages.

Parties other than the Prosecutor may appeal Antitrust Commission orders to the Supreme Court only if they require the dissolution or restructuring of a firm, the disqualification of an individual to hold certain positions, or the payment of a fine. The Prosecutor may appeal such orders and also any decision finding that a defendant did not violate the law.

The decisions of the Commissions are public. A private firm has published the Antitrust Commission's decisions up to 2000. In a major new initiative, the Prosecutor's Office has prepared a database containing summaries of 334 Antitrust Commission rulings and 344 Preventative Commission rulings, and is publishing the databases on its website.

Additional summaries are being added, and will call attention to key points in addition to being summaries. There are plans to publish by year's end the full text of the nearly 2,000 rulings that have been handed down since the law was adopted.

The Prosecutor has recently decided that the Office's "reports" on investigations should also be included on the website, and 17 are ready to be posted. This is an important development, because the reports are public records that can be obtained on request but have never before been published. The reports apparently contain relatively detailed interpretations of the law and applications of it to the facts at issue, and their earlier publication would undoubtedly have meant less uncertainty about applicable legal standards. However, given the current level of uncertainty, the time it will take to publish all reports and rulings, and the fact that even the collected reports and rulings is not likely to provide an overall analytic framework for interpreting the law or an up-to-date interpretation of some of its provisions, one of the most important recommendations of this report is the issuance of enforcement guidelines or policy statements.

Remedies

The Prosecutor's Office may seek criminal sanctions for violations of the competition law, but in practice this does not occur.

The maximum fine is approximately US$ 230,000, but fines are rare and seldom approach this maximum. In fact, as discussed further below, during almost 30 years of competition enforcement, fines have been imposed in only 73 cases (including 9 horizontal, 4 vertical, 43 monopolisation) and have totalled less than US$ 1,000,000. The average fine has been about US$ 13,500. The Antitrust Commission's highest fines on average (about $55,000) were in eight unfair competition cases, and the Supreme Court has on average reduced the Commission's fines by almost 50 percent. The proposed amendments to the law would increase substantially the applicable civil fines – to US$ 15,300,000 – and eliminate the criminal sanction. The amendments also provide for fining directors, administrators, and all who have acted in furtherance of the illegal conduct, and will make directors, administrators, and those who have benefited from the conduct, secondarily liable for the fines imposed on their firm.

The competition law does not provide any "consent" or other formalised procedure to dispose of a matter with a binding negotiated order and/or fine. This may essentially force firms to engage in a full defence of their conduct even when they and the Prosecutor's Office could settle the matter in a much less costly manner. The proposed amendments include a "conciliation" procedure, which will apparently permit the Prosecutor's Office and a party to agree to a negotiated order, subject to its acceptance by

the Tribunal. This is a significant step, although the amendment apparently would not authorise the Prosecutor's Office and a party to send the Tribunal an agreed proposal to terminate a matter on the basis of a negotiated order and fine.

In general, anyone harmed by the illegal action of another has the right to sue in court for damages caused by that action. In competition matters, no damages can be awarded unless a Commission has found that the defendant violated the law, because a civil court would not be competent to make that decision of illegality. There may be another avenue for private suit under the 1980 Constitution. Anyone who is denied a constitutional right has a remedy – "recourse to protection" – in the Court of Appeals. This might be a means for obtaining a court order against anticompetitive conduct. Competition officials do not follow private litigation under these general principles of Chilean law, and they do not know how frequently they have been used in the competition area.

Proposed new enforcement structure

The main purpose of the pro-growth agenda's proposed competition law amendments is to create an independent Competition Tribunal to replace all of the Commissions. The relevant amendments, which are currently being discussed in the legislature, would subject candidates for membership to a public examination of their qualifications, require a minimum of two days of work per week on the Tribunal, provide funding for up to three days of work per week, provide a clear separation of functions between the Tribunal and the Prosecutor's Office, and provide complete independence from the government.

3.2 The law's substantive framework

Article 1 of the law contains a very broad prohibition of acts or agreements "attempting to restrain free competition in business activities." This ban is a criminal provision, but the law's civil aspects predominate. As amplified somewhat by Article 2's illustrative list of conduct deemed to tend to restrain free competition and Article 6's passing reference to "any abuse incurred by whosoever monopolises a business activity," Article 1's ban is the basis for all enforcement actions, whether they involve horizontal agreements, vertical agreements, monopolisation (abuse of dominance), mergers, or unfair competition. Both the generality and the criminal nature of the initial ban are consistent with the view that the law was based on the United States' Sherman Antitrust Act. Chile is primarily a civil law jurisdiction, though, and thus neither its law nor its practice looks to United States cases as a guide.

Article 2 is an illustrative list of anticompetitive arrangements. It sets out five specific categories of "actions or agreements" covered by Article 1. A sixth section clarifies that the list is illustrative, not exhaustive, by referring to any other action for the purpose of eliminating, restraining, or hampering competition. The first, third, and fourth categories are standard; but the second and fifth are unusual. The categories include actions or agreements that relate to the following:

- *The distribution of quotas and reduction or suspensions of production*. This apparently applies to horizontal agreements, and the covered agreements would constitute hard core cartels.

- *Transportation*. It is unclear why the transportation sector is mentioned specifically. At least in recent years, this provision has not had any impact on how transportation cases are handled.

- *Trade or distribution, such as imposing quotas, allocating territories, or exclusive distribution.* This covers a variety of non-price vertical restraints. Some believe that it also covers horizontal market allocation, though this would appear covered by the first category.

- *Determining prices of goods or services.* This applies both to horizontal price fixing agreements and to resale price maintenance.

- *The freedom to work, unionise, and bargain.* This unusual provision is discussed above in connection with the goals of Chile's law.

There is some continuing uncertainty about the legal effect of Article 2. In the early years, the Prosecutor's Office and the Commissions apparently took the position that Article 2 was not merely illustrative of conduct that *tends* to restrain free competition, but a declaration that the listed forms of conduct are always (or *per se*) illegal. That approach justified the condemnation of non-price vertical restraints without consideration of efficiencies or market power. The competition institutions no longer take that approach to vertical restraints, and this has been interpreted by some as a recognition that Article 2 (a) is merely illustrative of conduct that *can* violate Article 1, and therefore (b) does not establish or authorise the application of a different legal standard.[8] This argument implies that Article 2 does not authorise *per se* treatment of any competition law violations, including hard core cartels, resale price maintenance, and unfair competition. On the other hand, competition officials generally take the position that hard core cartels are illegal *per se*, basing this position on either

Article 2 or on a flexible interpretation of Article 1. The argument based on Article 1 seems significantly more persuasive.[9]

The amendments proposed as part of the pro-growth agenda will revise the list in Article 2 to drop the two unusual items and to set forth more precise descriptions of the covered conduct. The agenda mentions: (a) explicit or implicit agreements or collusive practices whose object is to fix resale or buying prices, limit production, or allocate zones or quotas; (b) the abuse of a dominant position by an enterprise or group of enterprises with a common owner by fixing buying or selling prices, tying arrangements, allocation of markets or quotas, or other similar conduct; and (c) predatory practices to gain or increase a dominant position. The amendment appears to drop nonprice vertical restraints from the list. If Article 2 is the law's authorisation for use of the *per se* rule, dropping nonprice vertical restraints codifies the current practice of using rule-of-reason analysis to assess such agreements. However, the new language does not answer the important and long-running question whether Article 2 justifies subjecting the listed forms of conduct to the *per se* rule.

3.3 The law's coverage

Article 1's ban applies to all individuals, to all enterprises (regardless of state ownership), and in some circumstances to government ministries or other agencies. An unusual feature of Chile's law, which it shares with Russia and some other transition countries, is that it applies to some extent to decisions by government ministries or agencies even when they are acting in a regulatory capacity, and not just when they are acting in a proprietary capacity. It has been applied to discriminatory government action that creates an "unlevel playing field." The law is not interpreted as covering governmental "output restrictions" in the form of non-discriminatory quality standards or other limitations on who may enter a market. On the national level, the law has been applied to the Ministry of Transportation, the Telecommunication Undersecretary's Office, the Electricity and Fuels Superintendency, the General Waters Directorate, and the State Procurement Directorate. It also applies to municipalities.

Virtually all competition laws have an express or implied exclusion for conduct that is required by law, including private action that is authorised by government regulations or official decisions. In general, the basis for this exclusion is a concern that applying competition law could or would interfere too much with other government regulation. Chile's position concerning regulated conduct is unclear. With respect to competition actions against government entities acting in their regulatory capacity, Chile has apparently attempted to avoid interfering with legitimate government regulation by limiting the law's coverage to discriminatory regulations or

conduct. Deciding what is discriminatory can be difficult, however, and there is some potential for interference with legitimate regulation. On the other hand, excluding executive action from the law's coverage would prevent use of a tool that Chile, Russia, and some other countries have found very useful. Deciding when private conduct is "sufficiently" regulated pursuant to some other policy to warrant an exclusion is itself a significant policy problem.

Industry-wide exclusions

There are no express exclusions in the competition law. As in other countries, statutory monopolies do exist and there are instances when laws (such as those governing intellectual property) grant exclusive rights. Since possession of a monopoly is not a violation, these laws do not actually create exclusions, as long as abuse of the monopoly or exclusive right is subject to the law. In Chile, this is generally, and perhaps universally, the case. For example, Chile accords the usual kinds of intellectual property rights, and also provides that anticompetitive use of those rights can be penalised under the competition law. Chile's Constitution provides that the state is the sole owner of all mines, regardless of who owns the surface land; this includes ownership of the right to explore for and exploit liquid and gaseous hydrocarbons. It appears, however, that the competition law would apply if the state acted to abuse its monopoly. There is no express exclusion for labour, but the Constitution and other laws guarantee the right to create unions and to engage in intra-firm collective bargaining. Under common principles of statutory construction, there is an implied exclusion for the agreements that are inherent in those processes. The Antitrust Commission once declined to rule on a minimum fee schedule for engineers on the ground that labour is not subject to the law. That interpretation has not been tested recently, since other laws authorise such fee schedules if they are strictly voluntary, but competition officials believe that the Commission would today find the law applicable in such a case. There is nothing to suggest that labour organisations are excluded from coverage. There is no express exclusion for agriculture, and since there have apparently been no cases challenging, for example, farmers' co-operatives, there are apparently no decisions that explore the extent to which the extensive government regulation of farmers creates an implied exclusion. In a recent bank merger case it was argued that the bank supervision law exempted such mergers from the competition law, but the applicability of the competition law was confirmed.

Other Exclusions

Article 4 provides that private parties may not be provided a monopoly to carry out business activities. This provision is interpreted as stating the

general rule that except through legislation, the state may not grant a monopoly to private parties or authorise them to engage in conduct banned by Article 1; such grants or authorisations may ordinarily be given only to "governmental, semi-governmental, public, autonomous, or municipal organisations." If national interests are at stake, the President of Chile may permit a private party to be given a monopoly or authorised to engage in conduct covered by Article 1, but to do so he must issue a well-founded executive decree, based upon a well-founded positive report by the Antitrust Commission. Since the President must obtain a positive report from the Commission, this process seems less a public interest override than a reflection of Chile's unusual ban on grants of monopoly rights. In the 1970s and 1980s, this process was used on several occasions, primarily to authorise mergers that were considered necessary for one or both of the parties to survive, but the process has not been used in recent years and it seems likely to be eliminated by the proposed amendments.

4. Substantive competition law violations

Chile's very broad ban on acts or agreements that attempt to restrain free competition provides a sufficient basis for a full range of competition enforcement. A significant number of basic substantive issues appear to be unresolved, though, because principles have evolved yet explanations of the law's requirements have been infrequent. In the early years, agreements within the categories of Article 2 were essentially illegal *per se*. Increasing use of economic principles has meant moving away from rules that were clear, although arbitrary and sometimes perverse. Rulings of the Preventative Commissions have sometimes explained their reasoning in a manner that could provide predictability and certainty, but those rulings are not definitive. The Supreme Court decisions are definitive but cannot be expected to develop basic competition law jurisprudence. The Antitrust Commission, which would be expected to develop and explain competition law jurisprudence in a definitive manner, has been hampered by its lack of resources.

Among the issues that have apparently not been systematically or definitively addressed are the following:

- Does Chile continue to have *per se* rules? If so, what conduct is illegal *per se*? Some academics and government officials say that the law requires use of the rule of reason in all cases, and some competition officials have claimed that they are required to prove excess prices or profits, as well as entry barriers, even in price fixing cases. Other competition officials view cartels as illegal *per se* but are less certain about the status of resale price maintenance and unfair competition.

- If hard core cartels are not now considered illegal *per se*, should they be? Would law enforcement be better able to contribute to Chile's economic efficiency and growth if it used a *per* se approach, under which certain agreements are irrebuttably presumed to harm competition and to be unjustified?

- If the rule of reason is used, what must be proved to establish a violation? Agreements that are not illegal *per se* can sometimes be condemned without the extensive market definition and market power analysis that would be involved in, for example, an abuse of dominance case.

- Is resale price maintenance illegal *per se*? A recent case seems to say no, but some officials say that this may not be the case.

- Should the competition law ban unfair competition that has no effects on the market as a whole? Some value the ability to condemn forms of unfair competition that have no other remedy. The principle that unfair competition violates the law even without market-wide impact may be well enough established that new legislation would be required to take a different approach.

- How are product and geographic markets defined? What is the test, and what evidence is required? There is apparently no general definition of "product market" or "geographic market," and no general procedure for defining markets in particular cases.

- Are dominant position and market power the same thing? If there is a difference, what difference does it make in an actual case? What is the test for whether a firm has a dominant position or market power? What kind of evidence is useful, relevant, or required? Is dominance or market power presumed if a firm has a market share above a certain level? Must there also be some showing of barriers or impediments to entry? At what market share does the presumption arise? How can this presumption be rebutted? Could any market share or concentration safe harbours be identified, as in the guidelines of various OECD jurisdictions?

- In merger cases, are there presumptions based on market share? What is the significance of entry barriers? Chilean officials have said that they apply both a "dominance" test and a "substantially lessen competition" test in merger cases. What does this mean, in terms of what must be shown to make a *prima facie* case? What must be shown in order to establish an efficiency defence? Rules or principles governing these questions are important for substantive merger analysis, whether or not Chile continues not to have a premerger notification system.

The most interesting and unusual aspect of Chilean competition law enforcement is how much of it has involved infrastructure industry monopolies. It has been suggested that many South American countries erred in beginning with a North American model, because that model is not necessarily well suited for addressing fundamental problems that follow a history of state intervention in economic activity.[10] By concentrating first on infrastructure monopoly, Chile appears to be an exception.

The following discussion of how the competition law is applied to particular restraints contains some mention of the number of different kinds of cases considered by the Antitrust and Central Preventative Commissions during the period 1974 – 1993 and in 2001. Such information reflects statistical analysis that is set forth in Annex B to this report.

4.1 Horizontal agreements

During the 1974 – 1993 period, the Antitrust Commission apparently ruled on 45 horizontal agreements, finding 29 lawful and 16 unlawful. The Central Preventative Commission handled only six such cases and found five violations. Available data do not show how many of these cases involved agreements among competitors that were integrating their operations (*i.e.*, potentially efficient joint ventures), how many involved price fixing or other agreements that would be "hard core cartels" under the OECD's 1998 Recommendation,[11] and how many involved other kinds of "suspect" agreements among independent competitors (*e.g.,* agreements to observe uniform hours of operation or otherwise refrain from particular ways of competing, horizontal agreements to refuse to buy or sell except on collectively defined terms). In 2001, it appears that the Antitrust Commission made an interim ruling on one horizontal case, while the Central Preventative Commission had no such cases.

It is not surprising that there have been few challenges to true hard core cartels, which are hard to investigate and harder to prove. Moreover, Chilean officials and academics agree with the view expressed at the February 2003 meeting of the OECD Global Forum on Competition that in a small economy, the small business elite may be able to restrict output and increase price through tacit collusion (*i.e.*, without reaching an explicit oral or written agreement). It was also suggested that if businesses had reached an explicit agreement, the small and closely knit business community would make it nearly impossible to find an executive willing to provide evidence against his co-conspirators, because doing so would mean never again being able to hold an executive position in Chile. The Prosecutor's Office was able to use testimony from a cartel member in at least one case, however.

Apparently, the Prosecutor's Office has generally sought to prove price fixing through surveys showing otherwise unexplainable uniformity of prices or price movements. If there is no other plausible explanation, such uniformity can be persuasive evidence of price fixing. The Antitrust Commission has apparently found price fixing on the basis of such survey evidence. But in other cases the Commission has not accepted economic or other circumstantial evidence of an agreement. According to Professor Paredes, the timing and nature of the price movements and other circumstantial evidence in a 1993 case against Chile's two most important pharmaceutical laboratories clearly showed a cartel agreement, but the Antitrust Commission rejected the case because of lack of "concrete" evidence that company representatives had actually reached an agreement.[12]

Evidence showing entry barriers and excessive profits and other indicia of monopoly pricing may have been required in some cases in order to show

that competitors engaged in a hard core cartel. In other jurisdictions, evidence on these topics could be relevant circumstantial evidence about the existence of an agreement, but such evidence would not be required to prove it. If there is clear, direct evidence of the agreement, evidence on entry barriers or excess profits would have no independent value on that issue. Jurisdictions in which price fixing and other cartel activity is not illegal *per se* might regard evidence of barriers as necessary to show anticompetitive effects, but it is unlikely that evidence of monopoly pricing or profits would be required.

The Prosecutor's Office succeeded in proving price fixing in a 1995 pharmacy case. Low prices by a new entrant set off a price war among the four pharmacies operating in Santiago. To end the price war, the four firms agreed to fix prices, and the Office was able to show this through price surveys and statements from some executives who had participated in the conspiracy. The three incumbent pharmacies were fined about US$ 80,000 each, while the new entrant was fined about half that amount because of its co-operation in providing evidence of the cartel.

There are at least four ongoing cartel cases. Two involve cartels among the same milk processors. The first case began in 1997, the second in 2001. That both cases remain unresolved does not reflect well on efficiency of the litigation process. The gravamen of these complaints is that the processors have set the prices paid to mild producers too low. While these cases have been pending, the Antitrust Commission has regulated the processors' pricing practices. In the first case, the Commission's interim order is designed to prevent arbitrary price discrimination by requiring milk processors to have, and to adhere to, written, publicly available statements setting forth the terms and prices for their raw milk purchases. In the second case, the Commission at one point issued an interim order preventing members of the alleged buyers' cartel from lowering the prices they will pay. That order lasted for several months.

Another ongoing case involves gasoline (petrol) distribution. The market is very concentrated at the wholesale level and increasingly concentrated at the retail level as well. There is little price competition, and it is generally perceived that prices are quick to rise and slow to fall. The Prosecutor's Office has initiated a proceeding against four firms without specifically alleging collusion. The case is now in discovery. By way of relief, the Office is seeking mainly structural remedies. For example, the Office is asking the Antitrust Commission to recommend that the government modify two laws that create entry barriers (one preventing the installation of new gas tanks in some areas and the other preventing all but the government-owned firm from laying pipelines). It is also seeking an order requiring a firm to grant access to its pipeline, and an order directing

all four firms not to agree to fix prices. The final ongoing cartel case involves collusion between two cable companies.

The Prosecutor's Office is moving to improve enforcement against hard core cartels. One of the proposed amendments in the pro-growth agenda would decriminalise the law but substantially increase the fines that can be imposed. Since the Chilean public and policymakers have not yet accepted the view that hard core cartels are a serious crime, trading unused criminal sanctions for much more significant fines may lead to more actual enforcement action. The Prosecutor's Office should review the literature about sanctions for hard core cartels to prepare materials for cases and competition advocacy, to support imposing significant fines against violators. This literature documents the extent of harm cartels cause–estimated by some to be as much as 20 per cent of the volume of affected commerce, and sometimes more–and shows why fines should be several times the illegal gain, in order to prevent firms from simply treating the fines as a cost of doing business.[13]

In addition, the competition institutions should clarify that hard core cartels are illegal *per se* or consider the desirability of reinstating the *per se* rule. Many countries take an essentially *per* se approach, which has obvious enforcement benefits. The costs are mainly the result of incorrectly characterising joint ventures as cartels. Given the cautious approach Chile's competition institutions have shown, there may be little risk of such mischaracterisation.

Finally, Chile should focus also on such horizontal agreements as exclusionary boycotts (which are considered hard core in many jurisdictions), facilitating practices (such as information exchanges), and what might be termed "soft core cartels" (such as agreements to observe uniform hours, or to refrain from truthful non-deceptive advertising or other means of competing for customers). Facilitating practices may or may not be anticompetitive in and of themselves, but they can and should be prohibited when they significantly increase the risk of actual or tacit collusion. Some of these types of agreements are not only potential facilitating practices, but they are usually anticompetitive in and of themselves. Some are illegal *per se* in some jurisdictions, and when the *per se* rule does not apply, it may be possible in some cases to make use of rebuttable presumptions. For example, instead of requiring proof of relevant product and geographic markets, one could have a rebuttable presumption that the products or services covered by the agreement constitute valid markets. One could also rebuttably presume that the parties have sufficient power for their agreement to be successful. In any event, all of these sorts of agreements are much easier to prove than secret, hard core cartels.

4.2 Vertical agreements and practices

Chile has devoted far more attention to vertical agreements and other practices concerning the relationship between firms at different levels of the distribution chain. During the period 1974 – 1993 the Antitrust Commission ruled on 53 cases involving vertical arrangements, including discrimination, and 35 monopolisation cases that involved either vertical agreements (tie-in sales) or price discrimination. There were also far more vertical than horizontal cases in 2001.

The competition institutions long gave essentially *per se* treatment to vertical restraints and practices, condemning them without inquiry into whether the firm had market power or whether the practices had efficiency justifications. Refusal to sell without a plausible justification was consistently condemned. Price discrimination was considered illegal unless discounts or other favourable terms were available to all buyers according to "objective" elements. Cost-justified volume discounts were always seen as objective, but price differences reflecting other cost differences were not accepted. In the late 1980s, other forms of cost justification began to be accepted, but the area remains murky, and the lack of a clear legal standard in this area can be particularly harmful because it can deter firms from offering or negotiating for legitimate, procompetitive discounts.

The economic analysis of vertical agreements and practices has evolved a great deal in the last 30 years. Whether or not nonprice vertical restraints or price discrimination have efficiency justifications, it is now widely accepted that they are not harmful – and are probably efficient – if the firm imposing them does not have market power. In competition enforcement regimes with a strong efficiency orientation, therefore, proof of market power may be a required element in demonstrating a violation. Regimes that do not take such an economic-oriented approach may condemn restraints they consider unjustified even in the absence of market power.

Chile's increased attention to efficiency considerations was reflected, for example, in a 1992 advisory opinion to Daihatsu approving its proposed exclusive distribution system on the grounds that the market was so competitive that no monopoly abuse was possible. Moreover, the Antitrust Commission's 2001 decision in a case against Toyota shows that Chile may have gone further than most by suggesting that resale price maintenance is not illegal *per* se. Toyota fixed minimum resale prices for original replacement parts. The Commission said that resale price maintenance can have efficiency justifications and that there was vigorous competition in the automobile market, but it decided that consumers do not have a choice when buying original replacement parts and that therefore, the efficiency benefits (such as better service) were insufficient. Two members dissented on the

grounds that the automobile market was competitive and the restraint promoted efficiency and consumer welfare,

While somewhat exemplifying Chile's evolution in this area, the Toyota case is also an example of why its approach to vertical restraints (and other rule-of-reason cases) needs further clarification. Essentially, the majority in the Toyota case found that the relevant market was the sale of original replacement parts for Toyotas. In that market, Toyota obviously was a complete monopolist. On the other hand, the dissent appears to have said that there is no separate market for original replacement parts for Toyotas, and that the relevant market was automobiles and replacement parts. Neither the brief discussion in the decision nor the one-sentence summary of the dissent mentioned the need to define product and geographic markets or began to address the complexities of that process in this case. Both the majority and the dissenters may have rigorously analysed the issues, but since the analysis does not appear in the decision, even competition experts cannot tell how the Commission believes such issues should be addressed.

4.3 Monopolisation or abuse of dominance

More of Chile's competition cases have involved monopolisation (also called abuse of dominance) than any other kind of potential competition law violation. Chile's focus on monopolisation during the period 1974 – 1993 is typical for a country whose economy is in transition from government ownership and control. Available data do not indicate how many of Chile's monopolisation cases involved infrastructure monopolies, although it is clear that the competition institutions have devoted very substantial resources to those sectors.

At least in recent years, Chile's sectoral regulators have apparently had the authority and the power to deal with matters involving the prices and requirements of the services that the Antitrust Commission has found non-competitive. As a result, unlike their counterparts in Central and Eastern Europe, the Chilean competition institutions have not had to bring monopolisation cases challenging public utilities' pricing or other practices. Rather, their major cases involving these sectors have involved acquisitions and other structural matters. Those cases are discussed in a later section of this report.

If public utilities were not the targets of many of Chile's monopolisation cases, then the number of monopolisation cases is surprisingly large. The distribution of these cases, by industries and by practices that were challenged, is not clear, nor is it clear how Chile has treated conduct that exploits market power, such as monopoly or "excessive" pricing, as opposed to conduct that maintains or extends market power, such as predatory

pricing or other exclusionary acts or agreements that raise entry barriers. Competition law challenges to excessive pricing by firms in potentially competitive markets may not have long-term benefits, because they may prolong the monopoly by deterring entry that could destroy it. For this reason, excessive pricing is not considered to be abuse or monopolisation in some jurisdictions, and it is seldom challenged in many others. Efficient capital markets and other factors may make new entry a more effective remedy than litigation. In developing and transition economies, where new entry is less likely to be as quick, such cases are more common, although some of them decline on policy grounds to bring such cases. Chile's Commissions considered at least two excessive pricing cases in 2001. One involved the Santiago subway, which presumably faces no threat of entry. They seem to have had only one excessive pricing case that may have involved a potentially competitive market (clinical gases), and one predatory pricing case (a complaint against Carrefour that was ultimately rejected). They had at least two price discrimination matters, one of which (pharmaceuticals) apparently did not involve market power at all and the other of which (the purchase of raw milk) involved alleged price discrimination by cartel members whose agreement presumably removed the threat of entry.

One interesting monopolisation case involved a firm with an exclusive right to operate the system for handling inter-bank payments by internet. Access to the firm's system was required by any firm wanting to provide internet bill-paying services, and the firm itself had affiliates offering those services. The Banking Superintendency's rules provided that in order to offer services using defendant's system, a firm had to have a contract with a bank – thus in a sense making the banks responsible for the firms that offer internet bill-paying services. The firm denied a new entrant access to its "essential facility" even though it had the required contract with a bank, and this action was found to have illegally created entry barriers.

Although the Antitrust Commission may order "the dissolution or restructuring of companies," and the Supreme Court upheld the Commission's *de facto* order that Telefonica sell shares of stock, the Commission appears to be very reluctant to use its full divestiture authority to require the sale of assets.

Despite the large number of monopoly cases, the interviews and limited documentary research conducted for this review suggest that the competition authorites' work in this area has not been very important outside the infrastructure industry sectors. Part of the reason may be that the lack of formal or informal guidelines about market definition and assessing dominance may be deterring complaints by the Prosecutors' Office and the public.

4.4 Mergers and acquisitions

Mergers have evidently gotten increased attention in the last few years. There are currently four merger investigations being conducted by the Prosecutor's Office and two cases being considered by the Antitrust Commission. Competition officials observe that in Chile's very open economy there are few anticompetitive mergers and that in recent years, at least, the potentially problematic mergers have been reviewed. Some of Chile's most important recent merger cases have involved acquisitions of firms operating in infrastructure sectors such as telecommunications and electricity. Since the cases constitute an important part of Chile's overall regulatory approach to those markets, they are noted below as part of the discussion of competition law and policy in regulated markets.

Until recently, however, it appears that Chile has never had a significant merger control program except in infrastructure industries. The statistical information on cases during the 1974 – 1993 period does not include mergers as a separate category or subcategory. Some believe that small but potentially anticompetitive mergers have been ignored, while large, controversial ones have been the object of investigations or challenges that were initially publicised and eventually closed without action. There is also criticism of the Antitrust Commission's finding that the Coca Cola – Cadbury Schweppes transaction was lawful. It seems fair to say that the competition institutions have actively sought to prevent mergers from deterring the development of competition in the few but important potentially competitive elements of infrastructure sectors, but they made less effort to determine whether mergers in other markets were likely to create a monopoly or facilitate collusion. The law's lack of a specific mandate for merger work may partially account for the extremely cautious approach the Prosecutor's Office and the Commission have traditionally taken. It could also be that the caution is a legacy of "the Chicago boys," but the competition institutions' approach to vertical restraints in the 1970s and 1980s suggests that they had very little impact on competition law enforcement.

The competition law does not include a specific prohibition of anticompetitive mergers, and Chile has no premerger notification system.The absence of a separate merger section does not imply a lack of coverage, though, and Article 1 is broad enough to reach an anticompetitive merger under either of the commonly applied substantive rubrics: "substantially lessen competition" or "create or maintain a dominant position." The Prosecutor's Office has said that Chile applies both tests, but it is unclear what this means in terms of what must be proved. The Office has also said that there is an efficiency defence in merger cases.

Prenotification to the competition institutions is required only for transactions involving television and radio. In such cases, a 30-day notice period, which seems too short for a serious analysis, is required. (Transactions involving newspapers must apparently be notified after the fact.) Banks and some other financial institutions must notify the Bank Superintendency before merging, and the Superintendency could ask the competition institutions to review a matter. The parties to proposed mergers sometimes consult with the Prosecutor's Office in advance of closing, but consultation is at the discretion and timing of the firms. Parties to the largest and most important mergers rarely consult in advance with the Office. Although Office representatives do not say that the lack of premerger notification is a significant problem, it has led to some problems. For example, when challenging the stock acquisition that gave ENERSIS total control of ENDESA, the Prosecutor's Office argued, unsuccessfully, that ENERSIS was required to give the Office advance notice in the particular situation and thus it should receive the maximum penalty for having failed to do so.

The lack of a general consent order process now makes it impossible to resolve problems in proposed mergers effectively through advance consultation. Discussions between the parties and the Prosecutor's Office are unofficial, the Prosecutor's Office is not authorised to enter into an agreement for divestiture or other prospective relief, and there is no procedure by which such an agreement could be considered by the Antitrust Commission. The proposed amendments appear to resolve this problem, through a "conciliation" procedure that will apparently permit the Prosecutor's Office and a party to agree to a negotiated order, subject to its acceptance by the Tribunal.

The most prominent recent merger outside the infrastructure sectors was the acquisition by Coca Cola of Cadbury Schweppes' soft drink brands and licenses. Acting on a complaint by Pepsi Cola and certain soft drink bottlers, the Prosecutor's Office conducted an investigation and made a report that noted risks to competition but did not contain a "*requerimiento*" – a formal charge seeking a fine or other remedy. Pepsi Cola and the bottlers also filed complaints with the Antitrust Commission, which opened a proceeding to which the Prosecutor's Office became a party. In that proceeding, Coca Cola argued that the relevant product market was much broader than "carbonated soft drinks", which was the market definition alleged by Pepsi Cola (based on precedent from other jurisdictions). In the carbonated soft drink market, Coca Cola already had a 73 per cent market share, which the acquisition would raise to 82 per cent (nearly 100 per cent of orange flavoured soft drinks and mixers). This international merger, whose competitive impact was assessed in many different countries, presents an interesting

comparative test of merger oversight. Market conditions in those countries vary, of course. Coca Cola did not even seek to acquire Cadbury Schweppes' assets in the United States; because recent cases there made it clear that the acquisition would not survive antitrust scrutiny. Australia, France, and South Africa all raised antitrust objections to the acquisition in their markets.

At least until the mid-1980s, Chile's competition institutions considered a variety of goals in their assessment of mergers.[14] This could be inconsistent with the current focus on efficiency, if other goals are asserted as reasons to strike down an efficient transaction or to permit one that harms competition. It is unclear whether and to what extent the competition institutions have stopped considering non-efficiency public interest considerations such as employment, in merger decisions.

4.5 Unfair competition

The competition law does not mention unfair competition as a violation, but Article 1 is broad enough to cover it, and there have been many cases. Most of the cases have involved trademark abuses (including parallel imports) and comparative advertising. Some in Chile believe that the competition institutions devote too much time to unfair competition cases, which generally involve private disputes, do not necessarily protect competition in the market as a whole, and thus do not make the best use of the competition institutions' expertise. Typical examples of unfair competition are commercial bribery, misleading advertising, deception (by "passing off" and other means), defamation of competitors, and misuse of trade secrets. In most jurisdictions, claims about these practices are usually dealt with in private lawsuits brought by the injured competitors, while government-enforced consumer protection laws may ban the same or similar practices when they harm consumers.

Despite unfair trade laws' focus on protecting competitors, unfair trade practices can, in the aggregate, be harmful to competition because they undermine confidence in the market's integrity, and they may also distort market information and thereby affect purchase decisions. In economies where the "rules of the road" are not clear and access to courts by injured parties is limited, government enforcement against unfair trade practices can be important to the creation of competitive markets. In those conditions, unfair competition enforcement by the competition institutions may well be beneficial, but only if the institutions have enough resources to do such work without interfering with their core obligation to enforce the competition law in cases where market power exists or may be created. But if the rules are reasonably clear and parties injured by unfair competition have a practical way to bring a private action, it could well be preferable to

codify the principle that unfair competition does not violate the competition law if the conduct does not harm the market as a whole.

In Chile, the competition institutions do not seem to be flooded with unfair competition cases. Some of the cases (*e.g.*, parallel imports) may be preventing harm in the market as a whole. In any event, bringing some big, highly publicised unfair competition cases can call the public's attention to the competition institutions and their mission. Since comparative advertising is another main subject of unfair competition cases, it is noteworthy that a case provided by the Prosecutor's Office in connection with this review states that such advertising must be objective and verifiable, as well as truthful and nondeceptive. Some OECD countries permit (or even encourage) any comparative advertising that is truthful and non deceptive, and regard it as anticompetitive to insist that such advertisements also be objective and verifiable. Although there is some movement towards this more liberal position, there are also OECD countries whose restrictions on comparative advertising are significantly stricter than those in Chile.

5. Competition law and policy in regulated sectors

For many OECD competition authorities, activity relating to regulated sectors of the economy is largely a matter of competition advocacy because the sectoral regulator has the exclusive power to make many of the key decisions relating to competition. In their advocacy, OECD competition authorities have increasingly sought vertical separation in infrastructure industry monopolies. An OECD Council Recommendation urges consideration of this approach, while acknowledging that it is not always appropriate.[15] This issue has been important in Chile,[16] where the balance of power is different because the competition law can sometimes be applied even to a sectoral regulator or other part of the government. This section focuses on the competition institutions' advocacy and enforcement work concerning infrastructure monopolies. The competition institutions never play a direct role in setting prices; in general, tariffs are set by sectoral regulators with the participation of the Ministry of Economy's Market Development Division.

5.1 Telecoms

Chile's telecom industry has been privatised. To a great extent, it is owned by foreign firms. The telecoms law states that providers may generally set the price of their services, except that access charges are always fixed, and other prices may be fixed if the Antitrust Commission finds that competitive conditions do not exist. In practice, this means that Chile's telecom regulator sets tariffs for local fixed telephony (pursuant to Antitrust Commission rulings) and for access charges; in the mobile market, only access prices can be fixed, and long distance charges are free by law. The competition institutions have done far more in the telecom sector, however, than making these periodic determinations on the existence of competitive conditions.

Prior to privatisation, Chile's telephone system was dominated by two state-owned companies – Compañia de Téléfonos ("CTC"), which provided local telephony services, and Empresa Nacional de Telecommunicacion ("ENTEL), which provided domestic and international long distance service. By 1990, the national telephone company of Spain (Telefonica) had obtained control of CTC and a twenty per cent share of ENTEL. The Prosecutor's Office challenged Telefonica's holdings. The Preventative Commission, the Antitrust Commission, and eventually (in 1993, after having rejected six previous Telefonica appeals) the Supreme Court ruled that Telefonica had to sell its interest in one of the two firms. Telefonica sold its interest in ENTEL.

While this case was proceeding, the competition institutions also played a crucial role in deciding whether competition would be impaired if local telephone companies were permitted to offer long distance service. Asked this question by the telecoms regulator, the Preventative Commission found that such entry would be anticompetitive, the Antitrust Commission affirmed the decision, and the Supreme Court directed the Antitrust Commission to open its own proceeding to examine the issue. In 1993, the Commission concluded that local and long distance should not be separated, because doing so would be difficult and developing technology seemed likely to eliminate the rationale for such separation. It ruled, however, that entry into a new market must be by a separate corporate subsidiary, and it laid out various other principles that should be incorporated into new provisions in the telecom law. The Supreme Court affirmed this decision, and a 1994 amendment to the law added the Commission's principles, beginning with the obligation of the local service provider to establish a "multicarrier system" so that the user could choose his or her long distance provider. In 1998, the Commission concluded that national and international long distance service no longer needed price controls. By 2001, Chile had ten firms offering the former and ten offering the latter. Overall tariffs had decreased by 30 percent.

The competition institutions also determined how the telecom regulator allocates spectrum in the mobile telephony market. Two firms operating at 800 megahertz petitioned for additional spectrum at 1900 megahertz in order to compete more effectively against two firms that already had some spectrum at that level. The telecoms regulator agreed. One of the incumbents complained, and the Prosecutor's Office initiated a proceeding. Eventually, the Antitrust Commission ordered that the regulator use an auction to decide which firms should obtain rights to the spectrum. (Another order in this proceeding directed the regulator not to give the first two firms preference merely because they had applied first for the megahertz.) The entire process took about two years, and the two firms initially approved by the telecoms regulator were the successful bidders at the auction. Relying in part on this fact, some telecoms officials regard the case as one in which the competition institutions were used to delay the allocation of new spectrum. While such "nonprice predation" can and does occur, in this situation that criticism does not seem to give adequate weight to the present and future benefits of establishing the principle that spectrum (and other assets) should be auctioned in a competitive and transparent manner. Some telecoms officials also believe that on occasion the competition institutions become too involved in technical matters, but the two agencies apparently work well together for the most part.

A number of other important cases have been decided or are currently pending. In one case, the Commission issued the maximum fine against Telefonica for using its power in the fixed local telephony market to gain a competitive advantage in the mobile telephony market. Telefonica owns a number of mobile firms, which offered a subscription to mobile users under which there was in effect no charge for the network services. The Supreme Court upheld the finding but (as it often does) halved the fine. There is an ongoing case, currently at the discovery phase, involving alleged collusion between two cable television companies.

Under a law to protect free speech, the Preventative Commissions must be consulted on all mergers or acquisitions involving the transfer of television and radio stations. The law's text provides merely that the Commissions must decide within 30 days whether the transfer would be anticompetitive, but the law is perceived as expressing a special concern for media concentration. The adequacy of a 30-day review seems questionable. The Commissions have reviewed many proposed transfers without objecting to any.

There is an ongoing issue concerning the determination of access charges. Currently, access charges are asymmetric: high for incumbents and low for new entrants. This system has facilitated entry and competitive rivalry, but some are concerned that it may harm efficiency. In addition, Telefonica has sued the government on the ground that the system cost it US$ 237 million in excessive access fees. Notably, the pro-growth agenda originally contained several proposals for regulatory reform in telecoms, but the proposed amendments have apparently been withdrawn and replaced by a programme that involves regulatory changes that are at this point unclear.

5.2 Electricity

Before privatisation began in the 1980s, Chile's electricity sector was dominated by two SOEs – ENDESA, which operated on the national level and engaged in generation, transmission (through ownership of TRANSELEC), and distribution, and CHILECTRA, which distributed electricity in the Santiago metropolitan area. Had competition policy principles been given serious consideration when privatisation occurred, ENDESA might have been divided vertically (and perhaps horizontally) before it was sold, but this did not occur. Several buyers acquired minority interests in ENDESA, while ENERSIS acquired CHILECTRA. Since then, Chile has been engaged in a lengthy struggle to limit the anticompetitive effects of vertical integration, which relate in large part to the resulting barriers in generation and marketing, both of which are potentially competitive. The struggle has included both unsuccessful attempts by the

Prosecutor's Office to force vertical separation and the usual sorts of regulatory strategies for preventing abuse of dominance.

The first formal intervention by the Prosecutor's Office occurred in 1992, after ENERSIS acquired some of ENDESA's stock. The Prosecutor's Office sought divestiture of these shares, but the action was unsuccessful. In 1994, when ENERSIS increased its ownership interest to 25%, the Prosecutor's Office brought another unsuccessful case, but in 1997 the Antitrust Commission issued binding "general instructions" aimed at increasing competition and transparency. The instructions required the electricity regulator to issue new rules and ordered distribution companies to call for bids and sell their supplies on objectively stated and non-discriminatory terms. The order also required that ENDESA transfer ownership of its transmission assets to TRANSELEC and that TRANSELEC be operated as a separate corporation, subject to the same rules as publicly held stock companies, and in which other generators or other firms could invest.

The Antitrust Commission's 1997 instructions greatly improved the regulatory system, but in 1999, after ENERSIS attempted to increase its interest in ENDESA from 25% to 60%, the Prosecutor's Office brought yet another action. While the case was pending, the Office's case was weakened when Canadian interests acquired TRANSELEC. The Prosecutor's Office again failed to obtain structural separation but obtained improved general instructions and an order that ENDESA and CHILECTRA could not merge or have interlocking directorates, and must be audited by different firms. That order is under review by the Supreme Court.

According to one recent report, there are currently 58 firms in the electricity services sector, 20 of which are concessionaires for generation, four for transmission, and 36 for distribution. The Antitrust Commission plays a special role in this market, since by law prices may be set only for services that the Commission finds are not subject to competitive conditions. The market is regulated by Chile's National Energy Commission and the Superintendency of Electricity and Fuels, acting under a 1998 regulation that sought to increase transparency and competition. Chile's pro-growth agenda includes further pro-competitive reform in this sector. An ambiguity in the electricity law is holding up investment in new transmission assets, which in turn is deterring investment in new generation facilities. The main purpose of the proposed amendments is to clarify how investors in transmission assets will be able to obtain a return on their investment.

5.3 Banking and financial services

Chile adopted a new banking supervision law in 1997 to modernise the sector, adopting international supervision standards while also allowing banks to undertake more activities. The sector has been fully privatised, and a recent report indicated that 13 domestic and 17 foreign banks operate in Chile.

The competition institutions have had limited dealings with this sector. As discussed above, the Prosecutor's Office challenged a merger of two Spanish banks that gave them 27 percent of Chile's banking market at the national level, but the Antitrust Commission found this not to be anticompetitive. Since the Spanish banks case was decided, the Banking Superintendency has acknowledged the competition institutions' authority to address competition issues in the sector. In addition, new legislation governs the circumstances when approval by the Banking Superintendency is needed and the procedures for that process.

More recently, Chile's two largest banks merged and obtained a 20 per cent share nationally, but this merger was not challenged although five-firm concentration reached 70 percent in the national market. As also noted above, the competition institutions issued a general instruction requiring non-bank providers of consumer credit to use the system for disclosing interests rates, etc. that the Superintendency imposed on banks.

There is a potentially important debate going on in Chile now about whether the banking and financial services markets are competitive. The Banking Superintendency points out that it has relaxed entry requirements while keeping rules that safeguard the banking system. And although some in the Prosecutor's Office express concern about increased concentration in banking, others have no such concerns. On the other hand, other government officials do express concern that the industry is not competitive. This review did not analyse these sectors in depth, and the specific concerns that were articulated may be unwarranted for a variety of possible reasons, but the general concern is itself notable. Concentration is high, and despite Superintendency action to facilitate entry, there is a perception that entry is difficult and foreign entry is generally through acquisition rather than the creation of a new firm. It is noteworthy that the debate seems to have focused on national concentration levels for all banking services, without having addressed what would be the first step in any competition analysis – whether and to what extent bank mergers and other practices should be analysed in the context of particular banking services and local or regional geographic markets.

It has also been said that the large banks in Chile make loans almost exclusively to large firms and (sometimes) to individuals. While others

question this view, there are reports that, directly or indirectly, loans to small and medium size firms ("SMEs") come largely from CORFO, which has evolved from being the traditional investor/owner of much Chilean enterprise into an industrial promotion agency; using World Bank and IDB credit lines, CORFO provides the funds that many banks lend to SMEs. Loans to SMEs are riskier and costlier than other loans, but some see the banks as being excessively conservative as a result of a lack of competition. Some Chilean officials express concern over the fact that there is only one credit card network in Chile.

An interesting feature of Chile's financial system is that 70 per cent of all consumer credit comes from retailers rather than financial institutions. Outside the banking sector, the only financial service that was mentioned as a matter of competition concern involves pension plans. Chile has an elaborate pension system, which this review did not seek to analyse, but it is said that price competition among the plans is apparently not strong. It has also been suggested that the plans' high administrative costs reflect a lack of competitive pressure that results from oligopolistic interdependence.

5.4 Water and sewer services

Water and sewerage companies are among the few in Chile that continue to be largely state owned. Fifty-two firms operate, of which six are private. In 1997, the Antitrust Commission approved the acquisition of a water company by ENERSIS, the dominant electricity supplier. In doing so, however, the Commission recommended that the conglomeration of public utility companies should be subject to closer government surveillance.

The Antitrust Commission's recommendation led to enactment in 1998 of the Sanitary Services Act, which increased transparency and sought to pave the way for the future introduction of competition where possible by restricting integration among public service companies operating in the same area. Thus, water and sewerage companies may not combine with gas, electricity, or local telephone companies in the same area if they serve more than one half of the area's population. Since the Department of Public Works grants concessions to firms on the basis of competitive bidding, there is competition for the market even though there is none within the market. The law also encourages competition by requiring water distribution and sewerage collection firms to permit water production and sewerage disposal firms to use their network and contract directly with "large consumers." The Antitrust Commission is responsible for deciding whether utility concessionaires are natural monopolies and hence subject to maximum tariffs and other rules set by the relevant agency. The Sanitary Services Superintendency fixes the maximum rates and may authorise utilities with

fewer than 25,000 water connections to provide services jointly if this results in efficiencies that lead to lower rates.

5.5 Transportation

The state does not own or operate any transportation companies except for three companies that are managed by an independent board – Santiago Metro, a passenger train, and a ferry service. Transport companies are free to compete on price and service, subject to safety and other regulations with limited economic impact. The state does not subsidise transport companies except to ensure transportation to isolated areas. In a pending case, the Antitrust Commission is considering a complaint by a consumer organisation alleging that the Santiago subway is abusing its monopoly by charging excessive prices.

In 1979, Chile adopted an open sky policy regarding passengers and merchandise. The air transport sector has been fully privatised. A recent report indicated that 34 airlines operate in Chile, seven of which are private domestic firms. Most transport cargo, mail, and passengers. There are 25 additional non-regular cargo airlines. As discussed in the section concerning the goals of Chile's competition law, the Antitrust Commission once approved the merger of Chile's two largest domestic passenger airlines, subject to a requirement that the merged firm in essence set its own maximum tariffs, and several years later found that the merged firm had sought to drive a new competitor out of the market by a predatory lowering of its price on the one route on which it competed with the new entrant.

5.6 Other sectors

Natural gas. When the first natural gas pipeline between Chile and Argentina was created during the 1990's, the Antirust Commission played a role in ensuring that the transportation and distribution was conducted under competitive conditions. Natural gas prices may be set freely, but the sectoral regulator may ask the Antitrust Commission to declare that competitive conditions do not exist when the regulator finds that a firms' rate of return exceeds certain guidelines. If such a declaration is made, the regulator may set maximum tariffs.

Mining. Chile's Constitution provides that the state is the sole owner of all mines, regardless of who owns the surface land. This ownership does not create monopoly problems, however, because a system of concessions provides mining rights to a variety of firms. There is some interest in seeing whether the concession system can be made more efficient. Chile participates directly in mining through its ownership of the national copper company, CODELCO, and the national mining company, ENAMI. There

are also 27 private Chilean mining companies, and 17 foreign firms are engaged in exploration while 27 are engaged in exploitation.

Ports. State-owned ports have been leased on a long-term basis to private concessionaires that are responsible for operating them, and there is to be no future public investment in new ports. The Central Preventative Commission is required by law to establish the competition rules for the operation of Chile's ports, and it has issued an order laying down rules regulating horizontal and vertical integration. For example, "important users" of a port may not have more than a 40 per cent interest in the port.

6. Competition Advocacy

Chile's competition law is unusually specific in providing advocacy powers. Supported by the Prosecutor's Office, the Preventive Commissions may request any public body to exercise its regulatory powers to protect competition, and the Antitrust Commission may request the amendment or repeal of any statutory or regulatory provision. In its response to a questionnaire from the International Competition Network, the Prosecutor's Office said that it engages in little competition advocacy, but the response understates its activities. 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, the clearest example being the order to use an auction to decide which firms would receive additional bandwidth. Therefore, the institutions' record in promoting competition principles in designing regulatory systems is understated if one looks only at advocacy.

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. In pactice, the scope of advocacy presentations can vary widely. A set of bullet points about basic issues, such as how monopoly harms the public but enriches the monopolist, is advocacy. So is an extended legal and economic argument in a sectoral regulatory process. Advocacy activities can include testifying, making written submissions, or issuing papers to legislature, ministries, courts, sectoral regulators, or municipalities. In addition, they can include making speeches to professional and trade associations, academic institutions, and conferences, and writing articles for publication in specialised or other journals or other publications. Even holding press conferences and otherwise publicly explaining the importance and implications of competition and market principles could be considered advocacy. 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.

Chile's competition institutions engage in considerable advocacy to other government entities on topics relating to infrastructure monopoly sectors. For example, the competition institution's review of the competitiveness of the electricity and telecom markets determines whether rates are free or fixed. Although the competition institutions do not necessarily provide "advice" as part of this process, the review itself

manifests both a major competition principle and an unusual way of ensuring that the principle is followed. The major principle is that prices should be free unless there is a finding that conditions are not competitive. The assurance that the principle will be followed lies in assigning this task to the competition institutions rather than the sectoral regulator. Thus, the exercise is competition advocacy, and both the magnitude of the task and the Office's commitment to it are reflected in the fact that the ongoing review of the electricity sector is being conducted by a team of four economists and two lawyers – more than 25 per cent of the professional in the Office's three main substantive departments.

There is also some competition advocacy in connection with the Prosecutor's service on two intergovernmental bodies. Notably, the Prosecutor chairs the national commission that investigates distortions in the price of products that are being dumped. Since antidumping remedies are generally viewed by the competition community as anticompetitive actions that benefit domestic producers at the expense of consumers and the economy as a whole, this is a potentially useful though awkward function. Together with the representative of the Central Bank and sometimes the Ministry of Foreign Affairs, the Prosecutor sometimes successfully opposes the imposition of requested remedies, but his discretion is limited by the law that created the commission. The Prosecutor also serves on a body that hears appeals in certain customs cases, which seldom if ever raise competition issues.

7. Policy options

- ***Adopt the pro-growth agenda, taking into account some possible changes.***

It seems reasonably clear that the amendments will be enacted without major change, hopefully during 2003. Enacting and implementing the amendments should be a priority, because the new Tribunal will have more independence, more qualified members, and a larger budget. Exchanging unused criminal sanctions for substantially increased fines also seems to be a sensible move, even though it runs somewhat counter to the current international trend.

One aspect of the proposal regarding the Tribunal may warrant additional consideration. The proposal requires Tribunal members to work a minimum of two days per week and provides funding that may support up to three days per week. This means that collectively, Tribunal members should be able to devote to the Tribunal about twice the total amount of time worked by all of the current commissioners combined. In addition, the Tribunal's staff will be somewhat more than twice as large as that of the Department that now supports the Commissioners. These are significant increases. However, the Prosecutor's Office also recently doubled in size, and more cases are being brought by consumer organisations and other private parties. Moreover, the current Commissions are somewhat slow in deciding cases and tend to write conclusory decisions that leave the private sector unsure of the standards that are being used to judge their conduct. Generating faster and more complete decisions will take more time and resources. Thus, although the resources will be increased, there is already reason to be concerned that even more might soon be needed.

Whether the Tribunal can do what is expected of it with only part-time members is partly a budgetary issue, but it is also an institutional one. Where members are part time, it can be more difficult to pay members enough to address complex matters. Requiring members to work at least two days per week partially addresses this problem. On the other hand, this commitment may make it more difficulty to obtain Tribunal members who have expertise but no conflicts of interest. Private-practice lawyers and economists with expertise in competition law may be unwilling to give up their clients and resign from their firms in order to take on part-time work on the Tribunal, and recuse themselves when necessary in particular cases. The commitment could also be problematic for academics, most of whom apparently have private clients or relationships with law firms. If it appears that this could be a problem, Chile could consider a Tribunal with some full-time members and a larger number of part-time members.

The proposed modification of Article 2 should be revised to clarify whether acts and agreements on the list are subject to different legal standards than other acts and agreements covered by Article 1.

The Prosecutor's Office should also consider whether the proposed conciliation procedure would permit the Office and a firm to enter into an agreement that would, if accepted by the Tribunal, dispose of a matter on the basis of an agreed fine. If it would not, the Office should consider proposing a modified amendment that would permit this practice. The concept of a negotiated fine is apparently not familiar in Chile and may seem to some to be an unseemly "bargaining with the law," just as a few years ago the idea of giving leniency to a "whistleblower" seemed to some to be improper. However, it is common practice in much of the world, and if a defendant is willing to pay an appropriate fine in order to avoid the cost and uncertainty of litigation, such an arrangement is efficient for the government as well. If the Tribunal considered the agreed upon fine to be too small, it could reject the agreement and order the litigation to proceed.

Clarify legal standards with guidelines or policy statements, while continuing the important initiative to publish the text and summaries of decisions, and eventually the Office's reports, on the Prosecutor's Office's website. Considering the legal and economic sophistication of competition officials and others in Chile, it is remarkable how much uncertainty there is on even quite basic issues such as the means of defining markets, evaluating dominance or market power, assessing the legality of a vertical restraint, and even the standard applicable to cartels.

When a decision-making body does not clearly explain its reasoning, uncertainty about the applicable legal standards can discourage firms from making investments or experimenting with new distribution systems, deprive injured parties of knowledge that they may have a remedy, and reduce respect for law enforcement. The enforcement staff may share the public's uncertainty, leading it to devote unwarranted attention to matters that the decision-maker would consider frivolous or to disregard issues that the decision-maker would consider vital. The staff may find out "the real story" through informal means, which helps enforcers but does not remedy public uncertainty.

The Prosecutor's initiative to put more information on the Office's website is an important one. Moreover, the new Tribunal will have time to prepare more explanatory decisions. Still, a more comprehensive approach, using nonbinding guidelines or other clarification, should be a high priority. The Prosecutor's Office should seek supplemental funding if necessary to address the following issues, among others:

– What conduct, if any, is illegal *per se*? This issue is related to the above recommendation to clarify whether conduct listed in Article 2 is subject to different legal standards. Is unfair competition a violation even when it has no effects on the market as a whole?

– How are product and geographic markets defined? What is the test?

– What is the test whether a firm has a dominant position or market power? What evidence is useful, relevant, or required? What is the agency's approach to the key steps in its analysis? Is dominance or market power presumed if a firm has a share above some level in a market (or a market with entry barriers)? At what share does the presumption arise? Can any market share or concentration safe harbours be identified?

– In merger cases, are there presumptions based on market share or concentration levels in markets (or in markets with entry barriers)? What test is used to decide when a merger is unlawful, and what is the agency's approach to the key steps in its analysis? What must be shown to make a *prima facie* case or to establish an efficiency defence?

The Prosecutor's Office does not have specific legal authority for issuing enforcement guidelines, and this is not a common practice in Chile. The purpose of guidelines would be to clarify the Office's interpretation of the law. Guidelines about competition issues have been adopted in other Latin American countries. In response to criticism that its standards were not transparent or comprehensible, Mexico's competition commisison issued guidelines that explain its approach to defining markets and assessing dominance. Brazil used "Resolution 20" to introduce guidelines on evaluating anticompetitive agreements and has also issued merger guidelines. As guidelines have become increasingly common, the cost of preparing them could be minimised by selecting appropriate models and adapting them to Chile's situation.

If the Prosecutor's Office questions the propriety of "guidelines," it should consider other ways to clarify the overall analytic framework it uses and its interpretation of the elements of particular violations. The Office might issue "policy statements" or add an interpretive introduction to the case materials on its website. A series of speeches on law enforcement (with written texts that are more detailed than the speeches), or a series of short articles on the Office's website or elsewhere, could also be helpful, though perhaps somewhat less so than products that are clearly identified as guides or policy statements.

Increase the amount and the visibility of competition advocacy outside the infrastructure monopoly sectors, so that the Prosecutor's Office or the

Tribunal become central to the government's consideration of the wide range of regulatory matters that affect competition and to which competition principles should be applied. There is no budget allocated to the Prosecutor's Office specifically for competition advocacy. The Office manages its own budget and already allocates significant resources to competition advocacy in infrastructure monopoly sectors. Moreover, it is beginning to allocate resources to outreach to law firms, private sector organisations, and universities, and has also been actively involved in developing the competition law aspects of the pro-growth agenda. Since the Office's work with infrastructure monopolies is sometimes mandatory and in any event valuable, budget reality will for now require very careful selection of advocacy activities in order to keep costs to a minimum. The Office already co-ordinates to some extent with the Ministry of Economy's Market Development Division, and creative thinking about the way these institutions interact might produce synergies while holding down costs.

Although the Prosecutor's Office must of course take into account the likely costs of competition advocacy, the lack of a more active programme could also be costly. The competition institutions are not well known in Chile, and although market liberalism seems more firmly established in Chile than in many Latin American countries, it faces continuing challenges in that many consumers are not aware of the benefits of competition and of avoiding unnecessary regulatory restrictions on competition, while some academics and business representatives seem to prefer a more laissez-faire approach. In this context, building a broader competition advocacy programme should include three inter-related goals.

- First, the Prosecutor's Office (and the Tribunal, when it is established) should work to integrate competition policy into a wider range of the government's regulatory policy and analysis and to ensure that a competition institution is involved in – if not the centre of – this process. Chile's inclusion of the competition institutions in the process of regulating infrastructure monopolies provides a model on which the competition authorities can seek to build, but where on some natural monopoly issues the competition institutions have a decisive voice and must invest substantial resources, in many other regulatory issues they would presumably play the smaller but important role of commenting from a competition policy perspective on issues that that will be decided by other parts of the government. And although the Market Development Department of the Ministry of Economy apparently engages in some activities along these lines, the OECD's 1997 Regulatory Reform Report recommended providing competition authorities the authority and the capacity to advocate reform throughout the government.

- Second, the Prosecutor's Office should seek to demonstrate the value of competition policy by becoming a more visible advocate and taking positions on important issues that raise competition policy issues. For example, one issue covered by the pro-growth agenda is the harm caused by slow, non-transparent licensing and other procedures by municipal and other government entities. Although direct governmental responsibility for this matter is in the hands of other government entities, the harm they are trying to halt is largely the inefficient and other anticompetitive effects of unjustified entry barriers. If this topic were not on the pro-growth agenda, it could be a good one for competition institutions to study and call to the attention of the government and the public through a published report explaining the cost to Chile of such entry barriers. Since the topic is being addressed, the Office could support the movement for reform by emphasising the competition policy aspects of this problem. In this and other areas where competition institutions may be unable to eliminate competition problems, they can bring concrete benefits to Chile's economy by helping create consensus on the need for reform, while also winning support for competition policy by showing that it is not anti-business, as some fear.
- Third, the Prosecutor's Office (and eventually the Tribunal) should engage in a more broad-based effort to explain how competition law and policy benefits consumers, businesses, and the economy as a whole. This programme should seek to educate the public about the costs of monopoly, cartels and competition distorting regulations, while also reassuring the business community that competition enforcement in Chile focuses on economic efficiency. (There would be synergies between this work and the development of guidelines or policy statements.) In view of the Chilean government's current concern about equity issues, including social protection, education, and health, the advocacy program could include emphasis on how competition policy can serve as a tool to help policymakers pursue equity goals as efficiently as possible.

- ***Pursue traditional law enforcement more vigorously in a wider range of industries.***

Despite the benefits the competition institutions have achieved in infrastructure markets, they should adopt a more proactive and aggressive approach to competition enforcement in markets that can and should be competitive. The focus on sectors with natural monopoly elements has led or contributed to a relatively low level of enforcement in potentially competitive markets. Taking into account both the relatively low level of enforcement and the infrequency and low level of fines, it seems unlikely

that Chile's competition law is currently doing much to deter anticompetitive conduct.

- ***Consider providing increased funding for the Prosecutor's Office.***

Chile has increased its investment in competition law and policy and will soon increase its investment further by funding the new Tribunal. However, in light of the importance of increased attention to guidelines, competition advocacy, and traditional competition enforcement, the Office's need to continue its recently increased involvement in international competition matters, and the value of the Office's work on issues relating to infrastructure monopolies, Chile should consider a moderate increase in funding for the Prosecutor's Office. This is a crucial time for competition enforcement in Chile, and increased funding could easily pay for itself through increases in the efficiency and productivity of Chile's economy.

- ***Reconsider Chile's approach to merger control and perhaps to hard core cartels.***

Chile's lack of a premerger notification programme should be reconsidered. Developing countries sometimes choose not to have premerger notification or even substantive merger control because they believe they lack the necessary skills, they want to avoid being buried in paperwork, and they seem to embrace the view that mergers which do create anticompetitive problems can later be undone or kept in check by enforcement against abuse of dominance. But Chile has the legal and economic expertise, paperwork burdens can be managed by adjusting filing thresholds, and there is general consensus that it is preferable to prevent an anticompetitive merger than to try break up or to control the dominance created by the merger, once "the eggs have been scrambled". With respect to hard core cartels, if it is true that Chile's law now requires applying the rule of reason in all cases, then Chile should consider returning to its previous *per se* approach. The risk created by use of the *per se* rule is that it will be applied to pro-competitive conduct such as the integration of firms' operations that should in fact be treated as a joint venture. Given the sophistication and caution of Chile's competition institutions, this seems to be a very small risk.

ANNEX A

Table A-1.: National Economic Prosecutor's Office Resources

Year	Person Years	Budget (in 000s of US$)
2001	54	2,224
2000	57	2,083
1999	28	985
1998	34	795
1997	33	671

Table A-2.: Conduct Fined As % of Total Fines, 1973 – 2002

Conduct	Commission Fines – US$	Final (S. Court) Fines – US$
Horizontal agreements	25.6 %	31.1 %
Vertical agreements	2.2 %	3.9 %
Monopol/Abuse	33.7 %	27.4 %
Unfair competition	24.5 %	17.9 %
Merger	0.8 %	0.3 %
Others	13.2 %	19.3 %
Totals	100 %	100 %

ANNEX B

STATISTICAL OVERVIEW OF CHILEAN COMPETITION LAW ENFORCEMENT

An overview of the competition regime from historical statistical and other information generally confirms the conclusions reached above. Three main sources of such information exist. First, an article by Professor Ricardo D. Paredes-Molina, a former member of the Central Preventative Commission, lists the number, type, and disposition of all the cases handled by the Antitrust Commission and the Central Preventive Commission in the period 1974 – 1993.[17] In addition, in connection with its FTAA activities, Chile prepared a listing and brief summary of all the rulings by the Antitrust Commission and the Central Preventative Commission in 2001. Finally, the Prosecutor's Office has assembled data on the fines that have been imposed during the entire 1974 – 2002 period. This section briefly examines all three sources.

Antitrust and Central Preventative Commission decisions, 1974 - 1993

The Antitrust Commission

The Parades article lists 367 matters decided by the Antitrust Commission, of which 278 fall into three major substantive categories: horizontal arrangements, vertical arrangements, and monopolisation. Although there apparently were some merger cases, the lack of a separate category for mergers is a striking illustration of the Prosecutor's Office's priorities during this period. After setting aside a few ambiguous subcategories, one can say with relative confidence that the Commission handled 45 horizontal cases, 53 vertical cases, 42 monopolisation cases that involved vertical arrangements, and 114 other monopolisation cases (some of which may have involved vertical arrangements), and 6 unfair competition cases.

Table 1. Table B1: Resolution of cases by Chile's Antitrust Commission, 1974 – 1993

Conduct	Total	Violation	No Violation	Other
Horizontal arrangements	45	16	29 (64%)	0
Price agreements	31	7	24 (77%)	0
Territory allocation	5	4	1 (20%)	0
Production quotas	1	0	0 (0%)	0
Trade associations	5	5	0 (0%)	0
Info. Exchange	2	0	2 (100%)	0
Vertical Arrangements	53	26	24 (45%)	3
Exclusive distrib.	12	6	5 (41%)	1
Resale price maint.	18	13	5 (27%)	0
Discrimination	16	4	10 (63%)	2
Refusal to deal	7	3	4 (57%)	0
Vertical Monop/Dominance	42	21	17 (40%)	4
Price discrimination	28	16	9 (32%)	3
Tie-in sales	7	4	2 (29%)	1
Other Monop/Dominance	114	58	44 (39%)	12
Monopolisation	83	39	34 (41%)	10
Monopsony	8	4	3 (38%)	1
Barriers to entry	23	15	7 (30%)	1
Predation	7	1	6 (86%)	0
Unfair Competition	6	2	4 (67%)	2
All categorised cases	***260***	***144***	***118 (45%)***	***21***

This case distribution is what would be expected in Chile's circumstances. It is normal for a country in transition from a largely state-owned or state-controlled economy to have a large number of cases involving dominant firms. And the difficulty of investigating and proving cartels makes it not surprising to see more vertical than horizontal cases. On the other hand, when one considers that at least 42 of the monopolisation cases apparently involved vertical restraints by dominant firms, the great preponderance of vertical over horizontal cases does tend to support the previously noted conclusion that the competition institutions may have tended to challenge intrabrand restrictions that limit a firm's autonomy but may not harm competition in the market as a whole. The current concern that the institutions may spend too much time on unfair competition cases may note a recent trend, because there were only six during this previous 20 year period.

Viewed with caution, statistics on how the Antitrust Commission decided these cases also raise interesting points or questions. First, the Prosecutor's Office or private party initiating a complaint won only 55 per cent of the cases. Most challenges to horizontal arrangements and unfair competition were lost, while most vertical and monopolisation cases were won.

There are many possible reasons so many cases were lost, and the data do not permit in depth exploration of this issue. They do not disclose, for example, the cases in which the Prosecutor's Office was a party. It does, however, seem likely that this record reflects reluctance on the part of the Commission to find violations. An often-cited 1995 analysis of competition enforcement in Chile found that Commission members were indeed very reluctant to apply sanctions, and attributed this to a combination of factors, including (a) a strong belief in Chilean society that economic crimes are not serious, especially when the harm is to the public, (b) a perhaps related laissez faire attitude among some who regard the harm from monopoly as probably less than the harm from unwarranted intervention, (c) lack of resources, and (d) lack of an economic regulatory background or other expertise.[18]

Comparing the number of successful and unsuccessful cases in the subcategories raises interesting questions, but the data do not provide a means for further analysis. Challenges to horizontal price agreements had almost the highest percentage of losses. It is unclear what kinds of "discrimination" were involved in the cases labelled as vertical, but it is notable that discrimination by firms without market power was apparently condemned much less frequently than price discrimination by dominant firms.

The Central Preventative Commission

The statistics for the Preventive Commission are even harder to interpret. Of the 227 matters, only 118 fit in defined violation categories, and only 78 of these ended with approval or disapproval of the conduct. Of these 78 matters, only six clearly involved horizontal agreements – three price agreements, one territorial allocation, one association case, and one collusion case – of which five were found illegal. There were 38 cases involving vertical arrangements, and at least 27 of the 57 monopoly cases involved vertical restraints – 65 essentially vertical cases, of which 45 were found illegal. It is striking to see the extent to which vertical cases predominate, the much higher rate of disapproval in vertical cases, and the very small number of times in which horizontal conduct was challenged. There were eight unfair competition cases; the conduct was approved in four cases, and there were no formal findings of illegality.

Antitrust and Preventative Commission decisions in 2001

Antitrust Commission

According to information submitted by Chile in connection with FTAA discussions, in 2001, the Antitrust Commission made 55 rulings involving 33 docketed matters and one investigation (in which the Commission authorised arrest warrants for representatives of two companies that had refused to provide information relating to an alleged price fixing agreement on inter-province bus service). Overall, there were eight matters involving telecommunications, two involving electricity pricing, and a number of matters involving airline pricing. The more important infrastructure monopoly cases were the following:

- One telecom ruling was part of the case in which the Commission required the telecom regulator to hold an auction. In addition, the Commission declined to accept several complaints relating to telecom on the ground that the matters should appropriately be handled by the telecom regulator.
- In another important case, the Commission rejected a petition asking it to declare that there are competitive conditions in the local urban telephony market, including in its ruling six provisions that aimed at gradually creating a genuinely competitive market.
- The Commission was petitioned to find that some services connected with the supply of electricity are not provided under competitive conditions (and thus are subject to price control). It found that competitive conditions did not exist in the markets for 25 services, and made several recommendations to the electricity regulator.

Outside the infrastructure sectors, the most substantial matters before the Commission were the following, each of which is discussed in more detail elsewhere in this report.

- The Commission rejected a challenge to Coca Cola's acquisition of all trademarks and licenses of Cadbury Schweppes.
- In the buyers' cartel case against milk processors, the Commission issued an interim order suspending the buyers' price schedules for the period beginning 1 September 2001, ordering them to make payments based on their 1 July schedules.
- The Commission issued the previously described general instruction concerning price discrimination in the marketing and distribution of pharmaceuticals.
- The Commission upheld a decision by the Central Preventative Commission and fined Toyota Chile for fixing minimum resale prices for original replacement parts.

The Commission handled at least five unfair competition cases, at least some of which (e.g., a dispute over a restaurant's use of the term "express buffet" on its premises) appear to have been disputes without real competitive significance.

It is noteworthy that the Commission's only contact with horizontal price fixing or other horizontal agreements was its authorisation of arrest warrants stemming from firms' failure to comply with investigative demands by the Prosecutor's Office. Outside the infrastructure sectors, the Commission handled only one merger matter (Coca Cola/Cadbury Schweppes).

Central Preventative Commission decisions

The Central Preventative Commission issued rulings in 49 matters in 2001. Two were complaints alleging infringement of the right to work; both were dismissed, in one case with a decision stating the general proposition that such infringements are not cognizable under the competition law unless they involve real restriction of competition in the market as a whole. This is an example of the way in which Preventative Commission decisions have sometimes included the kinds of explanations of their reasoning that helps clarify legal standards.

Eleven cases involved government procurement and licensing, five of which appear to have been a purely formal review of whether requests for bids meet the standards laid out in an earlier Commission order. Four of the cases had some substantive element, which in three cases seems to have essentially amounted to a claim that the government was improperly conferring a monopoly on private parties.

The Commission's handling of two of the three monopoly cases was very cautious – finding no violation but issuing warning letters. Since the letters seem to warn against essentially the same conduct as that which had been at issue in the cases, they appear to illustrate a continuing reluctance on the Commission's part to find violations. In one case, it upheld an exclusive contract but warned the Department of Roads that before renewing the contract, it must consider whether other firms might like to bid. In the other, the Commission declined to overturn municipalities' grant of exclusive rights to sell compulsory auto insurance on the ground that the awarding process was proper, but it nonetheless issued a warning to the municipalities. The Commission did find a violation in a case involving educational establishments that required school uniforms to be bought from firms to which they had granted exclusive contracts without having called for bids. The Commission issued detailed rules to govern this process and

ordered that the operative part of its opinion be published in a newspaper with substantial national distribution.

An additional 14 cases involved infrastructure monopolies. The Commission rejected one pricing complaint on the ground that it should be considered by the telecom regulator. Eleven other cases all involved rulings under a special law on requests by the telecom regulator or private parties for a ruling on whether prospective license transfers would be anticompetitive; the Commission did not object to any of them. And in a case involving the electricity market, the Commission advised that the acquisition of shares in an electric company by the parties that had submitted bids would not raise competition issues. Finally, the Commission received a complaint by a consumer organisation that the Santiago subway system was charging excessive prices and thereby abusing its dominant position. The case is still pending (and offered as an example of the slow decision making process; the complaint was in February 2001, and the hearing in March 2002).

The remaining 22 cases involved firms in competitive or potentially competitive markets. Fourteen of these were unfair competition cases involving trademark or other intellectual property issues, and one was a comparative advertising case. Another four involved parallel imports or other import-related issues. This leaves three more conventional competition cases. In one, the Commission issued an advisory opinion stating that a proposed distribution system would not raise problems if changed in minor ways. In another, it dismissed allegations that Hipermercado Carrefour had engaged in predatory pricing, including in its ruling several specifications on how promotional offers should be handled. The third case was the dog food resale price maintenance that was mentioned above because during 2001 it was appealed to (and affirmed by) the Antitrust Commission.

Fines imposed, 1974 - 2002

Statistics on the number and amount of fines tend to confirm the apparent reluctance of Chile’s competition institutions and legal system to impose sanctions. Table 2 shows that fines were imposed in only 73 cases in the last 28 years. The Supreme Court reduced the Antitrust Commission’s fines by 45 percent, making the average fine about US$ 13,500 and the total less than US$ 1,000,000. The Commission’s highest fines on average were in unfair competition cases, followed by horizontal cases and then “other.” As finally approved by the Court, the highest average fine was for horizontal cases, followed by “other” and then unfair competition. By far the most fines (43) were for monopolisation, but the average fine totalled only

slightly more than US$ 6,000. Table A-2 in Annex A shows the total fines for each violation category as a percentage of total fines.

Table B2: Amount of Fines for Different Violations, 1974 – 2002

Conduct	No of Cases	Commission Fines – US$ (avg per case)	Final (S. Court) Fines – US$ (avg per case)	Final as % of Commission
Horizontal agreements	9	455,460 (50,607)	305,986 (33,998)	67.2
Vertical agreements	4	38,711 (9,678)	38,739 (9,685)	101.1
Monopoly/Abuse	43	600,156 (14,000)	269,779 (6,273)	45.0
Merger	1	13,613	3,403	25.0
Unfair competition	8	436,776 (54,957)	175,544 (21,943)	40.2
Others	8	235,875 (29,484)	189,808 (23,726)	80.5
Totals	**73**	**1,780,591(24,389)**	**983,259 (13,469)**	**55.2**

NOTES

1. Other than CODELCO, there are only two real SOEs: the National Petroleum Enterprise, "ENAP"; and a small firm that supports the development of small mining operations, "ENAMI."

2. Other components of the agenda include procompetitive regulatory reform in electricity and other areas, developing e-commerce and e-government, tax incentives for investment, better use of public expenditure in the higher education and health care, and facilitation of job-training and part-time work. The plan appears to be broadly consistent with views expressed in an article that examines the institutional and economic structure of the state in Latin America, finds it incompatible with an adequately functioning market economy, and calls for reform. Saavedra, Eduardo, and Soto, Raimundo, *Reformas Económicas e Institucionales Del Estado en América Latina*, Universidad Alberto Hurtado (Diciembre de 2000).

3. Chile's investment policies during this period are discussed in Eduardo Moyano, *Foreign Investment Policy and Promotion in Chile*, in Foreign Direct Investment Policy and Promotion in Latin America (OECD, 1999).

4. As originally proposed in the pro-growth agenda, this amendment would have made the law's efficiency orientation even clearer, by stating that the law's object is "the defence of free competition in the markets, as a means to develop and preserve the right to participate in economic activities, promote efficiency and, thereby, the welfare of consumers." This text would have codified Chile's current position concerning the primary goals of the law while also confirming Chile's special concern for economic freedom. *[During a major "Competition Day" conference in Santiago on 30 November 2003, the head of Chile's competition authority stated that the more specific goals referred to in the original draft will be used help define the more general term in the final law.]*

5. For example, Resolution Nº 257 (1987), explained that exclusive territories infringe competition by "preventing the access by other businessmen who may be interested in distributing such product."

6. Spain's competition law has a similar emphasis on what it calls "the exercise of freedom of enterprise."

7. Patillo, Guillermo, *The Chilean Antitrust System*, APEC/PFP Course on Competition Policy, Bangkok, Thailand, March 1997.

8. Paredes-Molina, Ricardo D., *Jurisprudence of the Antitrust Commissions in Chile*, the Law and Economics of Development (Buscaglia, Ratliff, and Cooter, Eds.) (19__).

9. Article 2 says that the listed acts and agreements *tend* to restrain free competition. This clarifies that the conduct need not have had an effect in order to be condemned, but it does not necessarily mean that the conduct covered by Article 2 should be any more likely to be illegal *per se* than any other conduct covered by Article 1. In the first place, Article 1 refers to "attempts" to restrain free competition, so it too has no requirement of an actual effect. In the second place, conduct that *tends* to restrain competition does not necessarily do so.

10. Ignacio De León, *The Role of Competition Policy in the Promotion of Competitiveness and Development in Latin America,* World Competition*,* Vol. 23, No. 4, at 115 (Dec. 2000)(Kluver Law International Journal).

11. OECD (1998), Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, 25 March 1998 [C(98)35/FINAL].

12. Paredes-Molina, supra n.8; *see also* Edgaro Barandiarán and Ricardo D. Paredes, Proteccion de la Competencia en Chile: El Estado v. Laboratorios Chile y Recalcine (1992/1993), Documento de Trabajo Nº 222, Instituto de Economia, Santiago (Septiembre 2002).

13. *See generally* OECD (2003), Second Report by the Competition Committee on Effective Action against Hard Core Cartels; OECD (2002), Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws; OECD (1998), Report by the Competition Committee on Effective Action against Hard Core Cartels.

14. To the same effect, *see* Carey, Jorge, World Law of Competition, Part 4: Chile (1986).

15. OECD (2001a), Recommendation of the OECD Council concerning Structural Separation in Regulated Industries. The underlying issues and OECD Members' experiences are discussed in OECD (2001b), Restructuring Public Utilities for Competition.

16. Eduardo Saavedra, *The Role of Informational Rents: Network Utilities and Vertical Structure,* Revista de Análisis, Vol. 16, No. 2, at 77-107 (Diciembre 2001)(concluding that vertical separation is more important in developing countries because of the greater difficulties in having complete and enforceable contracts).

17. Paredes, *supra* n.8

18. Serra, P., *La politica de competencia en Chile*, Revista de Análisis Económico, Vol. 10, No. 2, at 63-88 (November 1995).

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