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## **Global Forum on Competition**

### **INDEPENDENCE OF COMPETITION AUTHORITIES-FROM DESIGNS TO PRACTICES**

#### **Contribution from Chile**

**--Session III--**

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*This contribution is submitted by Chile (TDLC-FNE) under Session III of the Global Forum on Competition to be held on 1-2 December 2016.*

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## INDEPENDENCE OF THE COMPETITION AUTHORITY

### -- Chile (TDLC – FNE) --

1. The institutional design of the competition authority in Chile is two-fold: it encompasses the *Tribunal de Defensa de la Libre Competencia* (“**TDLC**” or “**Competition Tribunal**”), and the *Fiscalía Nacional Económica* (“**FNE**”). In this regard, Chile has a *prosecutorial enforcement model*<sup>1</sup> where the FNE is an administrative agency that conducts the investigations and then prosecutes the case in an adversarial setting before the TDLC, an independent court. In particular, the Competition Tribunal is a specialized judicial body, subject to the supervision of the Supreme Court of Justice.

#### 1. FNE

2. The three main areas where the independence of the FNE and its head, the National Economic Prosecutor, can be observed are the following: (i) the clear and transparent criteria for appointment and removal the National Economic Prosecutor; (ii) the absence of obligation to the executive in order to account on regular basis of its investigations; and, (iii) the National Economic Prosecutor does not have to broadly report to the Congress and the FNE’s activities are not monitored by independent auditor, although it is possible to be cited by the Chamber of Deputy to report on specific issues and investigations.

3. Firstly, the criteria for appointment and removal the National Economic Prosecutor are clear and transparent. The National Economic Prosecutor is appointed by the President of the Republic after pursuing a selection process for senior public officials leading by an independent institution (*Alta Dirección Pública*). Additionally, he/she can cease in his/her position considering only certain legal grounds: (i) end of the period of appointment; (ii) voluntary resignation accepted by the President of the Republic; (iii) negligence in the performance of his/her functions; and (iv) inability. The removal based on negligence (iii) and inability (iv) grounds will be declared by the President of the Republic, previous favorable report of the Supreme Court, at the request of the Minister of Economy; that report has to be issued by the majority of the members of the Supreme Court.

4. Secondly, the Competition Authority does not have obligations before the executive regarding reports on ongoing investigations upon to request. There is a legal recognition of the National Economic Prosecutor’s independence from other Government authorities and courts, and the physical location is exclusive for the FNE’s offices. Moreover, the FNE’s decisions cannot be vetoed by a ministry or by the executive branch, and the executive does not have powers to decide on specific cases. However, the FNE does have to report on annual basis to the executive, mainly to the Ministry of Economy, regarding budgetary issues and performance administrative indicators.

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1 As it is defined in OECD document DAF/COMP/M(2015)1/ANN9/FINAL.

5. Thirdly, regarding the legislative, the FNE does not have the obligation to report on its ongoing activities, neither the obligation to stand before Congress on annual basis. Also, the FNE's activities are not monitored by an independent auditor or by executive committee. However, the National Economic Prosecutor might be cited by the Chamber of Deputy to explain and answer questions regarding specific investigations which are public.

6. In sum, apart from the fact that the competition law regime in Chile is organized on the concurrence of different institutions (Competition Tribunal, Supreme Court and Competition Authority), which reinforces the independence of each one and increases check and balances, the FNE's independence is legally guaranteed from the executive and the legislative, and it is preserved by the mechanism for the appointment and removal of the National Economic Prosecutor.

## 2. TDLC

7. With regard to the TDLC's **governance**, as mentioned above, it is an independent judicial body, subject to the supervision of the Supreme Court of Justice. Therefore, it is not subject to the supervision by any Ministry or Governmental entity. In particular, the TDLC comprises four expert members or Judges - two economists and two lawyers- and a Chairman. The Chairman must be a lawyer with a minimum of 10 years of professional experience in competition, law and economics or commercial law.

8. With regard to the **appointment** of the Competition Tribunal's members, it entails a public, clear and transparent process of selection that ensures that nomination is based on merits rather than on political background. In particular, appointment of the Judges work as follows:

- The Chairman is appointed by the President of the Republic from a list of five candidates as proposed by the Supreme Court, which hinges on their qualifications.
- Two Judges –one lawyer and one economist- are appointed by the Central Bank Council from a list of three candidates selected on the basis of their qualifications, whereas the remaining two members are designated by the President of the Republic, from a list of three candidates, proposed by the Central Bank Council, selected likewise.

9. The TDLC also comprises two alternate Judges –one lawyer and one economist- that work in a part-time scheme and that replace the regular members when they have a conflict of interest or are unable to perform their duties temporarily.

10. Decisions within the TDLC are taken by simple majority and the Chairman is entitled to cast a tie-breaking vote.

11. In relation to the **term length** of the TDLC's judges, they stay in office longer than the political term (President of the Republic in Chile is elected for four years whereas Judges are appointed for a six year term). Judges can be nominated for one consecutive term so they are able to accumulate expertise. Finally, it entails a multi-member system with staggered terms every two years.

12. With regard to **conflicts of interest**, as of the legal reform of the Chilean Competition Law that became into force in August, 2016, any judge appointed from that date must exclusively work full-time at the TDLC, except for academic activities for up to 12 hours a week. This new provision enhances independence of the judges preventing conflicts of interest. Please recall that current members of the TDLC serve nearly full time, although they can provide advice as lawyers or economists in any area different from competition.

13. Moreover, the Competition Law provides that the National Economic Prosecutor or any individual that had a directive position in the FNE can be appointed as judge only a year after they left their position. Additionally, the legal reform enacted in 2016 strengthens the incompatibilities applicable to judges during their term, preventing conflicts of interest to both regular and alternate members.

14. It is noteworthy that TDLC members can only be **dismissed** in certain limited and prescribed circumstances (e.g. due to gross misconduct, impossibility to perform assigned duties and breach of their full-time regime). Dismissal is triggered by the TDLC's Chairman or two judges and decided by the Supreme Court of Justice. Furthermore, the Supreme Court can impose disciplinary measures anytime, when necessary.

15. In relation to **checks and balances**, pursuing an independent and objective decision-making, there are multiple safeguards related to the Competition Tribunal, such as the following:

- Procedural safeguards: transparency in public hearings and decisions are published.
- Judicial review: the decisions issued by the TDLC –either arising from an adversarial procedure or from mergers control<sup>2</sup>- can be challenged by the parties before the Supreme Court of Justice. The Supreme Court can review in-depth both the merits and legality of the decisions issued by the TDLC and declare them void.

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<sup>2</sup>

This judicial review will come into force during 2017 as part of the legal reform enacted in August, 2016. Specifically, according to the new legal provisions, where the TDLC clears a merger that was previously rejected by the FNE and imposes new remedies that were not submitted by the parties to the FNE, its decision can be challenged before the Supreme Court.