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Optimal Design, Organisation and Powers of Competition Authorities – Note by Chile

4 December 2023

This document reproduces a written contribution from Chile submitted for Item 2 of the 138th meeting of Working Party 3 on 4 December 2023.

More documents related to this discussion can be found at https://www.oecd.org/competition/optimal-design-organisation-and-powers-of-competition-authorities.htm.

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1. Introduction

1. Discussions about the ideal internal structure of competition agencies necessitate a prior clarification of the law's purpose and an evaluation of a country's specific institutional constraints. While there is a consensus on the fundamental objectives that competition legislation should achieve, recent debates driven by the neo-Brandeisian approach and concerns about the effectiveness of each country's system create pressure for legal amendments and institutional redesigns (see, William E. Kovacic, "The Institutions of Antitrust Law: How Structure Shapes Substance", 110 Mich. L. Rev. 1019, 1042-43, 2012; and for a specific case of amendments, Thomas Ross (2022): "Proposals for Amending the Competition Act", Canadian Competition Law Review, vol. 35, 1-45).

2. The optimal institutional design for each country must consider factors such as its economic structure, size, exposure to international trade, and historical institutional elements, including political processes and social dynamics. Recognizing that a one-size-fits-all approach is not suitable due to differences in global best practices and historical contexts, it is essential to tailor competition authorities' designs to each nation's unique circumstances. The political landscape and the level of market consolidation in a country play a crucial role in this context.

3. While Chile's history in competition law is relatively shorter compared to the United States and Europe, it has developed relatively robust institutions in contrast to most other Latin American countries. It is widely acknowledged that Chile has consistently enforced effective competition policies since the mid-1970s, well before similar efforts in other Latin American nations (see, e.g., Julian Peña, "Las políticas de competencia en América Latina post consenso de Washington", 2021 Centro de Competencia, Julian-Pena.pdf centrocompetencia.com; Marcelo Celani and Leonardo Stanley, "Políticas de competencia en América Latina", Serie Desarrollo productivo 142, 2003, Cepal; and Patricio Bernedo, 2013, La Historia de la libre competencia en Chile, 1959-2010). Additionally, Chile's reform initiatives have been well-considered, extensively debated, and adapted to the country's economic and institutional context.

4. Two distinct features of Chile's institutional system set it apart: i) the separation of investigative and prosecutorial functions, managed by the Fiscalía Nacional Economica (FNE), and the judicial decision-making handled by a specialized Court, the Tribunal de Defensa de la Libre Competencia (TDLC); and ii) the hybrid nature of the TDLC. While these characteristics introduce fresh challenges for internal design, they were initially established to address what were and still are the most significant challenges a competition enforcement framework design has.

5. The challenges posed by information usage, the increasing complexity of relationships between companies, including those beyond borders, result in higher skills and resource requirements, efficiency, collaboration, and resources. Additionally, the need to respond to an increasingly critic public opinion, with greater influence to affect policies, also requires improving the capacity to communicate the purpose and the consequences of competition actions.

6. The mentioned distinctive characteristic of the Chilean system, in a context of growing needs for highly qualified professionals, prompts the question of how the FNE and the TDLC can complement each other without sacrificing the valued independence of both.

Other challenges, such as those presented using data analytics, increasingly prevalent in other areas, appear relatively less urgent than a more fundamental one: clearly conveying the nature of the analyzed cases and the reasoning behind them.

7. This document analyzes the historical context that led to the internal design of competition institutions in Chile. The conclusions arrived at are that the reasons behind the separation of the FNE from the TDLC, initially intended to address the most critical challenges in the mid-1970s, remain relevant but have evolved to present new challenges. The document comprises three sections in addition to this introduction. Section 2 outlines the historical background of competition law in Chile. Section 3 focuses on the challenges of autonomy, technical expertise, and resources in the context of the current design. Section 4 concludes.

2. Historical background

8. The roots of Chilean competition law can be traced back to a section of the Klein-Sacks Mission report in the mid-1950s. During this period, the primary concerns in Chile and many other Latin American countries were not monopolies or the concentration of economic power, but rather stagnant productivity, chronic fiscal deficits, and high inflation rates. While some of the recommendations from the Klein-Sacks report were implemented, such as the introduction of Chile's first antitrust law in 1959, which closely resembled the Sherman Act, they had limited practical relevance. This was especially the case because the government's price-setting system remained in place, and competition-related issues continued to be resolved through price-setting rather than a well-defined legal framework. Additionally, the initial law lacked a formal organizational and functional structure that would make it operative (see Dale Furnish, “Chilean Antitrust Law,” in The American Journal of Comparative Law, vol. 19, No. 3, Summer, 1971).

9. The economic situation further deteriorated over time. By September 1973 was characterized by a high public deficit, a record inflation rate, and extensive state intervention in the economy through state-owned firms. This situation changed dramatically with the 1973 *coup*. From the outset, the military regime adopted a widely shared technical diagnosis that it was necessary to limit state intervention and the administrative discretion of the government to set rules. This discretion had been the source of price distortions and various forms of protectionism. Key reforms, including tariff reductions to a flat 10%, tax restructuring to a flat VAT of 20%, the price liberalization (over 3,000 prices were administratively set), and since the mid-1985, the detailed regulation of public utility services, were introduced to reduce government intervention and the risk of discretionary behavior (see Ricardo Paredes and Rodrigo Castillo, "El Modelo en la Encrucijada," RIL eds. 2020).

10. The military government initially adopted a mild enforcement approach, focusing on advocacy and preventing anticompetitive practices. Thus, the 1973 law (Decree Law 211) established administrative entities: Preventive Commissions focused on preventive measures and advocacy, and a Resolutory Commission[1] that could prohibit anticompetitive behavior, alter industrial structures, and impose fines. Both commissions included economists and lawyers.

11. Although the selection process did not guarantee the most qualified candidates and the government appointed one representative in each commission, the inclusion of a Judge

[1] In 1959 the first law considered a sole decision-making body and in 1963 a special prosecutor was appointed to lead the investigation whose conclusions were presented to a commission.

of the Supreme Court who presided over the Resolutive Commission and the Council of Presidents of Chilean universities appointing one member in each commission was a first effort to impose some autonomy. In turn, the government also named one commissioner in both entities and although these decision-making bodies were formally separated from the FNE, which handled investigations, in practice, the FNE acted as a Technical Secretariat of the Commissions.

12. The focus on prevention and advocacy during the first 15 years began to change with the financial crisis in 1982, the return to high economic growth since the mid-1980s, and the privatization of sectors traditionally run by the state at the end of the 1980s. The return of democracy in 1990 led to a political consensus for new powers and capacities for competition authorities to address anticompetitive practices, and to consider the need of autonomy from the political power.

13. Thus, in 2003, following recommendations from a panel of experts, Chile enacted a new competition law that more precisely defined its purpose, granted greater enforcement powers to the FNE, and replaced the commissions with the TDLC, a specialized tribunal comprising three lawyers and two economists who serve as judges ("Ministers") A key feature of the new law was the complete separation of prosecutorial and judicial roles to ensure the TDLC's independence from the government and to mandate technical expertise among its members.

3. Autonomy, Expertise, Resources and the separation between the prosecutorial and judicial roles

14. Chile's history suggests that when designing the competition institutional framework in 1973, special consideration was given to the risk of discretionary actions that could limit private sector initiatives by a potentially powerful prosecutor appointed by the government with a political agenda. There were also doubts about how the judicial sector, with its lack of economic expertise, would handle antitrust issues.

15. The two most prominent challenges, shared by most Latin American countries then and today, are ensuring that competition agencies operate independently, free from political or industry influence, and providing expertise and technical capacity at the decision-making level to effectively analyze and address competition-related issues. It is evident that both aspects are essential for a sound competition framework.

16. To assess organizational design challenges, we must determine whether the current design in Chile, particularly the separation into two distinct authorities, effectively addresses the main issues identified in the mid-1970s. If the answer is affirmative, we must analyze what challenges such an alternative might pose.

17. Among practitioners, there is a consensus that Chile's system offers a degree of political autonomy. This is attributed in part to the clear separation of prosecutorial and judicial roles, which is facilitated by the presence of two distinct authorities. Additionally, the introduction of a removal mechanism in 2009 for the head of the FNE, requiring the approval of the Supreme Court in the decision-making process, has further enhanced this autonomy.

18. This situation is further strengthened by the appointment for the National Economic Prosecutor, the FNE´s head, and TDLC members. The President of the Republic appoints the National Economic Prosecutor from a list of three candidates chosen through a public contest led by the body responsible for recruiting high-level state officials. Regarding the judges, the President of the TDLC is selected by the President of the Republic from a list

of five candidates nominated by the Supreme Court following a public procedure. Of the remaining four ministers, two are appointed by the President of the Republic and two by the Central Bank, an autonomous body, and all are selected from lists prepared by the Central Bank through public selection procedures among competition experts. Removal is also through a mostly political-free and extraordinary procedure before the Supreme Court. Thus, today political autonomy is not a current challenge.

19. Regarding the qualification and political autonomy of judges in addressing technical issues, it is also recognized that the appointment of economists to the adjudicating role has guaranteed technical competence. This is particularly relevant where sophisticated economic arguments are presented, such as questions of industrial organization. The involvement of economists as judges gives them a voice that is equal in weight to lawyers and provides an opportunity to enhance technical discussions to analyze complex issues. Furthermore, the benefits of expert courts are widely recognized (see, Valeria Ortega, Poderes probatorios del tribunal experto e impacialidad: el caso del Tribunal de la Libre Competencia chileno, Trabajo final Master en razonamiento probatorio, Universidat de Girona, 2022).

20. In addressing the challenge of acquiring staff expertise and technical capacity, the 2016 reform significantly increased resources. Thus, during the period 2003-2014 the TDLC budget raised approximately tenfold, more substantial than in their initial stages when the commissions relied heavily on information and investigations conducted primarily by the FNE. The change is also noticeable compared when the former commissions had no staff, shared offices with the Prosecutor, and members served as honorary appointments. The 2003 reform also provided staff to the newly created TDLC for technical support to the judges. Dedication hours for the judges were specified, and their remuneration was set equal to that of the Prosecutor. Law 20.945 enacted in 2016, required TDLC judges to commit full-time to their roles.

21. The approach Chile adopted to address these challenges has proven effective, with a positive overall evaluation of the Chilean experience (see, for instance, Bernedo, P. op. cit; and OECD, 2010, Chile's accession report competition policy, https://www.oecd.org/chile/47950954.pdf). Possibly, the most evident example of the success that the Chilean legislative design has achieved is its resilience to changes during different democratic governments and the temptation of substantial modifications when a non-popular decision was taken. This clearly contrasts with reversals of competition laws in Latin America. On the contrary, the importance and the role of competition in Chile has progressively been strengthened through refinements that have allocated more resources, provided more enforcement powers, including increasing maximum fines, the possibility of criminal prosecution for individuals in collusion cases, the introduction of leniency programs, mandatory pre-merger control, streamlining for compensation of damages, facilitation of information access for market studies by the FNE, and sanctions in case of non-compliance by the investigated parties.

22. This does not retract from the existence of challenges and eventual trade-offs. Thus, the separation of prosecutorial and judicial roles, which is a positive aspect from the perspective of independence and the consistency of the measures taken, thanks to double checks, may lead to some duplication of efforts during the investigation stage, for instance in the confidentiality process, and a longer time required to conclude cases.

4. Concluding Remarks

23. Many challenges in designing the competition system's institutions in Chile are common to those found in most countries worldwide. Issues relating to independence, autonomy, and transparency of decision-making bodies have been addressed over time. The favorable assessment of its competition law can be attributed in part to the general institutional design that curbs administrative market interventions, but also a relevant part is explained by the specific design that preserves autonomy from political power and promotes expert decision making.

24. Independence, expertise, and resources could be identified as the most critical challenges in consolidating any competition system. Failure to address these challenges could undermine the effectiveness of competition laws and institutions. That is why the new challenges posed by the digital economy, platforms, and the increasing litigation demanding higher legal and technical expertise within teams ultimately require increased resources and internal organizational enhancements for more effective use, and the existence of trade-offs, should not undermine the main pillars of the competition law.

25. Finally, addressing the judicial review, the general challenge in Chile being expressed in the review of TDLC decisions by the Supreme Court, requires a clear diagnosis, including to clarify the purpose of the law and how the technical language must be used by a special court whose decisions will be reviewed by generalist judges.