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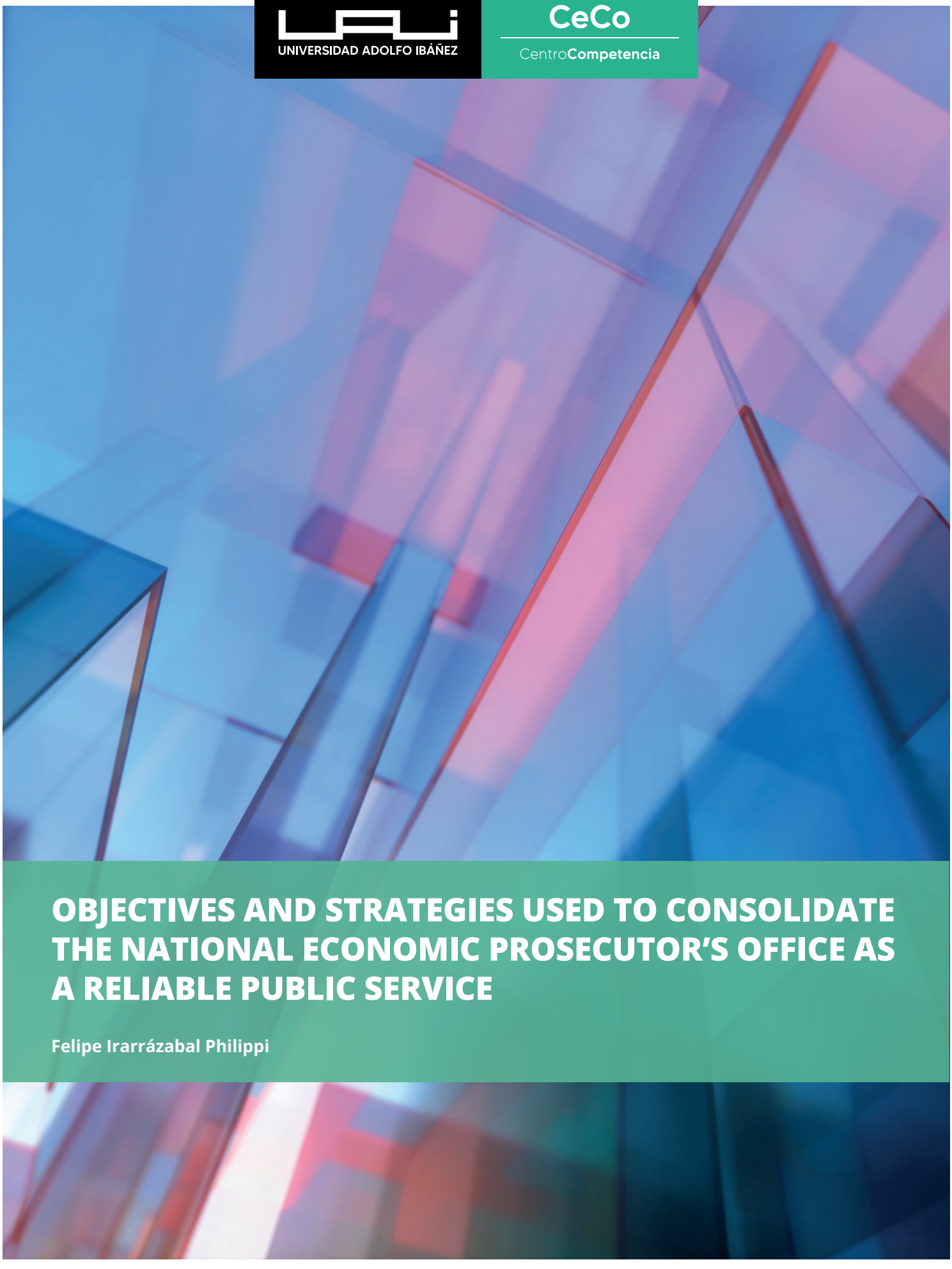

OBJECTIVES AND STRATEGIES USED TO CONSOLIDATE THE NATIONAL ECONOMIC PROSECUTOR'S OFFICE AS A RELIABLE PUBLIC SERVICE

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Objectives and strategies used to consolidate the national economic prosecutor's office as a reliable public service*

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Abstract: *In this text, the former Chilean competition prosecutor describes the objectives and strategies developed by the National Economic Prosecutor's Office (FNE) under his leadership with a view to consolidating an institutional model that would function efficiently, effectively and consistently, with high levels of prestige and trust. He explains the main characteristics of chilean competition law and institutionality, concentrating on the technical and political independence of the prosecuting agency, the strict selection of cases, the technical tone used, the formation of high-performing work teams and the internationalization of the FNE. He ends with a reflection on trust in institutions, which is the key to a successful model.*

Keywords: *antitrust, FNE, TDLC, institutional independence, institutional trust.*

The complexity of the future world is reduced by the act of trust. In trusting, one engages in action as though there were only certain possibilities in the future. Niklas Luhmann, *Confianza*[1]

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* This is a translated version of the following work: Felipe Irarrázabal, "Objetivos y estrategias utilizados para consolidar a la Fiscalía Nacional Económica como un servicio público confiable," Estudios Públicos 154 (2019). Available at https://www.estudiospublicos.cl/index.php/cep/article/view/24. This work was translated by Fernanda Ruiz and Ignacio Peralta.

1 Niklas Luhmann, Confianza, translated by Darío Rodríguez Mancilla (Barcelona: Anthropos, 2005), 33.

I. INTRODUCTION

At the beginning of 2010, President Sebastián Piñera appointed me as National Economic Prosecutor through a Senior Public Management selection process, and in 2014 President Michelle Bachelet renewed my appointment. Thus, I had the privilege of leading the National Economic Prosecutor's Office (hereinafter FNE) for a little over eight years and of contributing to its becoming a public service of excellence.

I want to begin by clarifying that the FNE was already a good public service when I took office.[2] In fact, the first measure I adopted upon arrival was to confirm each and every one of its officials in their positions. I also made it clear that I was coming alone. That is, no one from outside accompanied me—not a deputy, not a chief of staff, not even a secretary. These gestures were important because, for the first time since Chile's return to democracy, there was a transition from a center-left coalition to a center-right one, and the officials had legitimate doubts about their continuity.[3]

During those eight years in which I led the FNE, it managed to make significant contributions to the defense and promotion of competition and—so we believe—it came to be consolidated as a reliable and excellent public service, both in Chile and abroad, without exponentially increasing either the number of its officials or its budget.[4]

In those years, we were able to refine a model of operation for the FNE that respected the institution's timing, objectives, and hallmark. We consolidated its reputation, and concrete results were achieved that were perceived by citizens, by the country's political actors, and by the business community.[5]

That model was based on the following pillars, as stated in our 2017 annual public report:

> The FNE's model is complex and rests—I believe—on at least nine basic pillars. These pillars are autonomy, which must be defended tooth and nail, against all odds; a technical character, removed from political parlor games; a selective approach, both in cases and in the professionals who join our team; constant evaluation of our performance, however painful; our requirement to maintain a long-term strategic vision and to act in line with that vision; being transparent where the law allows us to; humility to seek specialized external advice; the need to maintain international integration, especially with the main places where competition rules are developed; and maintaining a clear strategy with the media.[6]

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2 It is interesting to read the "Balance cuatrienio 2006-2010" from March 2010, in which then–Prosecutor Enrique Vergara provides an account of his administration and expresses his institutional aspirations, which are in harmony with what was subsequently carried out: "(...) to be an efficient institution, with its actions oriented and planned according to their impact on competition in the markets, to be an institution recognized in the country, at both the technical and citizen levels, to be an institution validated before its foreign peers." There, he also sets out his main challenges: "incorporation of the new powers regarding collusion and cartels established by Law 20.361" and "increasing the effectiveness of the complaints filed by the FNE, particularly in cases of collusion." Available at http://www.fne.gob.cl/wp-content/uploads/2010/12/inan_0005_2010.pdf.

3 In addition, and to reinforce the signal of continuity, we hung the portraits of all former prosecutors in the FNE's main meeting room—something quite common in Chilean public services, but not customary at the FNE. We also invited the former prosecutors (including Ms. Olga Feliú, wife of Waldo Ortúzar) to a meeting where we presented the project of a book on competition law in Chile that required interviews with each of them, to which they immediately agreed. Patricio Bernedo, professor of history at the Pontificia Universidad Católica de Santiago, wrote the book after interviewing them. Patricio Bernedo, *Historia de la libre competencia en Chile (1959–2010)* (Santiago: National Economic Prosecutor's Office, 2013), available at http://www.fne.gob.cl/wpcontent/uploads/2013/11/Historia_libre_competencia.pdf.

4 The total number of officials increased between 2010 and 2018 from 87 to 115, and the budget from 3,940 to 6,981 million pesos (in nominal pesos according to the respective budget laws).

5 See Virginia Rivas, "La reputación técnica y el emprendimiento de políticas como fuente de poderes: el caso de la Fiscalía Nacional Económica," *Estudios Públicos* 152 (2018). Available at https://www.cepchile.cl/cep/site/artic/20181226/asocfile/20181226123254/rev152_rivas.pdf, especially regarding the relationship between independence and reputation. See also Francisco Agüero and Santiago Montt, "Chile: The Competition Law System and the Country's Norms," in *The Design of Competition Law Institutions: Global Norms, Local Choices*, edited by E. Fox & M. Trebilcock (Oxford: Oxford University Press, 2013).

6 See the 2017 Cuenta Pública del Fiscal Nacional Económico, at http://www.fne.gob.cl/wp-content/uploads/2018/04/Discurso_final.pdf.

How did we do it? That is what I want to recount in this article: the essential objectives that guided us and the specific strategies employed to achieve those objectives— strategies that, over these eight years, allowed us to consolidate an institutional model of efficient, effective, and consistent functioning, which translated into an improvement in the reputation of and trust in competition law.

It is necessary, however, before developing these objectives and strategies, to explain the main characteristics of competition law and of the institutional framework of our country.[7]

This work is organized, in what follows, under the following chapters: (2) complexity and simplicity of competition law, (3) institutional consolidation, (4) independence, (5) selection, (6) technical tone, (7) work teams, (8) internationalization, (9) trust, and (10) final reflection.

II. COMPLEXITY AND SIMPLICITY OF COMPETITION LAW

Competition law—that is, the regulation that protects the market economy—is complex. Tangled and unpredictable, some will say. In contrast, the laws that regulate these matters tend to be simple and austere. Bland, others will say.

The complexity arises from what is being protected. The market economy is a form of organization that is inherently complex and novel, with practical expressions that differ from what we can learn from theoretical economics texts.

The task of competition authorities is to draw a line between the inherent harshness of the market economy and anticompetitive faults, in a landscape filled with shades of gray, relying on an economic science that is dynamic and disregards formalism, with the purpose of building a legal edifice that is solid yet flexible, capable of withstanding the passage of time and radiating common sense.

That is not easy.

Perhaps this can be better understood through an analogy: the market economy should not be a boxing ring where everything is allowed, but neither should it be a tai chi practice.

The market economy is based on competition, and competition offers a vibrant *game*, leading to tension between rival teams that eventually works in the benefit of consumers. There is an air of creative destruction and a spirit of uncertainty in the environment, where no one's future is guaranteed.

The difficulty arises when concrete cases must be investigated or specific guidance provided. Most of the time, it is possible to distinguish when a business conduct is inappropriate and not based on competition, merit, and efficiency, but rather on abuse or conspiracy. But sometimes it is not easy to know, at first glance, whether a conduct is legal or not.

Thorough knowledge of the facts and of the market in which they unfold is essential. But that is expensive and slow, and only once it is obtained, the search for rules and standards begins.

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7 Those familiar with competition law may skip the first two chapters (on "Complexity and Simplicity of Competition Law" and on "Institutional Consolidation") and begin by reviewing the chapter on independence.

The legal framework of competition law includes instances, procedures, and standards that have particularities with respect to other traditions (especially regarding the sources of law), in which economic theory is combined, for example, with elements of economic law, administrative law, criminal law, constitutional law, and methods of reasoning of Anglo-Saxon origin.

The main legal source is the case law of the decision-making bodies and the guidelines and doctrines issued by administrative authorities. A double mental effort is required: induction (regarding the standard distilled from a concrete case already decided) and deduction (regarding the application of that standard to a new concrete case).

Because the institutions of each country have limited resources, and each case consumes lots of energy, only a limited number of cases are generally processed each year. These few cases take time to decide, depending on the judicial review regime in place.

The decision or judgment specifies the facts on which the case unfolds and then concludes whether or not there has been an infringement, referencing the applicable laws, precedents, and principles.

However, sometimes it is not clear what line of reasoning applied, or no precise rule or standard can be distilled from it. That lack of articulation makes it difficult to predict how a similar case will be dealt with in the future, diminishing the possibility that such a decision will generate a positive externality in competition law.

Another challenge is that the group of people most qualified to understand the keys to the cases and their decisions or judgments is small, and therefore the pedagogical effect of a decision or judgment may be diminished.

Some of the challenges noted above can become more acute in countries that belong to the tradition of continental law, where judges generally decide *case by case* and case law is not considered a binding source of law. In countries of Anglo-Saxon legal culture, by contrast, judges of the highest rank may exceptionally depart from precedent, but they must argue in depth why they are departing from what was decided in previous cases, and why the new rule or standard is superior to the previous one.[8]

In this area of law, foreign case law and doctrine exert significant influence. In general, there is a considerable degree of convergence. However, it may occur that such influence is not peaceful and that contradictory points of view exist among different foreign authorities on the same issue, not to mention the difficulties inherent in any transplant.[9]

Another challenge concerns the quantification of the economic consequences of a given abusive conduct or merger. The world of effects itself is *elusive* and requires aiming at what might occur in the future and constructing *counterfactuals*, something that is not easy to assume.

The main sanction or penalty for a competition law infringement is a fine. Determining the amount of the fine is difficult, because there are several factors that must be weighed, some of which are explicitly mentioned in the law. Other sanctions may also be imposed, and remedies may be offered in a merger, such as the prohibition of undertaking a specific action whose effects may reconfigure an entire industry—or even several markets.[10]

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8 An anecdotal expression of the strength of precedent can be found in the case *State Oil Co. v. Khan*, 522 U.S. 3 (1997), decided by U.S. judge Richard Posner, who ruled by following precedent but noted that doing so was entirely inadequate; said precedent was later overturned by the Supreme Court. See Daniel Crane, *Antitrust* (New York: Wolters Kluwer Law, 2014), 82.

9 Of course, great care must be taken with the temptation of copy-paste, especially when the importation is partial (and does not include a series of institutional considerations from the country where it is applied) or when the argument is built with features from different jurisdictions (in what could be called a legal Frankenstein). On the different prevailing views in the United States and Europe, see Daniel J. Gifford and Robert T. Kudrle, *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy* (London and Chicago: University of Chicago Press, 2015).

10 Aware of the sensitivity involved in making decisions in competition matters—due to their consequences and the possibility that

As evidence of this complexity, Nobel Prize–winning economist Ronald Coase said he had grown weary of competition law because when prices rose, judges said they were exploitative; when they fell, that there was predation; and when they remained the same, that tacit collusion was taking place.[11]

In a similar vein, although in a more acid tone, U.S. Supreme Court Justice Oliver Wendell Holmes complained that the Sherman Act was a fraud upon the public, due to economic ignorance and incompetence, even though he himself, in its application, made essential jurisprudential contributions that enabled the proper functioning of competition law.[12]

In sum, the complexity of competition law is reflected in the fact that what it protects is itself complex; generally, there are no precise rules but rather standards derived from rulings that may be difficult to understand; different branches of law converge; a consequentialist rather than a formalist analysis prevails; and comparative law often plays an important role.

As noted earlier, competition laws are simple, in contrast to the complexity just described, and this is the case in the places where competition law is created and led.

Indeed, both the initial U.S. law, the Sherman Act,[13] and the Treaty on the Functioning of the European Union (which regulates competition law)[14] are simple in their description of the offense, as is our own legislation.

In the case of Chilean law, the core of competition law is found in two words: "free competition,"[15] whose

such a decision may be wrong—academia has borrowed from statistics the concepts of "false negative" or "Type II error" (acquitting or releasing someone who infringed the rule) and "false positive" or "Type I error" (punishing an innocent party). Thus, it is acknowledged that a decision or ruling may be mistaken, and the possible effects of such errors are analyzed, comparing both situations: exculpation and punishment.

11 William Landes, "The Fire of Truth: A Remembrance of Law and Econ at Chicago," *Journal of Law and Economics* 26 (1983).

12 Letter from U.S. Supreme Court Justice Oliver Wendell Holmes to Sir Frederick Pollock, dated April 23, 1910. On the importance of the judge in competition law, see Spencer Weber Waller, "The Modern Antitrust Relevance of Oliver Wendell Holmes," *Brooklyn Law Review* 59 (1994), 1443.

13 The United States has two essential provisions, both contained in the *Sherman Act* of 1890, regarding the anticompetitive offense. The first section prohibits cartels in the following terms: ". Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any States or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished (...)." The second section addresses monopolization in the following terms: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor (...)." There are other laws that also establish prohibitions in competition law, such as the Clayton Act (1914), the *Federal Trade Commission Act* (1914), the *Robinson-Patman Act* (1936), the *Celler-Kefauver Act* (1950), and the *Hart-Scott-Rodino Act* (1976). See Einer R. Elhauge and Damien Geradin, *Global Antitrust Law and Economics* (Foundation Press, 2018), 11.

14 The European Union also regulates the anticompetitive offense in two essential provisions. Regarding cartels, Article 101 of the treaty provides: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.." With respect to abuses of dominant position, Article 102 provides: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." There are also regulations and directives, as secondary sources of competition law. See Elhauge and Geradin, *Global Antitrust Law...*, 52.

15 The competition law offense in our country is set out in Article 3 of Decree Law 211 of 1973, which "sets forth rules for the defense of free competition," and which has undergone several amendments since its origin in 1959. The 1959 law provided: "Any act or agreement that t*ends to impede free competition* within the country, whether by means of agreements to fix prices or allocate production, transportation, or distribution quotas, or market zones; by means of agreements, negotiations, or associations to obtain reductions or stoppages of production; by means of exclusive distribution, carried out by a single person or company, of various producers of the same specific product; or by any other means intended to eliminate free competition, shall be punished with lesser imprisonment in any of its degrees and with a fine of one percent to ten percent of the operating capital of the perpetrators." The legal text currently in force states: "Anyone who engages in or enters into, individually or collectively, *any conduct, act, or agreement that prevents, restricts, or hinders free competi-*

origins date back to Law 13,305 of 1959, enacted during the government of President Jorge Alessandri.[16]

Following the comparative tradition, Chilean law does not define what is meant by "free competition," the legally protected interest.[17]

This contrast between the complexity of the law and the simplicity of the statute is not accidental.

On the contrary, one could argue that this contrast denotes maturity on part of the legislative bodies, which knew that they had to counterbalance, in some way, private power—which invariably arises from a market economy—through a flexible and open formula. That formula had to allow competition law enforcement bodies to give it substance through their decisions and rulings. Thus, the law became a sort of *delegated type,* which allowed and legitimized specific decisions of competition authorities, while the legislator did not demand from itself something it could not deliver: a finely tuned description of what was prohibited.[18]

This is not ideal, of course. Ideally, one would want competition law to be less complex and to have a detailed and concrete list of what cannot be done, and for that list to remain fixed over time.

At least we have some consolation: this same duality of complexity and simplicity, and the resulting natural disappointment, occurs in the jurisdictions with the most developed competition law systems, such as the United States and the European Union. In this, we are neither alone nor original.

This is how competition law is structured *urbi et orbi*, which allows authorities to enjoy the necessary flexibility to control private power, avoiding formal evasions that would render the enforcement of these laws ineffective.

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tion, or that tends to produce such effects, shall be sanctioned (...). The following, among others, shall be considered as conduct, acts, or agreements that prevent, restrict, or hinder free competition or that tend to produce such effects: a) Agreements or concerted practices involving competitors with one another, consisting of fixing selling or purchase prices, limiting production, allocating market zones or quotas, or affecting the outcome of bidding processes, as well as agreements or concerted practices that, by conferring market power on competitors, consist of determining marketing conditions or excluding current or potential competitors. b) The abusive exploitation by an economic agent, or a group thereof, of a dominant position in the market, by fixing purchase or selling prices, tying the sale of one product to another, allocating market zones or quotas, or imposing other similar abuses on others. c) Predatory practices, or unfair competition, carried out with the purpose of achieving, maintaining, or increasing a dominant position." *Italics in the original.* The origin of the words "free competition" lies in a 1957 bill by Carlos Ibáñez del Campo that was not approved, and in the advice of U.S. economists who were part of the Klein-Saks mission.

16 See notes of the National Congress, dated March 18, 1959. The then–Minister of Justice under Alessandri, Julio Philippi Izquierdo, defending before Congress the bill that became Law 13,305, argued that "if there is a subject on which it is difficult to legislate, it is precisely this one" and that "for the first time it is being attempted in Chile; it may be imperfect, but it does not seem fair to claim that it constitutes a mere demagogic declaration."

17 See Domingo Valdés, *Libre competencia y monopolio* (Santiago: Editorial Jurídica de Chile, 2006), 90–203, where eight different meanings of "free competition" are identified, and the need to define this concept through case law is also acknowledged. He states: "[free competition in Chile] takes place in a still incipient stage of legal positivization—in our opinion, this is more precarious than it should be—and for that reason the Competition Tribunal has been granted a set of powers and decisions that, in practice, far exceed the tasks ordinarily carried out by a court in the continental legal system." *Ibid.*, 23.

18 Had the legislator been tempted to provide a more detailed description of the offense, that law would have been doomed to obsolescence from the outset. The history of Law 13,305 reflects the need for the offense to be broad, "because human imagination is inexhaustible," as recorded in the session of the Chamber of Deputies of January 26, 1959. In turn, during the discussion of Law 19,911 of 2003, the Supreme Court acknowledged this legislative vagueness in its communication to the Chamber: "(...) that international experience on the matter advises that each case must be studied on its own merits, in accordance with its particularities and complexities, and therefore it deems it appropriate to establish a broad provision with basic examples, so that the members of the tribunal decide in each case which conduct constitutes an infringement of free competition" (Communication of June 20, 2002, 20). The legislative history of Law 19,911 of 2003 records the opinion of the Economic Committee in the same vein: "The majority of its members, having rejected the idea of defining free competition, favored establishing it solely as the legally protected interest, and leaving the determination of its scope to legal doctrine and, in particular, to the case law that will emanate from the Competition Tribunal." Likewise, Professor Jorge Streeter, invited to that committee, asserted that "competition law should be limited to describing the substantive aspects of monopolistic conduct, since competition law is a discipline that is in permanent development, based on very few but fundamental provisions of substantive law. Hence the need for the sanctioned conduct to be brief and simple, without full descriptions of normative and subjective elements that hinder the application and interpretation of the rule, ultimately favoring infringers and creating legal uncertainty among those who observe correct behavior." See www.bcn.cl/historiadelaley/nc/historia-de-la-ley/5814/. Finally, during the legislative process of Law 20,945 of 2016, the National Economic Prosecutor stated that "laws on free competition must be succinct, leaving it to the FNE and the TDLC to give them meaning, as these are provisions typical of Common Law, which is a body of law formed through its judicial application." See www.bcn.cl/historiadelaley/nc/historia-de-la-ley/5311/.

Such ineffectiveness would lead to the discrediting of the market economy, as the control of private power would become not only difficult but perhaps impossible.

Flexibility, of course, imposes the need for serious, prudent, and reputable authorities, both in the political and business spheres, who have the energy to understand in detail the markets and the facts under discussion, the *state of the art* of the standards applicable to the conduct under review, but above all, who are aware of the effects of their decisions on the market economy.

III. INSTITUTIONAL CONSOLIDATION

The essential bodies involved in competition law in our country are three: the National Economic Prosecutor's Office (FNE), the Competition Tribunal (TDLC), and the Third Chamber of the Supreme Court (CS).[19]

The Chilean institutional system is distinctive in that the decision is taken by a specialized judicial body, the Competition Defense Tribunal (TDLC), composed of three lawyers and two economists, whose rulings and decisions are directly reviewed by the administrative chamber of the Supreme Court.[20]

The FNE is the prosecutorial and administrative body that investigates possible infringements of competition law—"representing the general interest of the community in the economic order"[21]—administers the preventive merger control system, and conducts market studies, among other responsibilities.

Ours is a demanding system with checks and balances. The demanding nature of it comes from the procedures typical of litigation in complaints and lawsuits,[22*] in which each piece of evidence must be presented and assessed on its merits by a panel of five independent judges. The counterbalance lies in the fact that the complaint is nothing more than the opinion of the FNE (or of a private party, in the case of a lawsuit), and the ruling of the TDLC is in turn subject to review by the Supreme Court.[23]

Thus, the fact that competition law is vibrant and relevant in our country depends on a healthy ecosystem, made up of the three components mentioned above, in which each plays a specific role, allowing the system as a whole to function well and produce results.[24]

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19 The Court of Appeals also takes part in authorizations for intrusive measures, and eventually other authorities and bodies may intervene, if so required and within their respective areas of competence, such as the Constitutional Court, the Office of the Comptroller General of the Republic, the Public Prosecutor's Office, and the criminal courts when the National Economic Prosecutor has filed a criminal complaint for collusion.

20 The Chilean institutional system, which was established with the 2003 reform, is similar to that of South Africa, although the latter was established a couple of years later. Essentially, it differs from the U.S. system, in which decisions are made by generalist judges (in a decentralized manner, due to the existence of multiple federal circuits and state judges) and there are two agencies in charge of competition law: the Department of Justice and the Federal Trade Commission. The Chilean system, on the other hand, differs from the European Union system, in which the first-instance decision is taken by an administrative body and appeals are heard by a generalist but single court. The European system, unlike the U.S. system, is centralized and has a high administrative component.

21 Article 39(b) of Decree Law 211 of 1973, which "sets forth rules for the defense of free competition," available at http://www.fne.gob.cl/wp-content/uploads/2010/12/DL_211_refundido_2016.pdf.

22 * Translator's note: the disjunction "complaints and lawsuits" is a translation of "requerimientos y demandas", where "requerimientos" is the kind of lawsuit presented by the FNE, and "demandas" are the lawsuits presented by private parties.

23 The check to which the TDLC is subject before the Supreme Court is, in my view, healthy and necessary, insofar as it forces the former to connect competition law to the general principles of the legal system and to translate its reasoning into something intelligible for a generalist judge with little in-depth knowledge of economic science. In this regard, and given that the Supreme Court is the final instance, it is important to have critical analysis of its rulings by independent academics and specialized media, as well as for the highest court to show a natural deference to the economic and practical issues decided by the TDLC. Regarding the Supreme Court's expertise in economic matters, it is worth transcribing the comment of former Supreme Court Justice and Senator of the Republic Enrique Zurita, during the legislative process of Law 19,911: "I served for eight years as president of the Resolutive Commission (...). Do you know why, Your Honors? Because no one was interested in it, as it was unpaid. Moreover, what does a Supreme Court justice know about economics? And for the exercise of that position, I had to learn either from the representative of the Ministry of Finance, or from that of the Ministry of Economy, or from the deans; and if the latter knew little, I learned even less. What did I do, then? I listened to the opinion of the other four members and tried to produce harmony among them. That's all. In any case, I believe we should stop sending lawyers there. Economists! Nothing else."

24 See the speech of the National Economic Prosecutor on "Día de la Competencia 2017": "The FNE would not be a good public service if it

Let us now focus on the FNE and on what, without false modesty, we could describe as a consolidated institution that is widely respected due to its performance in recent years.

Why has the FNE been, and continues to be, successful? In short, and although it may sound self-evident, because it has been effective in enforcing the law in a complex context—both in terms of competition law itself and the prevailing political environment in the country—and it has done so with the prudence and sobriety proper to an authority.

Let us first look at the figures. From April 2010 to August 2018, the FNE filed 37 complaints before the TDLC, 19 consultations before the same body, 37 out-of-court settlements and agreements,[25] 43 resolutions ordering a change of conduct by the investigated party, 9 resolutions with recommendations for regulatory change, 37 reports to the TDLC, and 25 competition advocacy actions, including the studies on annuities and notaries.[26*]

Since 2013, both the TDLC and the Supreme Court have upheld 100 percent of the complaints filed by the FNE, far exceeding the rate of around 50 percent that prevailed before. For the period 2010 to 2017, it collected more than 80 billion pesos in fines.[27]

In the same period, more than 500 investigations were initiated and concluded, involving various types of conduct and in very different markets. All investigations conclude with a resolution signed by the National Economic Prosecutor, and since 2011 they have also been accompanied by the internal report produced by each division in relation to the investigation. Both documents, which reflect the FNE's doctrine, are posted on its website and, from time to time, are indexed to a classification that facilitates their search.[28]

The FNE successfully implemented the 2009 reform to DL 211 (Law 20,361), which introduced leniency and intrusive powers in cartel cases.

The FNE was able to process and grant leniency applications, both from domestic and international companies, in relation to eight specific company requests, leniency applications that served to dismantle and sanction six different cartels.[29-30]

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did not have excellent counterparts—the community of lawyers and economists dedicated to competition law—nor an excellent Competition Tribunal—specialized and with economist judges—nor the excellence of the Third Chamber of the Supreme Court," at www.fne.cl. In the same vein, see the National Economic Prosecutor's speech on "Día de la Competencia 2016": "The competition law system has worked (...) because its institutional design punishes unfounded opinions, superficial assertions, baseless theories, and phrases full of adjectives and lacking verbs."

25 Out-of-court settlements and agreements have increased in number and importance in Chile. The U.S. tradition follows this pragmatic approach, and prosecutorial bodies avoid going to trial whenever possible, seeking settlements in the vast majority of investigated infringements. In my view, this is a positive trend for our country for two main reasons. First, because concrete results are achieved regarding behavioral changes with immediate application, thus avoiding the years-long wait of litigation. Second, because it frees up human resources of the competition authority, allowing them to be devoted to other cases in different markets.

26 * Translator's note: annuities correspond to a determined pension payout model Chile and notaries correspond to businesses that certify legal documents in the country.

27 Upholding 100 percent of the complaints does not mean that everything requested is granted, and thus the complaint may be upheld but a fine imposed in an amount lower than that requested in the claim. The amount of fines collected for the period 2010 to 2017 was 80.292 billion pesos, updated to pesos as of December 31, 2017. It should be noted, however, that the FNE is not a collector of funds for the public treasury, as a tax authority would be, but rather a defender of free competition. Indeed, behavioral changes or adjustments in the way companies operate are often more relevant than fines. See Aldo González and Alejandro Micco, "Private versus Public Antitrust Enforcement: Evidence from Chile," *Journal of Competition Law & Economics* 10, no. 3 (2014): 691–709.

28 In our view, transparency in the reasoning behind the FNE's decisions helps improve the predictability of its future actions, insofar as the grounds for its decisions are publicly set out.

29 The cartels prosecuted by the FNE in which leniency applications have been granted are: (i) refrigerator compressors, (ii) Santiago–Curacaví intercity transportation, (iii) asphalt, (iv) tissue, (v) shipping, and (vi) ampoule medication. In the tissue and shipping cartels, leniency applications were received from two companies. It is noteworthy that some cases involve international companies (such as the compressors case) and others, domestic companies (such as the intercity transportation case). Among the domestic companies that obtained the benefit of leniency are two major Chilean business groups, which denotes a success in the implementation of the leniency program. The TDLC's convictions in the tissue, shipping, and ampoule medication cases were appealed before the Supreme Court and have not yet been decided by the highest court.

30 In 2009, the FNE drafted a leniency guide to provide certainty to applicants, which was later replaced by a new version in 2017. The 2017 document underwent three public consultation processes and incorporates the comments, suggestions, and contributions of various public and private bodies, both domestic (such as the Chilean Bar Association) and international (such as the American Bar Associa-

With the efficient and effective assistance of the police, the FNE was able to conduct searches and intercept telephone communications, with the proper authorization granted both by the TDLC and by a Court of Appeals justice.

All of those searches and interceptions were meticulously carried out in accordance with the applicable provisions of the Code of Criminal Procedure, and to date no appeal against them has been upheld by the authorizing justice, which is noteworthy as it reflects the rigor of the FNE and the police in applying criminal procedural rules that were unfamiliar to them until the 2009 reform. Most of these measures served to gather evidence that made it possible to sanction offenders of competition law.

Launching a leniency program that works and applying intrusive measures that are not challenged is no small task. It requires planning (especially with the police), prudence (in the selection of cases that merit such measures), and trust (both from the authorities granting the authorizations and from the companies requesting the benefits of leniency).

Both leniency and intrusive measures are somewhat foreign to the Chilean legal tradition: fully exculpating someone who confesses and using intrusive measures such as telephone interception for an offense of an economic nature.

Explaining leniency was not easy. Exculpating someone who has acknowledged an infringement is not, in principle, considered fair. But this criticism is short-sighted and mistaken, for several reasons. First, it is evident that the whistleblower must be given incentives to come forward. The main incentive is to be completely freed from monetary sanctions and from the possibility of facing a potential criminal proceeding. The incentives to self-report become more important as cartel participants manage to operate without leaving, or leaving little evidence—something that often happens when businesspeople become more aware of competition law. Second, an effective leniency program allows future cartels to be deterred or ongoing ones to be dismantled. Given the natural limitations of any authority, deterrence is vital. Third, the whistleblower and the other cartel participants must compensate the victims of the cartel, and such fair compensation is facilitated precisely by the whistleblower's disclosure.

Another expression of the FNE's maturity concerns the planning carried out by this body to pursue a legal reform (Law 20,945), which was approved with broad support from the diverse political sectors in Congress.[31]

It is worth noting what that planning consisted of and how, thanks to it, the debate, the discussion, and the outcome were as expected, with no major surprises or improvisations—something that contrasts with other reforms carried out in those years.

The planning consisted of having a clear diagnosis of what needed to be reformed, gradually presenting that need over time in connection with specific cases, and commissioning external studies to reaffirm the diagnosis of the problem and suggest solutions.

The internal diagnosis within the FNE was quite clear: sanctions for infringements—especially cartels—were not dissuasive,[32] and Chile required a predictable and orderly merger control system.[33]

tion, the International Bar Association, and the U.S. Department of Justice). See www.fne.gob.cl/guia-interna-sobre-delacion-compensada-en-casos-de-colusion.

31 Law 20,945 was approved unanimously in Congress, except for the provision establishing that the Public Prosecutor's Office could only initiate an investigation upon a criminal complaint by the National Economic Prosecutor once the TDLC's judgment convicting the cartel had become final. The Public Prosecutor's Office, on the other hand, preferred (at least that is what it stated at the end of the legislative process) to be able to initiate criminal investigations at its discretion, with or without a complaint from the National Economic Prosecutor.

32 As an example of the lack of deterrence of sanctions, we can cite the statements of the owner of a major poultry-producing company convicted of collusion and ordered to pay the maximum fine under the Chilean system, which amounted to approximately US$30 million: "If there are fines, we will pay them, but *fines don't matter.* It's the fact, the name (...)." *El Mercurio*, October 12, 2014. *Italics are ours.*

33 Chile, unlike the United States and Europe, had refused to pass a law that would preventively control merger operations—that is, before they are carried out—and had maintained a voluntary control system since 1959. The voluntary nature forced the authority to challenge

The filing of the complaint in the poultry cartel case accelerated the discussion, and President Piñera's first administration formed a commission to study Chilean legislation, led by economist Francisco Rosende, which delivered its report in 2012.[34]

The sensation that a reform to the merger control system was needed grew in part thanks to the FNE's activities. Several of the FNE's actions were unprecedented in the Chilean competition law system and were raising awareness of the need for legal change.

The first point worth highlighting is the rejection by the FNE of a proposed joint venture between two leading companies in the milk market, which departed from the prosecutorial body's traditional approach of focusing on the conditions of a transaction and avoiding a direct request for rejection.[35] In addition, for the first time, the FNE submitted a consultation[36*] regarding a purchase transaction in the supermarket sector, using a power granted by the 2009 reform.[37] The FNE also began to use the mechanism of out-of-court settlements to approve conditions negotiated between the FNE and the companies seeking to merge.[38] Finally, and also for the first time, the FNE filed a complaint for a merger completed without having been consulted, in the market for cinema exhibition venues.[39]

With a realistic approach but with the firm intention of moving forward on this issue, in 2012 the FNE adopted a merger control guide, offering an orderly procedure, in stages and with peremptory deadlines, for those who voluntarily wished to know the FNE's opinion on a specific transaction. This opinion obviously did not bind either the TDLC or the Supreme Court, but at least it allowed the applicant to know in advance the FNE's view under a horizontal negotiation procedure, thereby avoiding the surprise of a possible consultation by the FNE before the TDLC.[40]

The FNE commissioned three studies from reputable foreign bodies prior to the start of the legislative process to reform DL 211. One study concerned the sanctions applicable in Chile and their actual deterrent effect. This study was carried out by prominent lawyers and economists associated with University College London.[41] Another study was on merger control and was prepared by the OECD in 2014.[42] Finally the third study was also carried out by the OECD, and was on market studies in Latin America; this study was presented in 2015.[43]

transactions already completed, which was legally difficult due to the burden of proving the potential effects of the transaction. If the administrative authority had managed to convince the TDLC of the reproachability of the transaction, there arose the difficulty of having to return to the situation existing before the transaction, which is colloquially known in the Anglo-Saxon world as "unscrambling the eggs." In addition, DL 211 contained no specific regulation on mergers, and the consultation system before the TDLC was unsuitable for conducting a reasonable discussion on merger operations due to its litigious nature, even if, on paper, they were non-contentious proceedings.

34 Available at www.economia.gob.cl/wp-content/uploads/2012/07/INFORME-FINAL-ENTREGADO-A-PDTE-PINERA-13-07-12.pdf

35 See the FNE report on the Nestlé–Soprole transaction at http://www.fne.gob.cl/fne-se-opone-a-la-operacion-consultada-por-soprole-y-nestle/.

36 * Translator's note: in Chile, a "consultation" or "consulta" (in spanish) corresponds to a procedure in which a party asks for the opinion of the TDLC in regard to the legality of a future or actual market condition. Before the merger control procedure was established in Chile, this system was used to analyze mergers.

37 See the FNE consultation on the acquisition of Alvi by D&S at http://www.fne.gob.cl/fne-consulta-ante-el-tdlc-compra-de-supermercados-alvi-por-parte-de-ds/.

38 See out-of-court settlements on the TDLC website, "Expedientes" section, "Acuerdos Extrajudiciales" subsection.

39 See complaint regarding a merger in the cinema sector at www.fne.gob.cl/wp-content/uploads/2012/06/requ_01_2012.pdf. The transaction was a horizontal merger between Hoyts and Cinemundo, two cinema chains operating in our country. The FNE sought a divestment in three locations where the concentration of the new conglomerate was high. Ultimately, the parties reached a settlement.

40 Available at www.fne.gob.cl/wp-content/uploads/2012/10/Guia-Fusiones.pdf. This guide, drafted after an in-depth review of existing foreign guidelines, was subjected to a public consultation process, through which comments were received from both domestic and foreign stakeholders. It is not surprising that the guide shows clear similarities with Law 20,945 of 2016, which precisely established a mandatory merger control system.

41 Available at www.fne.gob.cl/2014/11/12/estudio-sobre-multas-en-sede-de-libre-competencia/. This study on fines in competition law proceedings was commissioned from the Centre for Law, Economics and Society at University College London (UCL) and prepared, among others, by Professors Ioannis Lianos, Florian Wagner Von Papp, and Frédéric Jenny. The study analyzed the sanctioning regimes of various leading competition law jurisdictions and compared them with Chile's, concluding that the Chilean sanctions system was not dissuasive and therefore required amendment.

42 See OECD Secretariat Report "Evaluación del régimen de control de concentraciones en Chile" [Evaluation of the Merger Control Regime in Chile], 2014, available at www.oecd.org/daf/competition/Chile%20merger%20control_ESP_nov14.pdf. This study was requested by the Ministry of Economy during President Piñera's first administration and received by the Ministry of Economy during President Bachelet's second administration, reflecting that it was, in fact, a matter of State policy.

43 See OECD "Competition and Market Studies in Latin America – 2015 Report," available at www.oecd.org/daf/competition/competencia-y-estudios-de-mercado-en-america-latina%202015.pdf.

Law 20,945 of 2016 introduced a deterrent sanctions regime, a preventive merger control system, and the power to conduct market studies, in addition to other reforms. With these changes, the regulatory landscape changed radically, and Chile aligned itself with the regulations of the most advanced countries.

Before the 2016 reform, monetary sanctions had a cap of approximately US$30 million, and there was no criminal sanction for serious cartel cases. That cap especially benefited large companies. These sanctions were not dissuasive, and it could've been said that it might be "good business" for companies to infringe the law, considering the enormous benefits that can result from a cartel or an abuse of dominant position.

Now, monetary sanctions can reach up to 30 percent of the offender's sales or twice the benefit obtained, and a criminal sanction of up to ten years' imprisonment was established for cartels that fix prices, limit production, allocate zones or quotas, or affect the outcome of public tenders.[44]

After a tradition of more than 50 years, the country moved from a voluntary system of merger review to a mandatory pre-merger notification system under an essentially administrative procedure. The new system allows for the analysis of mergers that exceed certain thresholds before they are executed, and allows for their risks and efficiencies to be assessed within specific time limits.[45]

The new law also granted the FNE the power to conduct market studies with information from private parties and public bodies.

The FNE has so far successfully implemented the 2016 reform to DL 211 through Law 20,945.

In 2017, following a public consultation process, the FNE issued five merger guidelines: one on jurisdiction; another on remedies or mitigation measures; a third on the application of thresholds; and two others on the documents that must be submitted, in full and simplified versions.[46]

The content of some of these guidelines was reviewed by foreign lawyers with experience in notifications, the Chilean Bar Association, U.S. authorities, the International Bar Association and the American Bar Association.

In addition, the FNE worked with the Ministry of Economy in drafting the administrative regulation for Law 20,945,[47*] which was published within the deadline established by the law and before the merger control system entered into force.

In June 2018, the merger control system had been in operation for one year. Out of a total of 58 transactions submitted, 43 had already been resolved, of which 36 were approved outright in Phase 1 (with an average processing time of 18 days), 6 were approved with remedies (in an average of 66 days), and 1 was rejected.

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44 See Article 62 of DL 211 of 1973.

45 The bill submitted by the government in 2015 provided that the determination of thresholds would be the responsibility of the Ministry of Economy. However, Congress preferred that such determination be made by the FNE, and thus it was established in Law 20,945. To determine the threshold values, the FNE relied on an economic report that followed the guidelines of the International Competition Network and the OECD on the matter. This report was submitted for comments to external economists Claudio Agostini, Ronald Fischer, Aldo González, Juan Pablo Montero, and Tomás Rau, all of whom expressed support for the methodology and the thresholds proposed in the report. See reports at www.fne.gob.cl/umbrales-operaciones-de-concentracion/.

46 See Felipe Irarrázabal and Felipe Cerda, "Establecimiento de un sistema de control previo de operaciones de concentración en Chile: orígenes, implementación y desafíos" [Establishment of a System of Prior Control of Merger Operations in Chile: Origins, Implementation, and Challenges], in *Comentarios a la Ley de Defensa de la Competencia*, edited by Demetrio A. Chamatropulos, Pablo Trevisán, and Miguel del Pino (Buenos Aires: La Ley, 2018). The remedies guide provides guidance to the parties to a merger on the mitigation measures they may offer to the FNE.

47 * Translator's note: this administrative regulation that seeks to implement a law is known in Chile as a "reglamento".

Six months after the notification mechanism came into effect, the FNE conducted a survey among lawyers from law firms who had advised the notifying parties in merger notification processes, and it yielded a positive assessment.[48]

In addition, a digital mechanism was implemented to receive notifications for interlocking directorates, as required by Article 4 bis of DL 211, and guidelines were issued on how and when to comply with this obligation through the relevant form.[49]

In the area of market studies, the professional team in charge of conducting such studies was established, a guide for their preparation[50]—following OECD best practices—was approved, and analyses were initiated on annuities, notaries, and pharmaceuticals, of which the first two were completed.[51] Furthermore, the FNE published a guide specifying the situations that would warrant the filing of a criminal complaint, prepared with the support of external advisors and after receiving comments on an initial draft from both Chilean and foreign lawyers. This guide seeks to reduce the scope for discretion and signal to the market the FNE's view on the application of the law, well in advance of its actual application.[52]

The consolidation of the FNE is also reflected in the results of perception surveys conducted by Deloitte among lawyers practicing competition law in Chile. In 2012, Deloitte personally interviewed these lawyers on perception and performance issues regarding the competition authority. The vast majority of the lawyers agreed to participate, and the final report was made public, with aggregated data. The results obtained by the FNE were generally good, and the exercise was repeated in 2014 and 2016, with the aim of observing trends.[53]

It is appropriate to analyze below the main objectives and values that guided the FNE's actions: independence, selective focus, technical tone, formation of work teams, and internationalization. For each of these orientations, a strategy was adopted that made it possible to implement them within the current model.

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48 The surveys were conducted between June and November 2017 and are available at: www.fne.gob.cl/wp-content/uploads/2018/03/Informe-Resultados-Encuesta-Fusiones.pdf. A total of 76.4 percent of respondents rated the implementation of the new merger control regime at 6 or higher (on a scale of 1 to 7). In turn, 87 percent of respondents considered the information requested by the FNE once the investigation had begun to be *very relevant or relevant.*

49 Available at www.fne.gob.cl/wp-content/uploads/2016/12/Formulario-Participaciones-minoritarias-v1.9.pdf. It is worth noting that the concern about the issue of cross-shareholdings and interlocking originated within the FNE itself, which conducted a study on the subject (years before the 2016 bill), incorporating a report by a U.S. lawyer on the regulatory reality of that country. See the document "Participaciones minoritarias y directores comunes entre empresas competidoras" [Minority Shareholdings and Common Directors Among Competing Firms], November 2013, available at http://www.fne.gob.cl/wp-content/uploads/2013/11/Participaciones-minoritarias.pdf; "Combating Anticompetitive Interlockings: Section 8 of the Clayton Act as a Template for Chile and Similar Emerging Economies," by Michael Jacobs, October 24, 2013, available at http://www.fne.gob.cl/wp-content/uploads/2013/11/Clayton-Act-Section-8.pdf; and "U.S. Antitrust Enforcement Involving Minority Shareholdings," by the same author, August 31, 2013, available at http://www.fne.gob.cl/wp-content/uploads/2013/11/Minority-Shareholding-in-the-US.pdf.

50 Available at www.fne.gob.cl/wp-content/uploads/2017/10/Guia_Estudios_Mercado_Final_oct2017.pdf

51 See the report on annuities at www.fne.gob.cl/wp-content/uploads/2018/02/Informe-Final-EM01.pdf and the report on notaries at www.fne.gob.cl/wp-content/uploads/2018/07/Informe-Final-optimizado.pdf. The report on pharmaceuticals is expected to be published at the end of 2019, according to the schedule proposed by the FNE at www.fne.gob.cl/wp-content/uploads/2018/04/Minuta_EMO3_2018.pdf

52 Available at www.fne.gob.cl/wp-content/uploads/2018/06/Gu%C3%ADa-de-Querellas-final-definitiva.pdf. This guide was prepared with the advice of prominent Chilean criminal and administrative lawyers and also received comments from the American Bar Association (ABA), Mexico's Federal Economic Competition Commission (COFECE), the International Bar Association (IBA), and the National Prosecutor of the Public Prosecutor's Office. It also reflects the planning with which the FNE addresses important matters. The application of the law will take place several years from now because the decision to file a criminal complaint—made by the National Economic Prosecutor—must be taken once the TDLC has issued a final judgment regarding acts that occurred after the enactment of the 2016 law, in accordance with the requirements of the Political Constitution of the Republic of Chile.

53 As far as we know, the FNE is the only competition agency in the world to have carried out this exercise on a continuous basis, and we hope it continues to do so, as it is an efficient way of gathering the views of counterparts on how the system—and in particular the administrative authority—is operating. The first agency to do so was the UK's OFT in 2007, but it did not repeat the exercise. The Deloitte survey consists of about 50 questions, asking, for example, about the level of the FNE's technical analysis, its independence, protection of confidentiality, degree of predictability, and rigor. The studies are available at http://www.fne.gob.cl/estudios-de-percepcion-deloitte/.

IV. INDEPENDENCE

The first strategy pursued by the FNE was to place special emphasis on independence—both from companies and from the government and public agencies. This was always considered a non-negotiable first priority. The FNE's leadership was responsible for this matter, so that the work teams could have the peace of mind necessary to carry out their work with strictly technical criteria.[54]

It was a priority because we saw that there was a connection and a virtuous circle between independence, technical depth, trust, and predictability. If decisions were entirely dependent on technical arguments and reasons, it was because there was no interference of any kind, and that lack of interference was achieved precisely through independence. Technical depth, in turn, makes it possible to improve the trust and predictability of the technical body, freeing it from the ups and downs and uncertainties inherent to the political game.

Likewise, independence is connected to planning. If the body is independent, it sets its own timing, priorities, and methods, and does not have to respond to the urgencies and anxieties inherent in the political world.[55]

By law, the FNE is independent from any state body, service, or authority. This is stated twice in DL 211, with no exceptions admitted.[56]

It is stated a third time when the law provides that the Prosecutor must defend the interests entrusted to him—that is, the public interests in the economic order of free competition, "in the manner he deems in accordance with the law, according to his own judgment."[57]

Thus, both the text and the spirit of the law are clear, without any ambiguity.

This independence is reinforced by the existence of a fixed term of office (four years, renewable for another four) and the mechanism for the removal of the National Economic Prosecutor. Since the 2009 reform, removal requires the existence of a legal cause ("manifest negligence in the exercise of his duties"), and the mere will of the appointing authority—that is, the President of the Republic—is not sufficient. Perhaps more important is the procedural safeguard for such removal: it must begin with a request from the Minister of Economy, go on to get a favorable report from the full Supreme Court confirming that the cause of manifest negligence is met, and it ends with the decision by the President of the Republic to remove the Prosecutor.[58]

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54 The FNE's leadership was composed of the Prosecutor, the Deputy Prosecutor, the Head of Institutional Relations, and the Press Officer. This was not an organizational structure established by law, but rather an internal arrangement that was adopted and facilitated by the physical proximity of their respective offices. It is worth noting that the Deputy Prosecutors of the last eight years were officials who had been hired under previous FNE administrations (Jaime Barahona and Mario Ybar), as was the Head of Institutional Relations (Mónica Salamanca), which confirms the healthy institutional continuity.

55 See the "Día de la Competencia 2017" speech. Available at http://www.fne.gob.cl/wp-content/uploads/2017/11/Discurso-Fiscal-Felipe-Irarr%C3%A1zabal-2017.pdf.

56 Article 33 of DL 211 provides: "The National Economic Prosecutor's Office shall be a public service (...) independent from any body or service, subject to the oversight of the President of the Republic through the Ministry of Economy, Development, and Reconstruction." Such oversight must be limited to the inspection of the FNE's administrative matters, the removal process in cases of manifest negligence, matters of payments and staffing, and any other administrative issues, without in any way affecting the powers set out in Article 39 of DL 211 of 1973, which are exclusive to the National Economic Prosecutor. In turn, the heading of Article 39 of the same statute provides: "The National Economic Prosecutor, in the exercise of his functions, shall be independent from all authorities and courts before which he appears." *Italics are ours.*

57 The same Article 33, in its heading, provides that: "He [the National Economic Prosecutor] may, consequently, defend the interests entrusted to him in the manner he deems in accordance with the law, according to his own judgment." *Italics are ours.* See Patricio Bernedo, *Historia de la libre competencia en Chile, 1959–2010* (Santiago: Fiscalía Nacional Económica, 2013): "As will be seen below, this article [Article 39 heading] became the true foundation of the autonomy and power of the National Economic Prosecutors which, depending on the personality traits of the sitting Prosecutor, served to resist all kinds of pressures."

58 See Article 33 of DL 211, as amended by the 2009 reform. In my view, it is important that the initiation of the removal process not be left to entirely political bodies, such as, for example, a certain number of Deputies of the Republic, as is the case with the position of National Prosecutor of the Public Prosecutor's Office. That formula, as I see it, can have a negative effect that stems from the mere initiation of a

It may happen, however, that reality overtakes the law, and the application of a legal provision becomes weak or non-existent—a dead letter—due to a number of subterfuges or loopholes, in specific situations where powerful interests are at stake, as often occurs in competition cases.

The historian Patricio Bernedo's book on free competition in Chile recounts the difficulties faced by former National Economic Prosecutors with respect to independence.

Rodrigo Asenjo, who served as National Economic Prosecutor from 1994 to 2000, describes his experience and views as follows:

> I want to state for the record that in six years, I never received a call from the President of the Republic. Nor did I receive a message from the President through any minister of State, but *I did receive many calls from various individuals, to whom I had to read Article 24 of DL 211, which established the absolute autonomy of the service and of the Prosecutor. There it says that the Prosecutor acts according to his own convictions. I acknowledge that I did this on many occasions, with many officials, members of parliament, heads of other services, and businesspeople.* Now, pressure exists only to the extent that one is pressurable. And I— and I am very proud of what I am about to say—do not consider myself a pressurable person. I could talk for an entire day about the pressures, because I truly had many, but well, this has to do with each person's personality, way of thinking, and career path. This position can be exercised with independence, as long as one wants to exercise it that way, because it has the powers to do so, but one must want it. And I believe that is enough. That is in the person.[59]

Francisco Fernández, National Economic Prosecutor from 2000 to 2001, decided to resign due to pressure, according to his own words:

> There *was very intense pressure, a lobbying phenomenon, which, as it was unregulated, opened the door to all kinds of maneuvers.*[60] (...) When I took office, I was promised political support that ultimately did not materialize. *Given the decentralized nature of the Prosecutor's Office, it was very important to have backing from the Executive to be able to exercise freedom of judgment. This meant support in the sense of not interfering, and that did not occur as I would have wished and as President Lagos told me when he asked me to take on this role in his government.* There were multiple pressures, and I witnessed some that were frankly unacceptable, and I then preferred to step aside. Pressure was also exerted on the members of the Tribunal [Resolutive Commission].[61*] In the case of the service directors, I witnessed peremptory instructions being given for them to vote in a certain way. When it was said that institutions were working, one wondered, well, this one should also be working.[62]

This phenomenon should not surprise us. The open texture of competition law—similar to a sponge that can absorb different public policies—combined with its heavy sanctioning arsenal and the natural reputational cost of any initiation of proceedings, makes it especially attractive to those who would want to instrumentalize it for unrelated purposes.

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removal process, even if it is later dismissed by the Supreme Court. During the discussion of Law 20,945, some members of the Chamber of Deputies' Economic Committee attempted to amend the law to allow the removal process of the National Economic Prosecutor to be initiated by 10 deputies, but fortunately the idea did not prosper. This removal mechanism was not provided for in the original bill. It was introduced in the Chamber of Deputies through an indication by the Executive. Initially, the Senior Public Management Council was the body that issued the favorable report for removal, but this was later replaced in the Senate by the Supreme Court.

59 Bernedo, *Historia...*, 148. Emphasis is ours.

60 Ibid., 152. *Italics are ours*.

61 * Translator's note: the Commission was a competition law institution at the time that has now been replaced through the enactment of a news institutional scheme.

62 Ibid., 157. Italics are also ours.

An example of such instrumentalization—albeit an extremely exceptional one—comes from the country that invented competition law. In 1971, then U.S. President Richard Nixon threatened U.S. television networks ABC, NBC, and CBS with initiating an antitrust lawsuit if those networks did not soften their criticism of the government, according to White House recordings that include Nixon's exact words to that effect.[63]

In this regard, we must admit that our experience of more than eight years at the helm of the FNE was very positive. We were not subjected to unpleasant situations from government officials or company executives seeking to exert pressure in one direction or another. Nor did we receive unpleasant messages or hints aimed at jeopardizing our decision-making process.

Independence naturally exists in relation to companies and private entities, as they are the subjects of investigations. The FNE focuses on the general interest, while companies focus on their particular interests. Anything different would verge on corruption. The FNE's challenge with private power lies less in independence itself and more in the reasonableness, non-discrimination, and equal treatment that companies must receive, which derives from a dispassionate analysis of the facts that emerge in each investigation.

Companies do, however, need to be certain that the competition authority is independent from the highest authorities in the country; otherwise, their *lobbying* efforts are channeled through those authorities.[64]

Thus, the issue of independence takes on real significance in relation to other authorities, and especially the highest authorities of government.

Hypothetically, the most serious interferences that could come from the government in office could involve suggestions to open an investigation in a specific market without sufficient grounds; to close it without adequate technical reasons; to request access to investigations being conducted by the FNE that are confidential; to demand prior knowledge of the complaints or filings the FNE will submit; or, more generally, to interfere in any way with a particular step in an investigation or trial.

As we have already said, at least in our experience—and having held the position during the terms of two Presidents of the Republic from different political coalitions (and their six Ministers of Economy)—we did not suffer any of the above-mentioned intrusions. Not even close. This is something the Prosecutor's Office has earned over time, thanks to the sacrifices of previous Prosecutors, and thanks to the seriousness of the country's highest authorities and their trust in technical bodies.

This asset of the FNE must be preserved in the future, at all costs, as it is its most valuable hallmark if its reputation and consolidation are to be maintained.

Independence, in my view, has an important component linked to the character of the individuals who hold the position. The mindset must be that no favors will be granted to anyone. The other side of the coin is that no favors can be requested from anyone. Thus, independence turns into solitude—both in relation to the government, political parties, Congress, other authorities, and, of course, the companies under investigation.

In addition to this solitude, there is another psychological component that is important: the personal control of ambition, which is connected to the freedom of action required by the position. In our view, ideally, the National

63 Ariel Ezrachi, "Sponge," *Journal of Antitrust Enforcement* 5 (2017): 56.

64 As previously noted, the Deloitte perception survey of Chilean competition lawyers measures, among other aspects, the degree of the FNE's independence. The results were as follows, on a scale of 1 to 7, reflecting a positive trend over time: a score of 4.5 for 2012, a score of 5.8 for 2014, and a score of 6.4 for 2016.

Economic Prosecutor should not aspire to another public office, least of all in the political arena, so that the position is not used as a springboard for future nominations or appointments. This lack of ambition provides the freedom needed to resist the temptation to please, especially the highest authorities of the country.

The absence of a desire to please translates into a certain coldness (without losing natural cordiality) toward both the public and private sectors. It does not seem advisable to allow a more relaxed close atmosphere. As we were wisely advised, it is necessary to be "unaffectionate."[65]

Independence is also linked to the issue of conflicts of interest. If one wishes to be independent, there can be no conflicts of interest.

In our view, great care must be taken in this regard. Upon taking office, we adopted an internal regulation in the FNE, which, to our understanding, was fully complied with.[66] It clarified that a disqualified official would not participate in internal meetings in which the case from which they had recused themselves was discussed, would not attend hearings, could not review the case file, and would even be denied computer access to the case's digital folders. In addition, a written notification mechanism for disqualifications was established.

Thus, in cases where an FNE official had a conflict of interest, they lost all connection with the case, which was then led entirely and exclusively by a team without any conflicts, who, with complete freedom and independence, decided what should or should not be done.

In sum, the FNE has enjoyed real and effective independence over these years, which has allowed it to decide based on technical criteria, increase the predictability of its actions, enhance the trust of those subject to its authority and of other authorities, and plan long-term tasks.

V. SELECTION

A second essential pillar of the FNE's model was to be selective both in relation to the cases we investigated and the tools to be used in cases of infringements.

Selection means having to choose and choosing means having to stop investigating matters that appear to be of secondary importance, assuming an opportunity cost. It also means having to select the proportional and fair tool to address the varying degrees of harm that different infringements may produce.

The natural tendency of an authority is to cover as much as possible, assuming unlimited resources and time. We did the exact opposite, establishing a strategy that required good reasons to initiate an investigation, whether it was *ex officio* or in response to a complaint.[67]

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65 In my first courtesy meeting with the sitting President of the Supreme Court, Milton Juica, I asked him what advice he would give me. The first thing he mentioned was to be "unaffectionate," something I always remembered throughout my tenure.

66 See the document titled "Instructivo sobre aplicación del principio de abstención e inhabi-lidades en la Fiscalía Nacional Económica" at www.fne.gob.cl/wp-content/uploads/2017/10/reso_236_2010-1.pdf.

67 See Robert Jackson, "The Federal Prosecutor," *Journal of American Judicature Society* 24 (1940): 19. Available at https://www.roberth-jackson.org/wp-content/uploads/2015/01/The_Federal_Prosecutor.pdf. There he states: "*Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.* If the Department of Justice were to make even a pretense of reaching very probable violation of federal law, ten times its present staff would be inadequate. (...) What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain." *Italics are ours*.

When we arrived at the FNE, the stock of investigations numbered around 150. We immediately considered that figure unmanageable and set out to reduce it, especially if we wanted to conduct in-depth investigations of complex markets within a limited time.

A secondary problem, key in investigations of inherently dynamic markets, was the time required for each investigation. The larger the number of investigations we were conducting, the longer it took us to complete any given investigation. Conversely, if we limited the number of investigations, we could focus our energy on the selected ones, and the average time should improve. That turned out to be the case, as we were able to verify years later, especially in abuse of dominance investigations (with a 50 percent decrease in their average duration between 2012 and 2017) and in mergers (18 or 66 days on average in Phase 1—depending on whether remedies were imposed or not—or 97 days in Phase 2, compared with prior delays of months for a consultation before the TDLC).[68]

The phrase running through our minds was "*less is more,*" something we knew was difficult to explain and could be misinterpreted, because its meaning is not intuitive and, in our culture, focus and the price to be paid for that focus are not highly valued.

Another benefit of choosing is that it increases the rate of investigations hat result in a concrete product or action: a complaint, consultation, settlement, or change of conduct. There is no luck involved here—it is simply the result of having selected well from the outset. Thus, one can choose fewer investigations and end up with a similar or even greater number of concrete enforcement actions. We were able to verify that reducing investigations was efficient, and we even measured the degree of efficiency based on the ratio between the number of investigations and the number of concrete actions (other than simple closure). Using that efficiency index, results went from 8 percent in 2010, to 41 percent in 2012 and 2013, to 61 percent in 2014, and to 71 percent in 2015.[69]

The control of the direction in which the FNE went, as it was exerted through the division heads, focused on two specific moments: at the beginning and at the end. In between, division heads were given considerable freedom to conduct their investigations, without prejudice to weekly bilateral meetings with each of them.

The initial stage was, in my view, the most complex, involving a degree of intuition in deciding what to investigate and what not to investigate, within the context of a reasoned exercise of discretion. There was also an element of "household economics" and timing, in the sense of weighing the cost of an investigation, which depended on the FNE's internal knowledge of that market, its sophistication, and possible hypotheses in regard to anticompetitive conduct.

The second control came at the end, when the team was convinced that there was indeed a violation. At that stage, the specific evidence from the investigation was carefully reviewed, and different versions of a complaint or consultation were prepared.

There was a self-imposed requirement that final documents be clear and to the point, without unnecessary *fat* or *purely decorative additions*, and certainly without editing or typing errors. The style used was deliberately not one of grand rhetoric, but rather closely tied to the facts we would later have to prove.

DL 211 contains a provision that allowed us to be selective. This is Article 41 on admissibility, which establishes that, in response to complaints from private parties, the FNE has 60 days to request information and summon

68 On timelines in merger investigations, see Irarrázabal and Cerda, "Establecimiento de un...".
69 See the FNE's 2015 Public Account at http://www.fne.gob.cl/wp-content/uploads/2015/11/Cuenta_Publica_Propuesta-Final.pdf, p. 19

individuals to give statements voluntarily, "to determine whether it is appropriate to investigate or to dismiss the complaints submitted."[70]

Through this mechanism, the initiation of an investigation could be dismissed for multiple reasons, which had to be reflected in a written resolution stating so, accompanied by a public internal report describing the activities carried out and the reasons for inadmissibility.

The greater control we were able to exercise over incoming complaints translated into the ability to increase ex officio investigations and depend less on the flow of external complaints, thus developing institutional muscle and instinct within the organization. We were able to increase the number of *ex officio* investigations above those initiated by private complaints, reaching a point where over 50 percent of investigations were initiated *ex officio*.[71]

Selection was facilitated by the fact that the FNE does not have any monopoly over actions before the TDLC. Any private party or authority can bring an action before the TDLC without the FNE's participation. In fact, most abuse of dominance cases occurred without the FNE's involvement, and only in some of them did the TDLC request a report from the FNE. This aspect of the Chilean institutional framework is healthy, allowing the FNE to focus primarily on certain specific conducts or transactions (such as cartels and mergers) and on cases where the general interest is at stake and there are no other actors willing to bear the costs of litigation.

We not only consciously decided to limit the number of investigations and increase the percentage initiated *ex officio*, but we also prioritized certain areas.

Cartel cases were given special attention because we felt that neither businesspeople nor the authorities fully appreciated their seriousness as an attack on the market economy.

The FNE established a *zero-tolerance* policy toward cartels and demonstrated it in the cases it investigated, prosecuted, and won before the courts. Each cartel case has its own story, but what is important is that we set and made explicit a clear prioritization in the prosecutorial policy against cartels, which translated into the creation of a cartels unit and the allocation of resources and staff hours for these investigations and trials.

This policy produced results, as evidenced by judicial victories in emblematic cases such as those in the market of drugstores (initiated under the previous administration), refrigerator compressors, interurban transport (Curacaví, Cartagena, terminals, Caldera), urban transport (Valdivia), poultry, asphalt, shipping lines, supermarkets, laboratories (ampoules and serums), tissue, and doctors (Chillán and the Fifth Region), to name the most prominent.

The other priority was mergers, where many novel efforts were made to put the issue on the table, as already mentioned. The meager regulatory framework we had to operate under was highly uncomfortable, and companies had strong incentives to simply merge without any consultation or review.

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70 The provision in Article 41 of DL 211 is consistent with the heading of Article 39 and with the principles of efficiency and effectiveness in Law 18,575.

71 For example, the poultry cartel investigation began without any complaint. In some years, the percentage of ex officio investigations over those arising from complaints was even well above 50 percent. See the FNE's 2015 Public Account at http://www.fne.gob.cl/wp-content/uploads/2015/11/Cuenta_Publica_Propuesta-Final.pdf, p. 16. The existence of *ex officio* investigations is positive, as it means that the agency is actively analyzing different markets, thereby reducing a bias toward focusing only on those that present complaints. This bias toward complaints—and the resulting reduction in ex officio investigations—has been a constant criticism faced by agencies in developed countries.

In addition to prioritizing cases, we also had to select the appropriate tool for a given case, which requires some explanation.

The FNE has a wide arsenal of sanctioning tools in cases of violations of competition law.[72] The main tool is the FNE's complaint, which may include requests for fines but also for structural remedies, termination of contracts and even dissolution of legal entities.[73] This is a powerful but costly tool. It requires allocating significant resources to prepare for litigation and to be effective. Legal proceedings can give rise to multiple variables that are difficult to control or predict, making strategy essential. Litigation also takes time, especially when the disputes are intense and the opposing parties powerful, as is usually the case in competition matters.

Given the investigative powers granted to the FNE by law, the Prosecutor's Office team was always expected to not be caught off guard during the process itself. That is, during the investigative stage, the FNE sought to carefully assess the arguments that the other side could make. This allowed the FNE to prepare its own arguments well, investigate the facts underlying those arguments, and, if warranted, be convinced of their validity or merit.

This had to be done during the investigation stage because if it was not done then, the path became steep and uncertain during the proceedings themselves. The idea of "*fixing the load during the journey*" that litigation entails was flatly ruled out.

To improve the ability to detect gaps in the investigation, we established an internal counterweight mechanism: we separated the investigative divisions (cartels, abuses, and mergers) from the litigation division. Thus, the litigation division began reviewing all the evidence in the investigation and analyzing whether anything was pending and whether it agreed with the investigative division's theory of the case.

This was a healthy internal check and balance, in addition to the natural counterweight of the TDLC. It was initially difficult to implement because of the understandable tension it created within the work teams, but it later came to be valued as a quality control mechanism that limits the confirmation bias inherent in those directly involved in an investigation. It also increased specialization, as the investigation team would not participate in litigation and could therefore focus its energy on new investigations as soon as a complaint was filed.

In addition to complaints, there are other tools that may be appropriate for certain investigations and may entail lower institutional costs while achieving similar results.

One such tool is settlements, in which the FNE must identify the conduct it considers objectionable, communicate it to the companies, and then negotiate how to address it. The mechanism provided in DL 211 before the TDLC is extremely expeditious.[74]

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72 An administrative change to the FNE's institutional efficiency targets, approved by the Budget Directorate, facilitated this selective approach to the tools to be used. This change consisted of replacing the target of number of complaints per year with one of "products" per year, which included complaints, consultations, and changes in conduct.

73 Article 26 of DL 211 provides that: "In the final judgment, the Tribunal may adopt the following measures: (a) Amend or terminate acts, contracts, agreements, systems, or arrangements that are contrary to the provisions of this law; (b) Order the amendment or dissolution of companies, corporations, and other private-law legal entities that have participated in the acts, contracts, agreements, systems, or arrangements referred to in the preceding letter; (c) Impose fines for the benefit of the Treasury of up to an amount equivalent to thirty percent of the offender's sales corresponding to the line of products or services associated with the infringement during the period over which it extended, or up to twice the economic benefit derived from the infringement. If it is not possible to determine the sales or the economic benefit obtained by the offender, the Tribunal may impose fines of up to an amount equivalent to sixty thousand annual tax units."

74 See Article 39(n) of DL 211 and legal opinions submitted in case No. 5418-2018 before the Constitutional Court, regarding the settlement submitted on August 27, 2018, by the FNE and Tianqi Lithium Corporation.

Similarly, in less significant cases with limited effects, it may be reasonable and fair for the FNE to accept changes in conduct proposed by companies, without the participation of the TDLC. These changes in conduct can be as relevant—or more so—than the fines that might be obtained, and their effects are often immediate.

Finally, both the FNE and the TDLC have the authority to recommend regulatory changes or the issuance of new regulations to promote competition, and this tool can also be useful and appropriate in certain cases.

VI. TECHNICAL TONE

Another pillar of the FNE's model was to maintain a technical tone, and even a certain distance from the heated debate that arose after the filing of important cases before the TDLC (especially cartel cases) or regarding the virtues or flaws of the market economy.

> This attitude is clearly reflected in our public accounts:
>
> They have been giving us a lot of power, (...) and precisely for that reason we cannot afford to believe that we know it all, that we only should speak or write because we do not need to listen or read. We can make mistakes. We can suffer from temporary myopia and inadvertently omit aspects of the market that should be analyzed. Or be wrong in accurately predicting the future changes that will occur in different industries. But under no circumstances can we fall into the temptation, now more than ever, of easy work, frivolity, populism, or short-term cleverness.
>
> (...) And the character that the Prosecutor's Office has been building for decades—of rigorous work, independence, and a long-term vision, of media sobriety and distance from show business and charlatanism, from partisanship and populism—is the only thing that guarantees that we will be able to face the new challenges that arise in a sensible, effective, and efficient manner (...).[75]

We were seen as timid, withdrawn, and lacking energy. People said we did not take advantage of our moments in the spotlight and that I was uncomfortable with labels such as 'sheriff' or *'czar*.' They also said we had no complicity with the government in office or with congressmen interested in economic matters, and that we wasted media coverage offered to us, especially on television and radio. But the strategy was always to maintain parsimony and sobriety—something we considered inherent to a public official, and which normally distinguished the latter from a politician. We believed this allowed us to keep the focus on the raw facts and solid evidence from investigations and litigation, and to avoid the frivolity and temptation of the easy adjective.

There was, of course, an aesthetic dimension to this decision—to view the exercise of authority with dignity and poise—that was not compatible with flippant attitudes, pompous statements, or short-term gains. Nor with fame. But we knew that what was at stake went beyond mere aesthetics and entered the realm of strategy.

We were not quick with the media because it is very difficult to translate legal and economic jargon into simple words without losing precision, as we will elaborate further below. Moreover, journalists could ask good

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75 "Cuenta pública de la Fiscalía Nacional Económica, del período 2015-2016," 2 and 13. Available at www.fne.gob.cl/wp-content/uploads/2018/04/Discurso-Cuenta-Publica-040517.pdf. The speech by Prosecutor Mario Ybar on "Día de la Competencia 2018" goes in the same direction: "We must, on the one hand, encourage trust, vigilance—even outrage at transgression; but also, on the other hand, a*void instrumentalization and populism.* Maintaining that balance between keeping social commitment to competition alive and not yielding to populism, I believe, will be the main challenge for the FNE in the times to come." *Italics are ours*.

questions, but it was very difficult to give good answers—either because doing so required explaining a great deal of background information (and television and radio time is limited to minutes and short phrases), or because we did not want to find ourselves in a position of having to preview arguments that might later arise in litigation.

Our strategy with the media was always the same: to maintain a low media profile, especially for the National Economic Prosecutor, but a high profile for the FNE's work and its coverage by the specialized press. Whenever possible, it was the institution that should speak, rather than the person.[76]

I was reluctant to give interviews. When I did, it was for specific reasons—preferably no more than twice a year—and in print media, which better allowed for explaining the complexities of competition law.

The idea behind the low profile was to encourage journalists to let the cases speak for themselves, thus fostering specialization in economic journalism that would cover the FNE's and TDLC's news independently, after analyzing the documents made public, whether in the context of an investigation or litigation.

We never had any objection to explaining to journalists what we were doing in relation to public cases and specific documents that were already in the public domain. We preferred not to be the ones to translate this into plain language, but rather to let it come from the journalists themselves, who were better equipped than we were to do so.

We saw the value of having a simple explanation, and over time we refined the press releases issued by the FNE to make them more understandable, without compromising their technical accuracy.

We also chose not to correct or respond to everything that was said in the press (many of it incorrect or taken out of context), except in exceptional cases and when we believed it was the right time. The idea was to avoid the temptation to react to every media mention that did not originate from the FNE, thereby keeping the focus on investigations and litigation.

We faced two major constraints—one legal and the other related to good prosecutorial administration. The legal constraint was the confidentiality we were required to maintain, which demanded vigilance to ensure that nothing was disclosed that could result in a breach of that confidentiality. The best way to do that was before the TDLC, where filings were made with confidential information redacted.

The other constraint was one of sound prosecutorial administration. We did not seek the fleeting spotlight of a complaint, but the weight of a judgment. As we have said, ours was merely an opinion, expressed through a complaint. The real decision comes from the TDLC's ruling and its confirmation by the Supreme Court, and much can happen between a complaint and the final ruling.

Another concern was that reputational considerations should not outweigh the legal consequences of the anticompetitive conduct. Underlying this concern was the conviction that the discussion had to be redirected into legal form, which allows for depth, nuance, and precision.

All of this is not easy to achieve when public debates take place in a loud, irrational tone and when the popularity of the market economy was (or so we felt) in decline—or at least in question—partly due to the recognition of business abuses that had been committed.

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76 See "Política general de comunicaciones de la FNE," July 2018, available at http://www.fne.gob.cl/wp-content/uploads/2018/07/%C3%ADtica_comunicaciones.pdf. It was also very useful to have the ongoing advice of external communications experts, who would provide weekly feedback on the FNE's media appearances and their context, and would alert us to new challenges that authorities in Chilean society would have to face.

It was difficult to convey that corporate abuses are inherent in a market economy, where freedom prevails and private actors hold significant shares of power. The crux of the matter is not that anticompetitive conduct should not exist, but that there must be a strong institutional framework capable of dismantling cartels and abuses, controlling mergers, and having enough muscle to effectively face an economic group or powerful company before the courts. The key is to have state bodies capable of deterring companies from engaging in conduct contrary to competition law—something that does not mean the absence of violations. It could not be—nor did we want it to be—that the FNE's own success would result in the discrediting of the market economy or the private sector as a whole; that is, that the improper and illegal conduct of a few would tarnish and delegitimize an entire social system of organization that is arguably effective and efficient in creating wealth.[77]

We believe, however, that a healthy balance was achieved between, on the one hand, the seriousness and confidentiality required for our investigations and the exercise of our entrusted powers, and, on the other, the need for every authority to explain what it does—which, in the FNE's case, especially involves promoting competition.

As part of the strategy, we held annual meetings with the editors of the main media outlets. In some years, we also did so with television and radio. In those meetings, we explained what we did and discussed resolved cases. But we essentially took the opportunity to explain the Chilean institutional system and the complexities of competition law. We did the same with Chile's most relevant think tanks, where the focus was on the legal changes needed and, once approved, how they would be implemented.

We also organized workshops for economic journalists, in which we explained the latest trends and the main principles of competition law.[78]

VII. WORK TEAMS

In these years, the FNE succeeded in consolidating a high-performance professional team, managing to attract the most talented young professionals in the market with an interest in public service. We knew perfectly well that the FNE's key asset was its people, and we made this publicly clear on several occasions. The teams worked in a cohesive and focused manner. The division heads were properly empowered. People could work as a team, and each professional knew what they had to do. Likewise, experience working at the FNE was considered valuable and formative in the job market.[79]

We knew perfectly well that the FNE's key asset was its people, and we made this publicly clear on several occasions:

> The Prosecutor's Office is its people, and it is those people who must prudently and without fanfare apply the rules that govern us, in work that demands not only intelligence and knowledge but also character and discipline. Each and every one of its officials has been

77 In the same vein, see the speech from "Día de la Competencia 2015," available at http://www.fne.gob.cl/wp-content/uploads/2015/11/discurso.pdf. It states: "The market economy is not buried because we discover that there are companies and individuals who take advantage of it. Quite the opposite: there could be a burial, and a failure, if the State does not take care to defend markets with all the legal mechanisms at its disposal."

78 See, for example, http://www.fne.gob.cl/fne-realiza-taller-para-periodistas-2017/.

79 In 2017, we conducted a survey among former FNE officials who had worked with us over the past ten years, the results of which can be found at http://www.fne.gob.cl/wp-content/uploads/2017/12/Encuesta-a-ex-funcionarios.pdf. Anonymously, 91 percent of them rated their experience at the FNE as satisfactory or very satisfactory, and 95 percent said they would recommend working at the FNE. But something even more important for the defense and promotion of competition in our country: 51 percent said they always applied competition law knowledge in their current job, and 45 percent said they did so occasionally.

> selected for their academic preparation, for their willingness to engage in well-executed teamwork, but above all for a character that allows them to face challenges and pressures in an efficient, effective, and healthy way. That disposition and that character made it possible, amidst so much jargon and theory, to preserve a grounding wire called common sense. That disposition and that character ensured that the powers and authority granted to the Prosecutor's Office did not cloud the team's vision, and that it was always understood that the modesty of well-executed work and an obsession with the facts have built, brick by brick, this edifice of competition law, whose foundations date back to 1959.[80]

We conceived of the FNE as having a broad-based pyramid structure. This meant that the average age of its team would be low, accepting the challenge of constant personnel change. It was understood that each hire would remain at the FNE for between two and a half and three years. We knew that the initial acclimatization period was costly, and to speed up that process—which in some cases could take a year—we implemented induction and training programs.

What did we do to attract young talent and compete effectively with law firms, consulting firms, and other public agencies?

First, we changed the FNE's organizational structure to make it more agile and efficient. The previous structure was based on a legal division and an economic division. By 2018, the FNE's design consisted of five divisions: Antitrust, Cartels, Mergers, Studies, and Litigation, in addition to Administration and the Office of the Prosecutor.

This design was gradually developed during our leadership of the FNE and proved to be quite efficient. It is based on the organizational model of law firms and consultancies. The idea is that one person can effectively manage around 20 high-performing individuals. Thus, the aim was to create small groups with a defined function and give each head the freedom to develop their division.

The keys, of course, were to choose an excellent head for each division and to have in-depth quality control, especially at the beginning and end of cases, with an emphasis on those resulting in complaints or consultations.

We also wanted to have an effective counterweight for each investigative division—namely, Cartels, Abuse, and Mergers—especially for those investigations leading to litigation or non-contentious proceedings[81*] before the TDLC (and potentially before the Supreme Court). From this arose the idea of creating a Litigation Division to review how the investigation had been conducted and to focus on winning cases.

From the outset, we wanted each division's professional teams to combine lawyers and economists, opting not to have two separate compartments according to the teams' members' professions. In this way, from the investigation stage onward—and later in litigation—there would be an effective synergy between lawyers and economists. This formula was also a draw for young professionals from both fields, who found it stimulating to work in an interdisciplinary environment with highly specialized heads—a combination that law firms could not offer in the same way.[82]

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80 See "Cuenta Pública de la Fiscalía Nacional Económica, del período 2015-2016," at http://www.fne.gob.cl/wp-content/uploads/2018/04/Discurso-Cuenta-Publica-040517.pdf.

81 * Translator's note: non contentious proceedings are those in which the focus is to obtain from the TDLC resolutions distinct from rulings that aim to solve conflicts between different parties. Amongst the proceedings included are consultations (where a party asks whether certain act is legal or not) normative recommendations (where the TDLC evaluates whether to recommend a legal or administrative reform) and general instructions (where the TDLC dictates a rule that economic agents must follow).

82 Moreover, this fit very well with competition law, which combines both disciplines, especially in a system such as Chile's in which two members of the TDLC are economists.

As of August 2018, the FNE had four employees with doctoral degrees, four PhD candidates, and 44 professionals with master's degrees, all graduates of the best universities in Chile and abroad.[83]

Another aspect of the FNE that attracted young professionals was the interaction with external advisors—whether national or foreign—which enriched internal discussions and enhanced technical perspectives. Some were permanent specialized advisors and some were engaged on a temporary basis, for example, to prepare a specific report to be used in litigation. We were always very well received by external professionals, who, in my opinion, valued working with us.[84]

We also made an effort to help FNE professionals' study abroad, especially at Anglo-Saxon universities, through guidance, contact with such institutions, and letters of recommendation.

We devised a candidate interview system that was also based on having effective counterweights. We wanted the best students—generally among the top 10% of graduates from the country's leading law and economics faculties. But we also sought diversity and, above all, integrity.

The counterweight system meant that candidates had to pass two different filters. On the one hand, there were interviews with the professionals in the division requiring them; on the other, interviews with the FNE leadership. The process could start on either side, but it always had to be double. Normally, hires began with the division needing the professional. They were responsible for finding the candidates, interviewing them, and selecting them. From there, the candidate had to pass the FNE leadership's filter. This consisted of two separate interviews: one with me and another with the Deputy Prosecutor and the Head of Institutional Relations. The interviews were separate, and there was no contact between interviewers until the end of the process, when we would meet to discuss the candidate.

In those interviews, the FNE leadership's main focus was to assess the candidate's integrity and character to withstand, despite their youth, the pressure and burden of power. As a secondary criterion, we evaluated their contribution to the FNE's diversity.

Another change we made concerned the clerkship program. There, we implemented an attractive program for law students, following the parameters used by law firms, with the main purpose of serving as a platform for selecting future FNE professionals.

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83 As of that date, the FNE had professionals graduated from the following universities: Georgetown University, New York University, The London School of Economics and Political Science, Universidad Autónoma de Madrid, University of Amsterdam, University of Barcelona, University College London, University of British Columbia–Vancouver, University of California–Berkeley, University of Cambridge, University of London–Birkbeck College, University of London–King's College, University of North Carolina at Chapel Hill, University of Oxford, University of Wisconsin–Madison, and Yale University. Without a doubt, the *Becas Chile* program helped us both to send FNE professionals abroad for further studies and to receive those returning from their studies.

84 During the 2010–2018 period, the following professionals provided services to the FNE in their respective areas of *expertise*: Alan Frankel, Aldo González Tisinetti, Alexander Galetovic Potsch, Andrés Fuchs Nissim, Andrés Gómez-Lobo Echeñique, Antonio Bascuñán Rodríguez, Arturo Fermandois, Carlos Noton Norambuena, Carlos Pizarro Wilson, Carlos Portales Echeverría, Claudio Agostini González, Claudio Magliona Markovicth, Cristián Maturana Miquel, Eduardo Cordero Quinzacara, Eduardo Engel Goetz, Eleonora Ocello, Enrique Barros Bourie, Enrique Navarro, Enrique Vergara Vial, Felipe Bulnes Serrano, Fernando Coloma Ríos, Fernando Díaz Hurtado, Florian von Papp Wagner, Frederic Jenny, Ioannis Lianos, Jaime Arancibia Mattar, Jorge Bofill Genzsch, Jorge Correa Sutil, Jorge Grunberg Pilowsky, José Luis Lara Arroyo, José Luis Lima Reina, Juan Pablo Mañalich Raffo, Juan Pablo Montero, Julio Peña Torres, Leonardo Basso, Luis Barros Cabero, Luis Cordero Vega, Luis Morand Valdivieso, Marcelo Olivares Acuña, María Soledad Krause Muñoz, Mario Olivares González, Massimo Motta, Michael Carrier, Michael Jacobs, Miguel Chávez Pérez, Mona Chammas, Nicolás Figueroa González, Octavio Bofill Genzsch, Okeoghene Odudu, Ramiro Mendoza Zúñiga, Ramón Domínguez Águila, Raúl Núñez Ojeda, Ricardo Jungmann Davies, Ricardo Sanhueza Palma, Richard Whish, Roberto Plass Gerstmann, Rodolfo Fuenzalida Sanhueza, Siobhan Dennehy, Spencer Waller, Tom Ross, Tomás Rau Binder, and Valentina Paredes Haz. The FNE even published in 2017 a book that compiles some of the legal opinions it commissioned and submitted in certain cases. See *Reflexiones sobre el derecho de la libre competencia: Informes en derecho solicitados por la Fiscalía Nacional Económica (2010–2017)*, available at http://www.fne.gob.cl/wp-content/uploads/2017/11/FNE-Libro.pdf.

VIII. INTERNATIONALIZATION

We have already said several times that the centers of development for competition law reside in countries such as the United States and the European Union. There are others with interesting activities worth following, such as Germany, Australia, Canada, and England. In Latin America, Brazil has been particularly strong in the area of cartels, and Mexico in competition advocacy. Peru and Colombia have advanced rapidly, while Argentina was just introducing a new law that promised to deliver results.

Chile was seen as an advanced country, with an interesting institutional framework, but the size of the Chilean market did not make it especially influential—particularly as we did not have a merger control system and the leniency program was just getting started.

Nevertheless, integration into the international arena is important in competition law, because both foreign judicial decisions and administrative resolutions and guidelines have had and continue to have an impact on national competition law. Furthermore, many of the challenges the national authority faces have already been addressed abroad—for example, on issues of confidentiality, interaction with other regulatory authorities, or internal institutional prioritization.

Thus, it is important to have networks within foreign agencies that allow one to make a phone call about an urgent matter, have a draft guideline reviewed by an agency experienced in the subject, and establish permanent ties with teams specialized in certain markets.

Through meetings at the Organisation for Economic Co-operation and Development (OECD), International Competition Network (ICN), United Nations Conference on Trade and Development (UNCTAD), and annual forums at Fordham University and New York University, contacts were gradually made with the heads of agencies and division chiefs from other countries. The question then was how to enhance our relationships with foreign agencies and international organizations in a way that would also make it worthwhile for them to assist us, despite our size.

The strategy we adopted was to make efforts to increase our influence in the region. Coordination with other Latin American authorities was easy—not only because the language facilitated relationships, but also because we all operated within the civil law system and economic structures tending toward monopolization due to economies of scale.

In those years, we made significant efforts to assist and advise our peers in Latin America. There was always something for all of us to learn, of course. But Chile had a more developed market economy than most of those countries, and this meant that our competition law was also more advanced in certain areas.

This involved engaging in conversations with heads of foreign agencies in the region about institutional challenges and offering our views—while respecting confidentiality—as well as arranging for technical teams from those countries to participate in working sessions on matters of mutual interest, attending those countries' "Día de la Competencia" events, assisting them with specific cases, and providing them with study materials, among other activities.[85]

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85 In addition, multilateral initiatives were created to share experiences and knowledge about specific markets. See, for example, "Declaración de Lima," in which Chile, Colombia, and Peru agreed to create a space for the exchange of experiences among competition agencies on legal and economic issues, as well as to strengthen cooperation and training mechanisms. Available at: http://www.fne.gob.cl/wp-content/uploads/2013/09/dec_lima_2013.pdf. A similar initiative was later developed with Mexico.

As soon as the more experienced agencies realized that Chile was exercising regional leadership, their attitude toward us shifted to one of greater attention. They understood, and we made sure they knew, that the lessons and experiences we received from them would be disseminated to the rest of the Latin American countries.[86]

We also worked to establish closer ties with major international law firms. We asked national law firms to tell us which foreign firms they worked with so that we could explain firsthand our leniency rules and the new merger control regime.[87]

IX. TRUST

The FNE's model's cornerstone is trust. Independence, selectivity, a technical tone, professional excellence, and internationalization are all anchored in the trust placed in the institutions and the system by each and every actor involved.[88]

Without trust, no model will work.

Perhaps this is the key element that explains our sense of institutional consolidation and reputation, in the context of a country marked by distrust.[89]

Trust helps reduce the complexity of the future. The complete openness of what lies ahead is limited by relying on the expectation that the events of the world, or the actions of others, will unfold in accordance with certain generalizations we have built from the present and the past.[90]

Although risky, trust is necessary and urgent to enable decision-making and action in an increasingly open, changing, and complex world.

A lack of trust prevents institutions from operating and freezes private action. Distrust in institutions is an insurmountable cost to economic development, and it may well be one of the key impediments preventing us from achieving it.

Trust emerges as the most perfect mechanism to reduce uncertainty, because it ensures the freedom and autonomy of all parties interacting, without requiring excessive intervention or transaction costs.

Trust must be built and nurtured; it is a permanent effort to ensure its survival. We place our trust in individuals, but also in institutions —and increasingly so— as the division of labor, technology, and globalization bring high levels of complexity and interdependence.

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86 Perhaps the most objective indicator of how the FNE's international standing improved is the agency ranking published each year by *Global Competition Review*, rating the world's main competition authorities. Merely being listed was, of course, an honor. In that ranking, we went from having two stars in 2010 to 2.5 stars in 2011 and three stars in 2015. Other signs of the FNE's successful international integration include joining the Bureau of the OECD Competition Committee, the Anti-Cartel Division's entry into ICN's Cartel Working Group, holding the presidency of the APEC Competition Committee, and sponsoring the first annual ISCI-Cresse meeting in Latin America for economists.

87 We took advantage of the annual meetings of the American Bar Association, held once a year in Washington, DC, to visit international law firms and explain the upcoming changes. This helped us accelerate the international alignment of our leniency and merger notification programs.

88 See "Cuenta pública 2017" del Fiscal Nacional Económico available at http://www.fne.gob.cl/wp-content/uploads/2018/04/Discurso_final.pdf.

89 See "Panorama de la sociedad 2016, la situación de Chile, OECD", which states: "Chile belongs to the group of OECD countries with low levels of trust: less than 13 percent of Chileans report having a high level of trust in others (36 percent in the OECD) (...); also, young Chileans tend to trust the government less than the rest of the population." Available at https://www.oecd.org/chile/sag2016-chile.pdf.

90 See María Soledad Krause M. and Rodrigo González F., "La confianza en la construcción de la realidad social", *Revista de Filosofía* 41, no. 1 (2016): 33–53.

There are reasons to trust an institution: transparency and knowledge of its structure; technical expertise, professionalism, rationality in its actions, and predictability; independence in decision-making; seriousness in past actions; and self-assessment aimed at detecting errors and deficiencies and working to correct them.

All these factors make it possible to create an expectation and maintain it over time, while also neutralizing potential disappointments that may naturally arise —the inevitable product of the flexibility that an institutional structure must possess.

This trust does not mean, in any way, regulatory capture or a lenient, indecisive authority. Rather, it means that companies should expect an alert and firm authority, that will nonetheless act within the bounds of the law, independently of any factor not arising from the specific case, and with a discreet and measured tone, seeking to safeguard the public interest in the best possible way.

X. FINAL REFLECTION

So far, Chile's competition law institutional framework has, in our view, been successful in fostering an environment of trust in competition law —in a country and a world that are, by nature, distrustful and litigious.

This trust is tangible among investigated parties and defendants, and in the business community in general, who rely on being able to present their arguments in a rational environment, confident that the evidence will be genuinely and in good faith analyzed by those responsible for making decisions; that the measures permitted by law will be taken to safeguard the confidentiality of their sensitive information; that there will be a reasonable level of predictability regarding the decisions authorities might make, or at least clarity on the reasons behind certain adjustments; that leniency applications will be assessed on their merits and with strict adherence to the principle of legality; that, in appropriate cases, there will be room to reach agreements that satisfy the claims of the parties in conflict while safeguarding the public interest; that the true meaning of the law will be sought rather than using a specific case as a pretext to push its boundaries —and a long etcetera.

The government, Congress, and politicians place their trust in the institutional framework, and need to be certain that, by following the technical parameters and formal safeguards required by law, the competition authority has had, has, and will have the courage to face the powerful, efficiently and effectively.

The media must also trust the institutional framework —trust that what is debated is faithfully reflected in the records of the proceedings or investigation; that legal and economic jargon serves the purpose of precision, not obscurity; and that procedural formalities facilitate rational debate.

It is this trust that should allow the FNE to face the challenges that competition law will forcefully present in the near future, especially in the context of a digital economy.

It is the prudent, fair, and proportionate application of this model —already established and refined— inspired by independence, selectivity, technical tone, professional excellence, and internationalization, that should enable the FNE to continue effectively and efficiently controlling the excesses of private power and to further deepen the market economy in Chile, through legal channels.

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