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# *Chile**

*– Gesner Oliveira†*

Chile is the Southern most nations of Latin America and one of the longest and narrowest countries in the world.

Since the restoration of democracy, Chile has served as a model for other developing nations and the East European countries that are attempting to make a similar transition to democratic government and free-market economy.

Chile has increasingly assumed regional and international leadership roles befitting its status as a stable and democratic nation.

| PROFILE | |
|---|---|
| Population: | 15.8 million *** |
| GDP (Current US$): | 72.4 billion *** |
| Per Capita Income: (Current US$) | 4,360 (Atlas method)*** 9,820 (at PPP.)** |
| Surface Area: | 756.6 thousand sq. km |
| Life Expectancy: | 76.4 years *** |
| Literacy (%): | 95.7 (of ages 15 and above)** |
| HDI Rank: | 43 |

*Sources:*
- World Development Indicators Database, World Bank, 2004
- Human Development Report Statistics, UNDP, 2004

(**) For the year 2002
(***) For the year 2003

**Economy**

Chile is a market-oriented economy, characterised by a high level of foreign trade (mining prevails over industry and agriculture, according to Total Export Volume Index[1]). Chile has the highest competitiveness ranking[2] in Latin America and one of the highest Economic Freedom Index[3] in the world.

In 1998, due to balance of payments complications, Chile had to adopt tight monetary measures, lowering its growth rate. The country also suffered because of instability in other Latin American countries. Although unemployment rates are high, the prospects for GDP growth are over four percent, FDI is picking up and exports earnings are growing.

**Competition Evolution and Environment**

State intervention into Chile's economy became widespread following the 1925 adoption of a Constitution that greatly increased the power of the executive. The Government's promotion of and engagement in preferred forms of economic activity became more pronounced in 1931, when the worldwide economic depression led to a short-lived takeover of Chile's Government by socialist-leaning military leaders. Over the next two decades, the state pursued policies of import-substitution industrialisation through various means. The policies created closer links between government and big business, and together with high tariffs they isolated Chile from international markets. By the end of the 1950s, the policies of the past were seen as having run their course, but there was no consensus on what new course to take.

Over the last 30 years, Chile has been a quiet pioneer in the field of competition law and policy in South America and among developing countries. In the application of competition policy principles in some infrastructure sectors, Chile and its competition institutions have been in the forefront. In Chile, the main focus has been a successful breaking of vertical restrains and collusive practices.

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1 Source: Central Bank of Chile
2 Sources: International Institute for Management Development, June 2004; World Economic Fórum, October 2004.
3 Source: The Heritage Foundation, January 2005.

Competition policy in Chile was based on the Anti-monopoly law, which was first enacted in 1959, a year after an international mission recommended abandoning price controls, enacting a competition law, and managing customs tariffs when prices rose too much. Since 1959, Chile has had regulations in support of free competition.

The law prohibited the Government from granting monopolies to private parties and legislated those acts or agreements as civil (administrative) and criminal violations. The Law was enforced by a Commission whose members were a Supreme Court Judge, the Superintendent of Corporations, Insurance and Stocks Markets and the Superintendent of Banking.

The Commission could investigate cases, decide whether to recommend criminal cases, issue rulings in non-criminal cases as well as general rules, and decide whether a monopoly concession could be issued. Four years later, in 1963, the position of the National Economic Prosecutor was created by Law No. 15.142, with the mission to prosecute and investigate anticompetitive conducts, acting on public interest.

Since Chile's Government fixed the prices of many products and services throughout this period of 1952-1972, it was doubtful that the 1959 Competition Law would ever play a major role in preventing enterprises from restricting output and charging monopoly prices.

In 1973, the new Government shifted the economy. The military government in the same year gave a new economic orientation to the country, based on free market principles. The features of this new orientation were the privatisation process, liberalisation of prices, unilateral tariff reduction and the opening of the economy to foreign trade.

Further, owing to several drawbacks in the 1959 competition law, it was reformulated as the '*Law for the Defence of Free Competition'* and was adopted in December 1973 as part of a programme to roll back the previous Government's steps towards a Government-owned and planned economy.

Together with these new orientations, the military government improved the system of competition enforcement with the Decree Law No. 211, just two months after the coup. And a new enforcement agency was in place two weeks later. The new law was and is substantively similar to its predecessor; however, it created a new institutional system that remains in place. So, it was pretty clear that competition was going to play a central role in the economic system of that Government.

**Competition Law and Policy**

After almost 30 years of application of this framework – globalisation, new technologies and concentration of markets – the need for a new enforcement system was felt as competition issues became more complex.

**Box 106.1: Main Laws that Regulate Competition in Chile**

1. Constitution. Article 19 (21) and (22) – assures the right that every individual has to engage in any economical activity that is not considered illegal or that put into risk national security or the public order. It also establishes that no privilege can be given to any sector, activity or geographic area.

2. Decree Law No. 211 of 1973 which established the rules for the protection and defense of free competition,

- whose text revised, coordinated and systematised was included in Executive Decree No. 511 issued by the Ministry of Economy, published in the Official Gazette on October 27, 1980;
- as amended by Law No. 19.610 published in the Official Gazette on May 15, 1999;
- by Law No. 19.806, published in the Official Gazette on May 31, 2002; and
- by Law No. 19.911 published on November 14, 2003, amends the prior competition law by creating a new Competition Tribunal and introducing a number of other reforms.

The focus of the reform of the competition law was the creation of a Competition Tribunal, which replaced the Preventive and Antitrust Commissions. This Law No. 19.911 was officially published on November 14, 2003 and came into effect on May 13, 2004.

As this new law proposed, the new Tribunal became an independent entity with judicial powers; however, it is not part of the judiciary. This quasi-judicial Tribunal is composed of three lawyers and two economists. Its chairman is a lawyer and is appointed by the President of the Republic from a list of five nominees proposed by the Supreme Court. One lawyer and one economist are appointed by the President of the Republic from a list of three nominees proposed by the Central Bank. The other lawyer and economist are designated by the Central Bank directly. In all cases there is a previous public contest where all candidates could apply.

Another important reform is the creation of the staff of the Tribunal. The predecessors – the Preventive and Antitrust Commissions – did not have their own staff and received support from the National Economic Prosecutor's Office. This aspect of the reform increases the independence of the Tribunal in relation to the National Economic Prosecutor's Office.

The Competition Tribunal maintains the staff of the Preventive and Antitrust Commissions. Consequently, its main function is to resolve conflicts and enforce the law. The Tribunal also fulfills an advocacy function when it responds to consultations about future contracts, or when it proposes to the President of the Republic the

modification, approval or termination of laws. Furthermore, it can promote competition principles when issuing general rules.

Regarding the sanctions, the reform abolished criminal imprisonment, because it had little application. As a counterpart, the reform substantially increases the maximum amount of fines from US$500,000 to US$12,000,000.

The framework currently empowers both the Competition Tribunal and the National Economic Prosecutor's Office for enforcing the competition law.

The National Economic Prosecutor (Prosecutor's Office) also adopted four reforms:

1. *A new unit* within the Economics Department was created, that is responsible for considering the competitive effects of proposed mergers, since Chile does not have a pre-merger notification programme;
2. *A new unit* within the Legal Department was created, whose function is to review proposed regulations that could harm competition;
3. It adopted an internal order on how investigators write reports that constitute their findings; and
4. Steps were taken to make the community and the public more aware on competition law matters.

Other changes made by Law No.19.911 of 2003, clarifies how particular types of anticompetitive practices should be banned only when the conduct is intended to maintain or increase a dominant position. The law now provides a limited 'settlement' procedure. Imprisonment is eliminated as a sanction, but the amount of fines is raised to US$10mn. The head of the competition enforcement entity, the National Economic Prosecutor, is given new powers, including the authority to enter into agreements with domestic agencies and foreign entities.

**Institutions and its Competencies**

Decree 211 of the current legislation created the National Economic Attorney along with the creation of a three-tiered institutional framework:

1. A number of Preventative Commissions (one Central and various regional);
2. A special tribunal (the Antitrust Commission); and
3. An enforcement agency (the Prosecutor's Office).

The *Preventative Commissions* are administrative bodies, which accomplish an important task in the transitional period from a planned economy to a market economy, educating firms and entrepreneurs on competition affairs. They can direct the Prosecutor's Office to conduct investigations and can issue orders to halt any conduct that they find illegal. In addition, at the request of the Prosecutor's Office, they can issue interim orders that for 15-30 days suspend anticompetitive agreements or set maximum prices; and request any governmental entity to exercise its regulatory powers to prevent harm from conduct that was under investigation.

**Box 106.2: Competition Enforcement through the Decisions of the Preventative Commissions**

Here are some decisions issued by the Preventative Commissions, in which it is apparent how those authorities have promoted competition principles in different markets. All the following decisions originated on complaints from firms or entrepreneurs.

1. Dictamen No. 995 of 1996. This order was issued because of the level of concentration in the waste management market. The firm that controlled the garbage disposal market also controlled the waste transportation market. The Central Preventative Commission suggested that the bidding processes for granting the waste management concession must be organised by the Municipalities after consultation with the Commission. Analysing the bidding rules, the Commissions have recommended several changes that promote competition in the bidding processes.
2. Dictamen No. 1045 of 1999: In 1998, three state-owned port companies consulted the Central Preventative Commission about the competition rules that they should consider in the bidding processes for the auction of harbour concessions in the dockage fronts. The Commission laid down rules for horizontal and vertical integration to promote competition in both intra port operations and inter port services. For example, it ruled that 'important users' of a port may not have more than a 40 percent interest in the port operation business; or established that the concessionaire of a port terminal or its related companies cannot have more than 15 percent of the shares of another terminal in the same area or region.
3. Dictamenes Nos. 202, 277, 979, 1133, 1211. Many matters of parallel imports have been brought up before the Preventative Commission, most of which originated as complaints from private parties. Generally, importers have asked the Commission about the legality of importing original products, which are already in the market by virtue of a previous distribution agreement. The Preventative Commission established the criteria that the parallel imports of original products promote competition in markets, authorising them.

*Source: Institutional Challenges in Promoting Competition, National Economic Prosecutor's Office June 2004.*

They do not have powers to enforce the Law but to respond to complaints from legal entities or individuals on competition issues.

The *Antitrust Commission* is a judicial body in the Chilean competition system. Its main function is to decide cases brought by either the Prosecutor's Office or private complainants. The Commission can also open an investigation on its own. In addition, it also decides appeals concerning the Prosecutor's information requests and the Preventative Commissions' decisions. It has the broadest remedial powers. It can impose fines (up to US$500,000), modify and nullify contracts, or order the dissolution and termination of corporations, disqualify individuals from holding office in professional and trade associations. It is composed of two government officials, two members of the academic world, and one Supreme Court Judge. They also serve without payment and with the technical support of the National Economic Prosecutor's Office.

The *National Economic Prosecutor's Office* has powers to investigate and prosecute anticompetitive conduct. Its head is appointed by the President of the Republic, but has statutory independence from any authority. In 1999, Law No. 19.610 was enacted and its investigative powers and budget were substantially improved. Its main duties are:

- to investigate and order confidential proceedings;
- to request the Commission to order injunctions;
- to act in any case before the Courts and Tribunals; and
- to request the support of the Police.

**Anticompetitive Business Practices**

According to the Competition Law anyone executing or entering into, individually or collectively, any event, act or agreement tending to impede free competition in economic activities within the country, both those of a domestic nature and those involving external trade activities, shall be liable to punishment by short prison term in any of its degrees. When the offense affects essential articles or services, such as those corresponding to food, clothing, housing, medicine or health, the punishment will be increased by one degree (Article 1, Decree 511 of 1980).

**Box 106.3: Leading to Unfair Competition**

Coats Cardena is the market leader in the production of yarn in Chile. A Chinese company, Soga imitated the shape of Cardena's yarn containers. Although the trademarks were different Soga displayed its products in a way that imitated the lay out by Cardena, albeit it had no registered trademark protecting its lay out.

However, the Commission ruled that though Cardena lacks the IPR, the imitation led to unfair competition in the market, resulting in:

- Misrepresentation to consumers; and
- Soga benefiting unduly from Cardena's goodwill.

The Commission did not fine Soga as it had changed its business practices after the complaint was filed.

*Source: International Law Office*

**Box 106.4: Concentration in Pharma Sector**

Reports have shown huge concentration in the Chilean pharmaceutical sector, where at present three giant companies control 82.5 percent of the market, prohibiting entry of the small pharmacies.

The concentration has also adversely affected laboratories' negotiating power with its conglomerates.

Although these large companies have made progress in the international competition market through increased research and technological development etc, consumers remain deprived of the benefits especially in the case of prices of drugs.

*Source: Consumers and Competition, Consumers International Global Competition Report*

Abuse of a monopolistic market position is a restraint on competition. Monopolistic market position is taken to mean not only that of a monopoly, but that of any dominant position exercised by one or more firms, whether they are monopolies or not.

Monopolies, as defined in this Act, which impedes competition in the production, processing, distribution or marketing of goods and services, are prohibited.

The concession of any monopoly for exercising economic activities, such as extractive, industrial, commercial or services activities shall not be granted to private individuals.

The monopoly of certain activities may be reserved for fiscal, semi-fiscal, public, autonomous administration or municipal institutions.

There are no specific provisions governing market control. Nevertheless, in light of the comprehensive nature of the general prohibition under Article 1 of the Law, that prohibition has been applied to instances of concentration among firms that threaten to interfere with free competition within the country.

**Regulatory Framework**

In formulating its economic policy at the domestic level, the Government placed emphasis on stability, both economic and institutional, by creating and developing an appropriate regulatory framework designed to favour private initiative while at the same time safeguarding the guiding principles of development with equity.

***Telecommunications Sector***

Chile's telecom industry has been privatised. To a great extent, it is owned by foreign firms. In Chile, the telecommunications sector was reformed as part of a broad strategy to open up the economy to foreign investment, to competition, to greater domestic and foreign private sector participation, and allow ready access to foreign exchange and a simplified tax regime.

The country has one of the least-regulated telecom markets in the region, with full competition in all areas. The telecoms law states that providers may set the price of their services, except that access charges are always fixed and other prices may be fixed if the Antitrust Commission finds that competitive conditions do not exist. This means, Chile's telecom regulator sets tariffs for local fixed telephony (pursuant to Antitrust Commission rulings) and for access charges; in the mobile market, only access prices can be fixed and long distance charges are free by law.

Before privatisation, Chile's telephone system was dominated by two state-owned companies: *Compañia de Téléfonos* (CTC), which provided local telephony services, and *Empresa Nacional de Telecommunicacion* (ENTEL) providing domestic and international long distance service.

Notably, the pro-growth agenda originally contained several proposals for regulatory reform in the telecom sector, but the proposed amendments have apparently been withdrawn and replaced by a programme that involves regulatory changes, still unclear at this point.

***Energy Sector***

Before privatisation began in the 1980s, Chile's electricity sector was dominated by two SoEs: ENDESA, which operated on the national level and engaged in generation, transmission (through ownership of TRANSELEC), and distribution, and CHILECTRA, which distributed electricity in the Santiago metropolitan area.

Had competition policy principles been given serious consideration when privatisation occurred, ENDESA might have been divided vertically (and perhaps horizontally) before it was sold, but this did not happen. Several buyers acquired minority interests in ENDESA, while ENERSIS acquired CHILECTRA. Since then, Chile has been engaged in a lengthy struggle to limit the anticompetitive effects of vertical integration, which relate in large part to the resulting barriers in generation and marketing, both of which are potentially competitive. The struggle has included both unsuccessful attempts by the Prosecutor's Office to force vertical separation and the usual sorts of regulatory strategies for preventing abuse of dominance.

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

In utility sectors, such as telecom, electricity and water industries, prices should be free unless there are no competitive conditions. The laws that regulate these sectors empower the Antitrust Commission to authorise government intervention in prices. In fact, the Competition Tribunal must determine the competition conditions of those markets. The exercise of this legal duty is, in part, a competition advocacy task of the Commission.

**Consumer Protection**

In Chile, the protection of the consumers is organised on the basis of a system that comprises the state, through the National Consumer Service (SERNAC) and the regulatory organs in special markets (electricity, fuel, potable water, banks, telecommunications). The basic legal frame that the SERNAC enforces is the Consumer Protection Act (CPA) of 1997.

Unlike authorities such as the US FTC, SERNAC only takes care of consumer protection whereas other bodies like the Office of the National Economic Public Prosecutor and the Court of Fair Competition take care of competition matters.

The SERNAC has undertaken a mission to inform, educate and protect consumers. Within the scope of protection mediation is also included; trying to obtain a voluntary settlement of disputes between the parties. The Role of SERNAC in the resolution of conflicts takes the form of administrative/voluntary mediation, which allows them to do conflict resolution of individual and collective nature.

The Role of the Judiciary is to decide upon these disputes once disputes cannot be resolved through administrative procedures, or when the consumer directly seeks the intervention of the Courts.

**Concluding Observations and Future Scenario**

Competition policy aims at maximising the welfare of society by preventing the economic inefficiency and waste that is caused when laws and regulations unnecessarily limit the ability of enterprises to respond efficiently to consumer demand.

Competition policy can help strengthen the 'safety net' for the disadvantaged. Chile's competition-oriented approach to telecom is to provide service efficiently and at lower cost, leaving consumers and the government more resources to spend on other essentials. And as a sort of 'applied microeconomics', competition policy might be useful in reforming aspects of Chile's health regulations, which reportedly create perverse incentives that unduly limit health care.

Competitiveness and higher productivity are the keys for sustaining growth. The goal of policy is to bring about systemic competitiveness of the economy. The Government is expected to continue developing competition law as a base of competition policy. The application of a competition law is increasingly important in dealing with the efficient operation of markets and with the effective benefits of a globalised economy, in order to assure transparency, non discrimination, comprehensiveness and accountability.

Chile's Government regards the principal goal of its competition law as an instrument to promote economic efficiency with the expectation that in the long run this maximises consumer welfare.

Despite amendments, the Chilean competition law faces a more complex market structure than it was designed to address. It does not cover economic concentration where it does not reduce, harm or prevent competition.

Although the Chilean competition law is not very strict, it is distinctly improving in efficiency, the quantity of fines has increased and the new juridical organ has received more power. The Tribunal, urged to resolve conflicts and enforce the law, is expected to play a big role in carrying out its advocacy functions and specially promoting competition principles. The main distinction of the Preventative Commissions is the staff which is much more professional now and allows the Competition Tribunal to meet its mandate more efficiently. This will permit Chile to develop more rapidly.

Thus, free competition in Chile is being facilitated not only by a strong economical basis but also by an efficient administrative one.