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Law and Policy**

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**Roundtable on:  
Prioritization and resource allocation as a  
tool for agency effectiveness**

**Contribution  
by  
Chile**

The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

## INTRODUCTION

1. I was appointed as head of the Chilean competition agency (the FNE) in April 2010. The FNE was created in 1973 as a public body in charge of competition law enforcement. However, for almost twenty years, it remained a small public entity whose staff did not surpass 20 officials. By the middle nineties, a legal amendment duplicated the FNE's staff and, from then on, the number of people working at the FNE has not stopped to increase, though at lower annual rates. The current FNE's staff is 101 people.

2. When the FNE began to grow, a modern management became crucial. Besides, by the early 2000s, developments in competition law and policy in Chile had reached a point where reorientation was needed: After almost thirty years of successful application of competition law to infrastructure sectors in a context of market deregulation and structural separation, competition authorities had to direct their efforts towards enforcing competition law in conduct cases, particularly, against hard-core cartels. By 2006, indeed, the FNE committed to the improvement of FNE's capacities in cartel enforcement. Focus on cartel enforcement was the first experience for the FNE in explicitly setting priorities. The strategy led to orienting resources towards the specific area of cartel enforcement with the purpose of increasing community's awareness of the harmfulness of cartels.

3. My orientation towards prioritization was more complex. I knew that cartel enforcement was the highest priority: a 2009 legal amendment improving investigative toolkit against cartels had to be put in force and the major cartel case in the history of competition law in Chile was in the final stages of proceedings before the Competition Tribunal. Thus, as to prioritization of cartel enforcement, I decided to continue this policy against cartels. However, I complemented this general orientation with the implementation of a cost-benefit approach supporting every FNE's intervention, and -as a managerial goal to be achieved- I defined the reduction in cases workload rolling over from previous years.

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\* A preliminary version of this note was drafted by Fernando Araya, Senior Legal Official and International Adviser at the FNE.

4. In the remaining part of this submission, I want to shortly describe these two experiences on prioritization, to share some general insights on prioritization by and large, to elaborate on the lessons learned from our own prioritization experiences, and to speculate on what role could international cooperation and technical assistance play when less-experienced and less-resourced competition agencies face the challenge of setting priorities.

ANTI-CARTEL LAW AS AN ENFORCEMENT PRIORITY (2006-2009)

5. My predecessor began his term in 2006, adopting a strong commitment with anti-cartel policy and law. The previous FNE's track record on cartel enforcement was negligible relatively to others areas of competition law enforcement. In addition, during this period, Chile received the OECD's invitation to participate first as an observer in the Competition Committee and, thereafter, as a full member of the organization. Such a context made unavoidable for the FNE to play hard against cartels.

6. As to capacity building initiatives, the FNE created first a cartel research unit. Its purpose was to perform benchmarking aimed at identifying the best anti-cartel frameworks and practices. Another initiative in the field was the appointment of highly trained professionals as cartel coordinators in charge of conducting and monitoring all cartel enforcement activities. These initiatives led to the creation of a cartel unit within the division in charge of FNE's investigations, by the end of 2009.

7. FNE's competition advocacy initiatives populated the anti-cartel field as well. The focus here was on cartels in public procurement tenders, an area that justified a joint outreach initiative, with the OECD and the Competition Bureau of Canada, aimed at disseminating among public procurement officials the best practices for bid rigging prevention and detection. The FNE's anti-cartel message was also spread in several other instances, such as the FNE's annual conference (the Competition Day) and conferences with the business community.

8. As a result of this prioritization definition, by the end of 2009 the FNE was able to show the following milestones in anti-cartel enforcement:

- For the first time, a cartel settlement had been agreed between the FNE and one of the three retail pharmacies accused of cartel activity. The company recognized its participation, gave substantial evidence, cooperated and agreed to pay 1 MM USD fine (April 2009);<sup>1</sup>
- Significant anti-cartel amendments to the Competition Act had been finally enacted in July 2009, as a result of a bill introduced by the government in June 2006. The amendments considered an immunity/leniency provision and several 'strong' powers for cartel investigations such as dawn raids and wiretapping, subject to the previous issuing of two judicial warrants;

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<sup>1</sup> The case I am referring to is the retail pharmacies chains cartel case, which is to date the most important cartel case Chilean authorities have ever dealt with. The case finished in 2012 with the imposition to the two defendants that litigated, the maximum amount of fines (19 MM USD each), a decision upheld by the Supreme Court.

9. The decision on prioritizing anti-cartel enforcement proven successful considering the stage of development of competition policy and law in Chile at the time of the definition. This raises two reflections.

10. First, the setting of priorities is strongly context-dependent: what worked for the FNE at that time and with certain initiatives, will not necessarily work well for another competition authority if any of the variables such as context, resources and so on is altered. This experience seems to suggest us that criteria used in prioritization are not one-fits-all solutions, and each authority must identify what purposes it wants to achieve with prioritization and the best criteria consistent with those purposes.

11. Second, there are some consensuses strongly and broadly shared by the international competition policy community. This makes unfeasible to step back from some of these definitions. For instance, it would be difficult for a competition authority to justify before the international community a significant reduction in anti-cartel enforcement or that this area is no longer a priority. But an abrogation of former definitions is not an absolute requirement for adopting a new set of prioritization criteria. This was the case for the FNE when I assumed in 2010: it was impossible for the FNE to stop assigning the highest priority to anti-cartel enforcement, but there was a space for improving, specifying and complementing prioritization criteria, and that was the mission I undertook.

#### A COST-BENEFIT APPROACH TO PRIORITIZATION AND REDUCTION IN CASES WORKLOAD (2010-2013)

12. First, a personal anecdote. When my new duties at the FNE started, I had recently finished the process of being part of the team that implemented a major reorganization in the law firm where I was a partner. Thus I was firmly convinced that investing in efficient management was worthwhile, particularly when resources are relatively scarcer as is usually the case for public bodies.

13. Consequently, I wanted for the FNE to get focused on high-impact cases. This idea was consistent with the FNE's experience which showed that in cases where a significant number of consumers had been harmed by competition law infringements, the agency's efforts really worth their value: in those cases the community as a whole is interested in the case and public awareness of competition policy is thus achieved. However, at the same time this kind of cases represents bigger challenges: litigation becomes more difficult and the need of winning the cases and obtaining exemplary sanctions is higher. Hence focusing on high-impact cases demands a strong personal commitment.

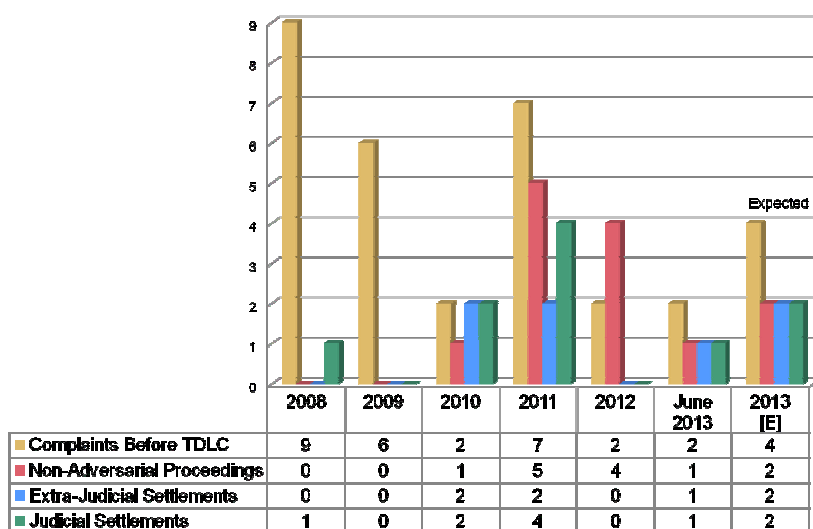
14. In order to accomplish this goal, I requested from our higher officials the drafting of an internal document on prioritization. In summary, the document proposes a methodology for prioritization on the basis of different criteria, as follows.

15. The guiding goal of the methodology is the Competition Act's stated purpose: "*to promote and defend free competition in markets*", construed closely to a total welfare rather than a sole consumer surplus standard. On the basis of this guidance goal, prioritization methodology covers sectors and markets justifying intervention, the different means of intervention and, available resources for the different kinds of intervention. As to sectors and markets, the methodology suggests the use of indicators related to the impact on final consumers, the impact on the economy as a whole and the competitive features of the sector/market according to the structure-conduct-performance (S-C-D) paradigm. For instance, regarding indicators on the impact on final consumers, the methodology suggests considering the share of the total population participating in the market as a consumer; amount of expenses on the corresponding good or service as a share of families' total expenses; whether the product is essential or which consumption is forced by law; whether asymmetries of information affect the market; whether evidence of consumer's lack of satisfaction exists. Regarding indicators on the impact on the economy as a whole, for instance, a sector which participation reaches over 8% of the GDP is considered a 'high impact' case. Regarding indicators on S-C-D, the existence of barriers to entry is one of the main indicators.

16. The methodology highlights the relevance for FNE's officials in the decision making process to bear in mind the complete palette of alternative means of intervention. This include, among others, the submission of a complaint before the TDLC and the initiation of an adversarial proceeding; the initiation of other proceedings before the TDLC; the negotiation under the frame of alternative dispute resolution mechanisms; the filing of the case with no further action but including a warning in the filing decision; or, undertaking competition advocacy initiatives before the corresponding stakeholders and interest groups, etc. (i.e. a broad range of interventions including competition law enforcement, competition advocacy and market studies). Having an appropriate equilibrium between competition advocacy and competition law enforcement is crucial for any competition agency with scarce resources, they are both essential tools for competition policy. However, litigation is relatively expensive and it does not always translate into market outcomes. Choosing an alternative -more cost-effective- intervention mechanism could be worthwhile and save significant public resources. Deciding whether enforcement or advocacy is preferable regarding a specific case is not an easy task. The methodology states that the relevant variables in this decision are availability of resources (information and easiness in gathering new information as well as professional resources) and

definitions on strategy (expected intervention outcomes, existence of a regulator in the sector, chances of a successful intervention, strengthening of the agency’s reputation and relevance of the case from a theoretical point of view). Even within law enforcement, alternatives are multiple, and we have tried to balance the use of all of them, as shown by the figure below.

## Enforcement Diversification



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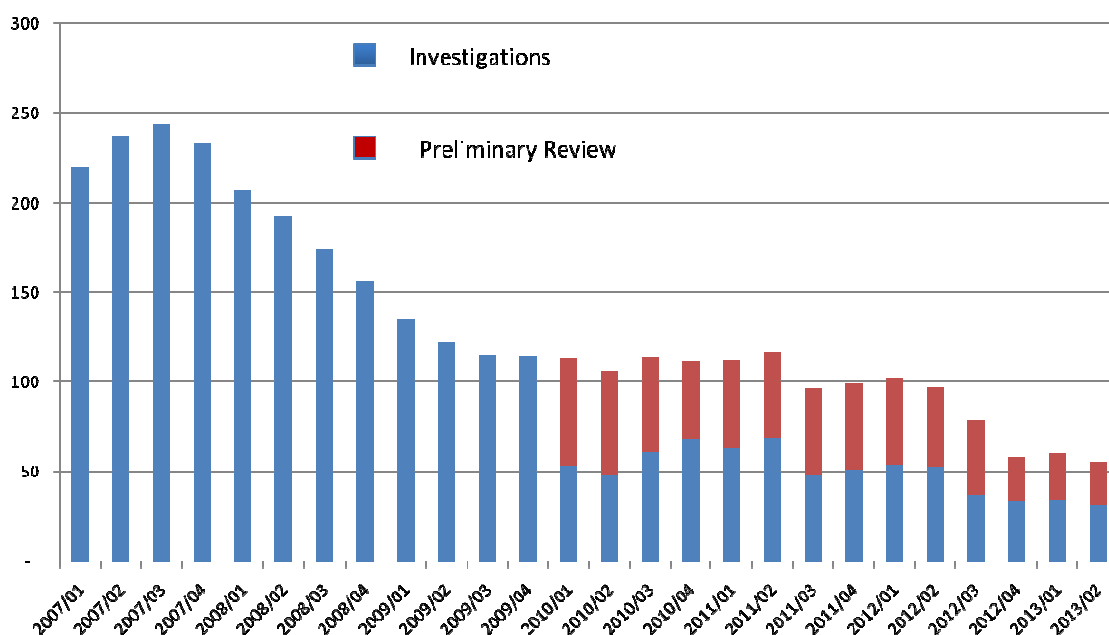
18. Consistency between defined prioritization criteria and actual performance is a fundamental question. In the case of the FNE, this consistency has been confirmed by a paper authored by economists González and Micco (2013).<sup>2</sup>

19. Beyond the internal document setting prioritization criteria, as an additional pillar of its prioritization strategy and foundation of agency effectiveness, the FNE has successfully implemented, a pro-active strategy, particularly, regarding cartel detection. We understand we cannot rest and wait for leniency applications unless we are very active in starting investigations *ex-officio*. In order to achieve this purpose, most of the resources were reoriented in the first years of my term to the Investigations Division. These additional resources in the Investigation Division allowed us performing screening of databases, a sophisticated tool contributing to cartel detection.

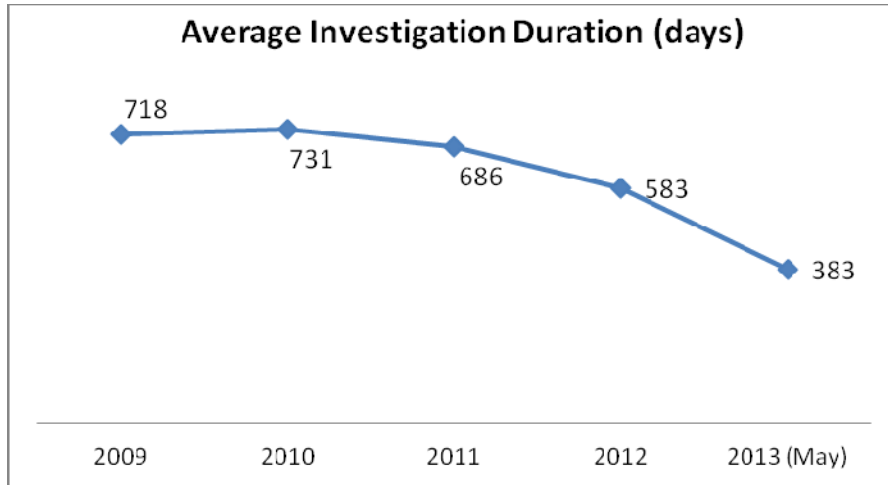
<sup>2</sup> González, Aldo and Micco, Alejandro, 2013, “Private vs. Public Antitrust Enforcement: Evidence from Chile”. Available on-line at: <http://www.econ.uchile.cl/descargar/publicacion/private-vs-public-antitrust-enforcement-evidence-from-chile> [reviewed on July, 6th, 2013 for the last time]

20. A final comment on this part of the strategy regards the consideration of the input side of the FNE's production function. It is worthless for any competition agency to invest resources in prioritization criteria without simultaneously strengthening the attractiveness of working in the agency and hence creating a line of highly competent professionals interested in working for the agency. Reputation is probably the most important asset a competition agency possesses and an asset that is built mainly by the professionals in charge of the day-to-day hard work.

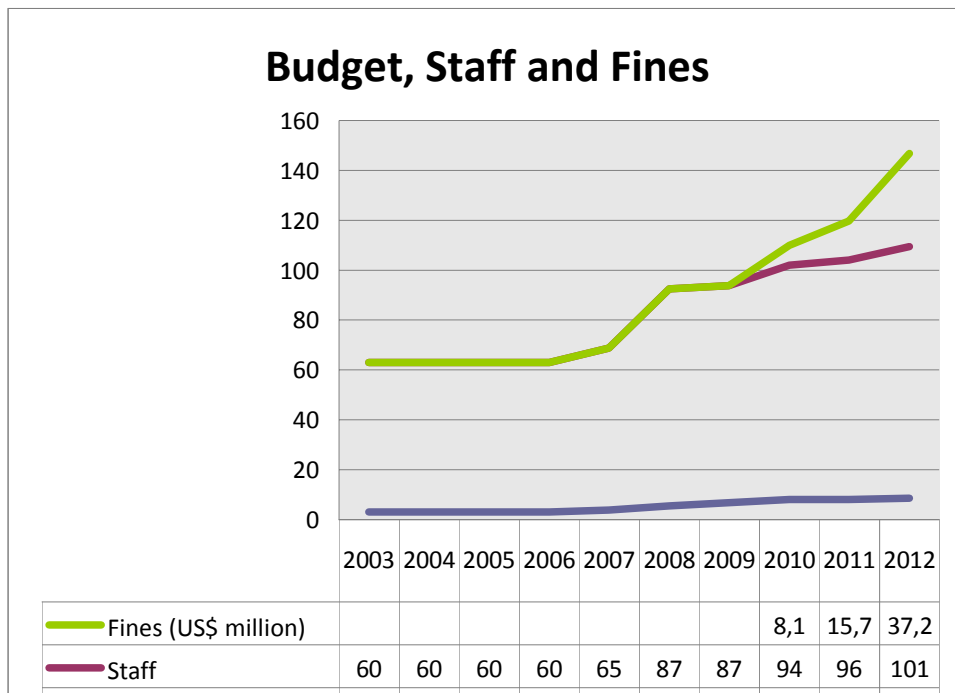
21. The other major pillar of the prioritization strategy we designed in 2010 was to define, as a managerial tool to be achieved, the reduction in cases workload rolling over from previous years. This goal of reducing the stock of non-relevant cases has been backed by a stricter policy on case-admission in preliminary analysis, as shown by the figure below:



22. Associated with this second pillar, the reduction in the duration of investigations has added additional efficiency to our internal processes. This pressure is justified in part by a short legal statute of limitations (5 years for cartels cases and 3 years for other infringements). But for the most part, I am firmly convinced that the legal maxim *justice delayed is justice denied* is very vivid in our sector: the longer the duration of market power excesses, the larger the harm a mass of consumers support. Reduction in investigations' length is showed in the following figure.



23. If such initiatives in case prioritization, effectiveness and productive efficiency are able to be presented during the agency's budgetary discussions, the agency will be in a better bargaining position and could bring more resources into the agency to better compensate its staff, training them, and hiring new highly qualified professionals. A possible correlation to assess is whether budgetary increases are well invested and whether these investments translate into better outcomes in law enforcement (e.g. measured by the amount of fines collected). Such a correlation, in the case of the FNE is shown in the following graph.



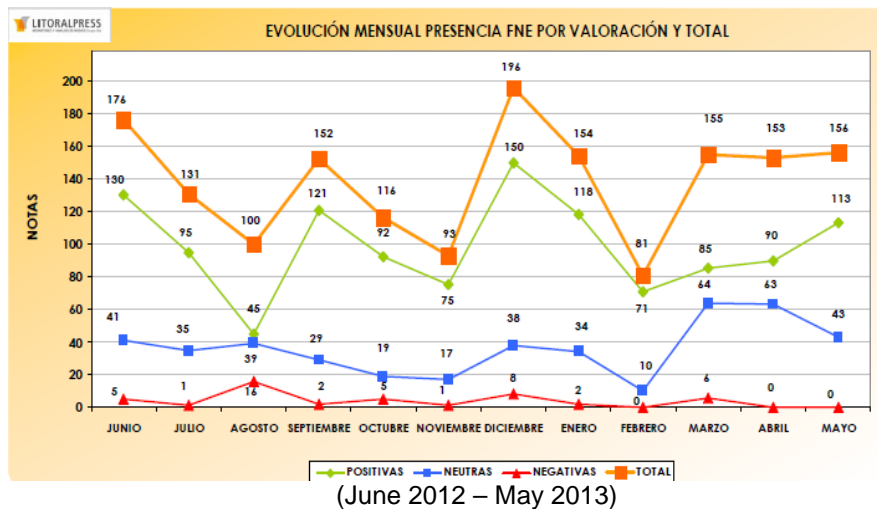
OUTCOMES FROM OUR EXPERIENCE IN DESIGNING, PLANNING AND IMPLEMENTING CASE PRIORITIZATION AND AGENCY EFFECTIVENESS



24. Evaluation of competition policy is one of the modern topics in current research by international forums and organizations, think tanks and academia. The research agenda aims at identifying how much competition policy favors growth and productivity; to what extent well designed institutions contribute to the effectiveness of competition policy; how competition authorities can introduce impact assessment of their activities for the purposes of accountability; and to what extent a specific intervention in a given market actually achieves the expected result on prices, quantities, quality, innovation, consumer choice, etc. Initiatives on evaluation are not freed from constrains due to prioritization strategies and alternative use of resources. But case prioritization and good use of resources have become particularly urgent in a context where several developed countries are facing significant budgetary deficits.

25. Evaluating the outcomes of a strategy on case prioritization and agency effectiveness as the one implemented by the FNE is a particularly difficult task. Besides, paradoxically, this evaluation does not seem to be a priority for agencies. However, in our case, we can rely on some proxies such as what is reported by the media, what perceptions do the community has on our work and what are the views by academia.

26. As to media reports, the FNE's actions and interventions in markets are always covered by the press. Major cases are usually part of the newspapers headlines. According to statics prepared by a media company, coverage by the written press has augmented in the last year and the number of positive press articles is significantly higher than neutral or negative ones, as shown by the figure below.



27. As to the community perceptions, the FNE hired an outside consultant (Deloitte) to conduct a survey of stakeholders to gauge their perceptions of competition enforcement in Chile. Top competition lawyers from private practice were the respondents of a questionnaire which answers were anonymous. The FNE is currently evaluating the results of that survey and drafting possible strategies for improvement. Most of the feedback obtained through this exercise is positive: (i) in the cartel field, 77% of respondents believe the FNE is moderately effective to find out cartels, 9% effective, 9% ineffective and 5% did not answer; (ii) regarding abuse of dominance cases, 82% of respondents believe the

FNE's analysis was correct, 4% very good and 14% regular; (iii) as to merger cases, 63% believe the FNE's analysis was correct; 14% very good and 23% regular.

28. As to the academics' views González and Micco (2013)<sup>3</sup> have concluded not only that the FNE's actual performance is consistent with previously defined prioritization criteria, but they concluded as well that when the FNE intervenes in an adversarial case before the Competition Tribunal -instead of cases in which there is only one or more private plaintiffs- chances of obtaining a condemnatory ruling increase by 40%. Reviewing cases of FNE's intervention, they show that formal independence guaranteed by the Competition Act is put into play in practice: since interventions do not show any bias towards private or public violators, the FNE shows as an entity not prone to capture or undue influences. The authors consequently conclude that fostering public enforcement is worthier than promoting private enforcement. Aguero and Montt (2013)<sup>4</sup> reach similar conclusions in a broader survey highlighting good stakeholders' evaluation on FNE's independence, expertise and transparency.

#### TECHNICAL ASSISTANCE AND COOPERATING WITH LESS-RESOURCED AUTHORITIES IN SETTING THEIR PRIORITIES

29. The decision on investing in priority setting and effectiveness improvements should ideally be an autonomous decision of competition authorities. The worst scenario would be that such a crucial decision was taken by an external body, unduly influencing the authority to prioritize on arbitrary grounds or pressing for an increase in effectiveness to satisfy a non-competition related goal. Thus, the advantages of being first-mover in such management improvements are worth to be considered by competition authorities.

30. However, it seems crucial to understand that there are circumstances in which well-intentioned competition authorities' heads and officials face contexts that are very adverse, preventing them to get focused on a good -competition oriented- performance. In such cases, some authorities could start by identifying what are the barriers and challenges they are currently facing and what to do in order to remove the obstacles impeding them to achieve a good performance.

31. In other words, case prioritization, as a part of a strategy aimed at improving effectiveness, assumes that other more serious problems have been already solved. If this assumption is backed by reality, case prioritization and other management improvements are very rewarding initiatives agencies' leaders should consider undertaking.

32. Technical assistance and international cooperation in this field should bear in mind the context the recipient of the assistance or cooperation faces in his country, considering the culture, the institutional design and the actual performance of the entity. Assistance and cooperation could be very helpful in promoting exchanges regarding case prioritization and management improvements experiences and in developing context-specific materials and recommendations. Case prioritization and other effectiveness improvements certainly belong to the broader agenda on Government Modernization which is fostered by several organizations at the domestic and international levels.

33. As a way of summary of our experience, the FNE's commitment with agency effectiveness and productive efficiency has been implemented through a broad strategy grounded in several pillars including a strict policy on case admission in preliminary analysis, a case prioritization methodology,

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<sup>3</sup> *Ibid.*

<sup>4</sup> Aguero, Francisca and Montt, Santiago, "Chile: The Competition Law System and the Country's Norms" in Fox, Eleanor and Trebilcock, Michael (eds.), "The Design of Competition Law Institutions", Oxford University Press, 2013.

a better human resources management, a strict limitation on the length of investigations and significant improvements on transparency and accountability. We have grounds for evaluating the outcomes of this strategy as positive: these good results have been highlighted by the private bar, the press and the academia.