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Recent Changes to Merger Notification in Chilean Antitrust Law

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This paper provides an informal overview of Chile's antitrust enforcement regime, and the 2017 changes to its merger notification policies.¹ Chile has a vibrant, rigorous antitrust enforcement regime, dating from 1973, but this system had come under criticism from the Organization for Economic Cooperation and Development (OECD).² One of the parts of the system that the OECD criticized was Chile's voluntary merger notification system.³ Chile had a system where firms had the option, but were not required to, seek permission from antitrust regulators for impending mergers.⁴ As part of the 2017 law, Chile instituted a system of mandatory merger review where all mergers and interest acquisitions between competitors above a certain size had to receive permission from Chilean antitrust authorities.⁵

This paper briefly reviews the history of Chilean antitrust enforcement, the recent change to merger notification law, and potentially interesting questions for future

¹ Law No. 13,305, Apr. 6, 1959.

² See OECD Secretariat, *OECD Merger Control in Chile* *21 (OECD 2014) ("*Merger Control in Chile*")

³ *Id.* at *22.

⁴ OECD Directorate for Financial and Enterprise Affairs, *Merger Control in Latin America and the Caribbean - Recent Developments and Trends*, (April 4, 2017), *9 available at [https://one.oecd.org/document/DAF/COMP/LACF\(2017\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2017)5/en/pdf).

⁵ See part III.i, *infra*.

scholarly investigation. The first Part of this paper traces a broad history of Chilean antitrust and the current structure of its enforcement agencies. Chile has a national prosecutor and an antitrust tribunal, and the first Part describes each agency and its role. The second Part delves into the recent change in the merger notification regime. The first Section describes Chile's pre-217 voluntary merger notification system. The second Section describes the new, mandatory notification system. The third Part concludes by questioning what the benefits of this new system are for businesses. Will it reduce their overall risk of antitrust enforcement, or will it simply provide more certainty about what potential antitrust enforcement would look like? This is an interesting open question, ripe for future research.

I. Basic Structure of Chilean Antitrust Enforcement

Chile passed its first antitrust law in 1959, Law No. 13,305.⁶ The Chilean government passed this law in response to a report from an American consulting reform which recommended a wide range of economic reforms, including setting up an antitrust regime.⁷ However, Commentators have noted that in this early era, Chile operated a merger regime which OECD commentators described as lacking “lacks transparency, legal certainty and predictability.”⁸ In the 1960s, Salvador Allende ran for the Presidency of Chile as part of the Socialist “Popular Unity” party, winning his country's elections in 1970.⁹ As part of Allende's platform, he promised to attack the “internal monopolies” which he saw as responsible for many of the countries ills, along

⁶ Law No. 13,305, Apr. 6, 1959. See Francisco Agüero, *Chilean Antitrust Police: Some Lessons Behind its Success* 79 L. AND CONTEMP. PROB. 123, 124 (2016).

⁷ Agüero, *Chilean Antitrust Policy* 79 L. AND CONTEMP. PROB. at 124.

⁸ *Merger Control in Chile* at *7.

⁹ Salvador Allende, BRITANNICA, available at <https://www.britannica.com/biography/Salvador-Allende>.

with the general capitalist structure.¹⁰ These plans never came to fruition because Allende was toppled in a military coup in 1973, which installed the pro-capitalism government of Augustus Pinochet.¹¹ Pinochet's pro-growth economic policies, contained in the regime's policy bible known as "*The Brick*", did not favor the sort of anti-"internal monopoly" policies of Allende.¹² However, the Pinochet regime was still interested in antitrust enforcement to prevent cartels from forming and interfering with the proper functioning of the markets, and therefore they sought to pass a new antitrust law.¹³

The law which sets up the basic framework is Decree with the Force of Law 211, passed in 1973.¹⁴ There are two main components to the Chilean antitrust regime. First, there is the Fiscalía Nacional Económica (FNE), the country's national economic prosecutor.¹⁵ Second, there is a specialized antitrust tribunal to play a judicial role in the antitrust process called the Tribuna de la Defensa de la Libre Competencia (TDLC).¹⁶ Previously the two separate bodies—an administrative tribunal and a series of advisory councils—played the judicial role in Chile's antitrust system, but these have since been consolidated into the TDLC.¹⁷ This Section will first give general background on the formation and structure of Chile's antitrust regime, and then explore the role of each of

¹⁰ Aguero, *Chilean Antitrust Policy* 79 L. AND CONTEMP. PROB. at 125.

¹¹ Id.

¹² Id.

¹³ Id at 126.

¹⁴ Decreto Ley No. 211 de 1973, Title I, Art. I., available at http://www.tdlc.cl/tdlc/wp-content/uploads/DL_211/DL_211.pdf.

¹⁵ Fiscalía Nacional Económica, accessible at <http://www.fne.gob.cl/>

¹⁶ See Tribuna de la Defensa de la Libre Competencia, available at <http://www.tdlc.cl/tdlc/>.

¹⁷ Paul Margaretic, Maria Fenanda Martinez, and Diego Petrecola, *Effectiveness of Antitrust Enforcement in Argentina, Chile and Perú During the 90's* at *11, available at https://www.uade.edu.ar/DocsDownload/Publicaciones/4_228_1630_WPS016_2005.pdf.

these two components. This will lay the groundwork for the Part II, which explores the recent reforms to the merger notification system.

Chile is a common law country, and therefore most elements of the legal system devolve from specific statutory provisions.¹⁸ However, Chilean antitrust law seems to operate through broad statutory interpretation rather than specific legislatively determined doctrine. Article I of Law 211 contains “very broad prohibitions on acts of agreement.”¹⁹ Article II lists examples of actions which would be illegal under antitrust law, although it is not clear if the role of Article II is to provide illustrative examples of anticompetitive conduct or to declare those types of anticompetitive conduct per se illegal.²⁰ However, there is no specific merger provision in Law 211. Rather, prior to 2016 the authority to review mergers was “primarily based on the general substantive provisions of articles 1, 3 and 26 of the Competition Act and on the practice developed over time by the two enforcers.”²¹

The FNE is Chile’s national economic prosecutor, and is part of the Executive Branch under the Ministry of the Economy.²² The FNE was created in 1963 to act as the country’s prosecutor in matters of competition.²³ Although the FNE is housed within the Executive branch, it is formally and practically independent because “institutional arrangements provide for guarantees of independence in the enforcement of Chilean

¹⁸ See generally Carlos Felipe Amunátegui Perelló, *Chile : Recent Evolution of the Civil Law in Chile: The Rise of Doctrine*, 88 J. CIVIL L. STUD. 283 (2015).

¹⁹ Margaretic et. al., *Effectiveness of Antitrust Enforcement* at *10.

²⁰ Id.

²¹ *Merger Control in Chile* at *14.

²² *Merger Control in Chile* at *14.

²³ Cristóbal Ramirez, *Antitrust in Chile: Succession, Limitation, and Two Unresolved Issues*, *4, available at http://kenan.ethics.duke.edu/wp-content/blogs.dir/2/files/2015/04/Ramirez_AntitrustInChile_2015-04-27.pdf.

competition law and policy.”²⁴ As of 2014, the FNE had a budget of USD \$10.1 million and a staff of approximately 100 lawyers and economists.²⁵ However, the FNE’s merger division was only created in 2003.²⁶ The FNE can be thought of as largely equivalent to the role that the Department of Justice Antitrust Division and Federal Trade Commission play in the United States. When the FNE is acting in its role as prosecutor, it “submits complaints to the TDLC for adjudication and decision.”²⁷ For example, the FNE sets forth a series of guidelines on different aspects of antitrust enforcement,²⁸ demonstrating that the body has a policymaking function beyond simply its discretionary ability to bring cases before the TDLC. These FNE guidelines are not binding on either the FNE itself or other parties (unlike with TDLC decisions).²⁹

The TDLC is “is independent collegiate tribunal that specializes exclusively on matters related to free competition.”³⁰ The TDLC does not act *sua sponte* in adjudicatory matters, but rather decides cases brought before it by the FNE or private parties.³¹ However, the TDLC does have some capacity “instigate proceedings to issue

²⁴ *Merger Control in Chile*, *14 n 6. For example, the FNE is “appointed by the President but he or she can only be dismissed by the President in case of manifest negligence and subject to the Supreme Court’s vote.” *Id.*

²⁵ OECD, *Competition and Market Studies in Latin America: The case of Chile, Colombia, Costa Rica, Mexico, Panama and Peru* (2015), *15 available at <http://www.oecd.org/daf/competition/competition-and-market-studies-in-latin-america2015.pdf>.

²⁶ *Merger Control in Chile*, *14 n 5.

²⁷ Ramirez, *Antitrust in Chile* at *4.

²⁸ See, for example, “Guidelines on Remedies,” available at <http://www.fne.gob.cl/wp-content/uploads/2017/11/Guidelines-on-Remedies.pdf/>.

²⁹ Ramirez, *Antitrust in Chile* at *6.

³⁰ OECD, *Competition and Market Studies in Latin America* at *15.

³¹ *Id.* at 15 & n 2 (“The TDLC cannot itself instigate enforcement proceedings (Article 18 N°1 of DL 211) or proceedings with the aim of ruling on whether an act or contract (e.g. a merger or an acquisition) restricts competition; nor can the TDLC impose ex officio

instructions of a general nature” under Article III of Law 211.³² The TDLC is well known in comparative antitrust law as one of the best examples of a specialized antitrust court.³³ The TDLC is composed of five judges, and by law two of them must have economics backgrounds, which in recent history have meant possessing an economics doctorate.³⁴ As of 2010, the other three members all possessed advanced law degrees and two had extensive antitrust experience.³⁵ However, despite the fact that the TDLC itself is a specialized body, it can be appealed to the Chilean Supreme Court, a non-specialized body.³⁶

It should be noted that both the TLDC and FNE are highly transparent bodies.³⁷ As part of Chile’s 2005 constitutional reforms, the country required transparency of all State decisions, including its antitrust authorities.³⁸ As a result, both bodies operate website containing all of the relevant documents produced by these bodies, and consults with the public in the process of producing guidelines and rules.³⁹ As a result “the TDLC has higher transparency than other tribunals in Chile.”⁴⁰

II. Merger Review and Recent Changes

i. Pre-2017 Voluntary Merger Review

conditions or remedies on private entities to address competition concerns - (Article 18, N°2 of DL 211).”).

³² Id at *15 n 2.

³³ Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV 1055, 1068 (2010) (“In many ways Chile is the best example of the limitations of an antitrust specialist court.”).

³⁴ Id.

³⁵ Id.

³⁶ Id. Additionally, “FNE has the power to request that the TDLC promotes regulatory changes.” Id at *16.

³⁷ Aguero, *Chilean Antitrust Policy* 79 L. AND CONTEMP. PROB. at 142.

³⁸ Id.

³⁹ Id at 142–43.

⁴⁰ Id at 143.

Before the 2017 reforms that are the subject of this paper, Chile had a system of voluntary review.⁴¹ Both the FNE and the TLDC has voluntary merger notification procedures.⁴² Each body had its own set of legal standards for how it would operate its voluntary review processes.⁴³ Formally, TLDC would only review a merger if “the parties, the Prosecutor’s Office or a third-party stakeholder refer the operation to [the tribunal].”⁴⁴ If the parties initiated the proceeding, the pre-merger review would be a consultative proceeding, but if the TLDC reviewed the case through some other mechanism, it would be an adversarial proceeding.⁴⁵ The advantage of these reviews was that the FNE and third parties would not be able to challenge a merger which had been approved through the pre-approval process, which would be faster and lower cost than an adversarial proceeding.⁴⁶ In theory, at least, the voluntary system was a trust system. As one OECD report noted, the thinking went that “Chile was a small economy with a

⁴¹ OECD, *Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries: Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Mexico, Panama and Peru* (2012), *24, available at http://www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review_en.pdf.

⁴² OECD, *Merger Control in Latin America and the Caribbean* at *9.

⁴³ Id.

⁴⁴ Id.

⁴⁵ OECD, *Merger Control in Chile* at *25.

⁴⁶ Id at 22. An OECD report notes several purported advantages of seeking voluntary pre-review of a merger before the TDLC.

The voluntary notification (consultation) by the Parties to the TDLC offers several benefits:

- If the merger satisfies the TDLC’s resolution closing the consultation procedure (which may include conditions), no further liability (i.e. no contentious or damage claim) is possible in respect of the transaction;³⁹
- The voluntary consultation allows for cost savings, given the lower procedural costs incurred in a non-contentious review as opposed to an adversarial one;
- Formal merger approval grants legal certainty to the Parties; their business stakeholders and customers.

few players in each industry, who could be trusted to conduct a self-assessment of their transactions and to come forward where merger control was desirable.”⁴⁷

However, the voluntary merger system was subject to a range of critiques. First, parties were unsure whether or not to come forward and submit their mergers for review or wait for other parties to move first. As one report put it, “[i]n practice, merger notification in Chile is not as voluntary as it seems.”⁴⁸ Although some parties submitted their mergers for review, many did not because they assumed that the FNE would act on their merger if they chose, regardless of whether they submitted it.⁴⁹ Therefore “Chile’s voluntary system of notification did not create the incentives for merging parties to notify their mergers before they consummated the transaction.”⁵⁰ As a result, “most of FNE’s merger investigations were initiated *ex officio*.”⁵¹ There have also been several instances where merger review becomes mandatory. The TLDC has ordered that companies seek merger review as part of an antitrust remedy, and certain industries, such as media, have to pre-clear mergers with the FNE.⁵² Therefore “notification for merger control purposes qualifies as quasi-mandatory, or at least as semi-voluntary” leaving a confusing and indeterminate situation for merging companies.⁵³

ii. Reform Law

In 2017 Law 20,945 came into effect and transformed the system of voluntary review changed to a system of mandatory review with the FNE after Law 20,945 came

⁴⁷ Id at *64.

⁴⁸ Id at *21.

⁴⁹ OECD, *Merger Control in Latin America and the Caribbean* at *9.

⁵⁰ Id.

⁵¹ Id.

⁵² OECD, *Merger Control in Chile* at *21.

⁵³ Id at *22.

into effect.⁵⁴ Chile enacted this law in order to “consolidate [its] leadership as a sophisticated agency in Latin America.”⁵⁵ These reforms were largely seen as a response to the OECD’s critiques of Chile’s pre-2017 antitrust enforcement regime in the 2014 Report “Assessment of Merger Control in Chile.”⁵⁶ Chile wished to remain at the forefront of antitrust enforcement, and therefore it took the OECD’s recommendations seriously and implemented them in this new law.

The thresholds for mandatory review are based on how much business the merging firms transact in Chile. The merger is subject to review if the aggregate turnover in Chile is greater than USD \$70 million.⁵⁷ Additionally, if the Chilean turnover of any two companies involved in the merger is over USD \$11.3 million, then the parties must submit their review for preclearance as well.⁵⁸ If the merger meets neither of these criteria, then the parties do not have to submit their merger under the new law, although the FNE retains the ability to investigate non-reported mergers for competition concerns.⁵⁹ It is important to note that these thresholds are not set in stone and will likely prove flexible in the future because the FNE can adjust these thresholds

⁵⁴ Claudio Lizana, María José Villalón, and Camila Albornoz, “Amendments to Chilean Decree with Force of Law No. 211” (Carey, Sept. 2016), available at <https://www.carey.cl/en/amendments-to-chilean-decree-with-force-of-law-no-211/>.

⁵⁵ Ryan Leske, “Changes to Chile’s Competition Law, (McDermott Will & Emery, Dec 7, 2016), available at <https://www.antitrustalert.com/2016/12/articles/mergers-acquisitions/changes-to-chiles-competition-law/>.

⁵⁶ Moraels y Besa, *Chile: Law and Practice* (Chambers Global Practice Guides Corporate M&A 2017) available at http://moralesybesa.cl/esp/wp-content/uploads/2016/11/CHILE_LP1.pdf. See also OECD, *Merger Control in Chile* at *25 (containing many of the OECD critiques to which Chile reacted with the new law).

⁵⁷ Felipe Cousino, Chile Competition Authority Determines Thresholds for Pre-Merger Notification (Alessandri), available at <http://www.alessandri.legal/newsletter/2016/11/20161129-.html>.

⁵⁸ Id.

⁵⁹ Id.

as they wish with just 90 days' notice.⁶⁰ There is a share-acquisition reporting requirement as well. Parties must “inform the FNE within 60 days of acquiring an interest representing more than 10 per cent of the equity of a competitor.”⁶¹ Chile has seemed to do a full 180—while before it did not even have mandatory reporting of major mergers, the country now has mandatory reporting of partial interest acquisitions in competitors.

An important aspect of this new merger control regime is that it is a two-step process, with greater consequences for the transacting parties. Once the merging parties have filed notice with the FNE, the FNE has 30 days to either approve the transaction or tell the parties that it would like to take another 90 days for a more in depth review of the merger⁶² One of the most important parts of the reform efforts is that the parties cannot consummate their transaction until the FNE has approved it.⁶³

This mandatory review was part of a wider suite of changes that were part of the 2017 legal reforms. The law increased the fines which the FNE could seek up to “30 percent of the annual sales” of the violating company or “double the illegal gains obtained.”⁶⁴ The law also allowed for imprisonment up to 10 years in cartel investigations, prohibitions on interlocking boards of directors, and a broad array of

⁶⁰ Id.

⁶¹ Ryan Leske, “Changes to Chile’s Competition Law, (McDermott Will & Emery, Dec 7, 2016), available at <https://www.antitrustalert.com/2016/12/articles/mergers-acquisitions/changes-to-chiles-competition-law/>.

⁶² Id.

⁶³ Id.

⁶⁴ Felipe Irrarázabal Philippi, *Chile: National Economic Prosecutor’s Office*, (THE ANTITRUST REVIEW OF THE AMERICAS, Sept. 12, 2017), available at <https://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2018/1147286/chile-national-economic-prosecutors-office>.

other additional powers for the FNE's office.⁶⁵ In implementing these laws, the FNE has put into place a series of new guidelines: "Remedies Guidelines, Competition Guidelines, and Threshold Guidelines."⁶⁶ Together, these reforms are intended to ensure that Chile has a modern antitrust enforcement regime, in line with the recommendations of the OECD and the current regimes of the developed nations who Chile considers as its peers.⁶⁷

III. Conclusion: Mandatory Merger Review and Certainty

This paper presented the recent changes to Chile's merger notification system, and contextualized them in the history of the country's antitrust regime. Chile's modernized antitrust system suffered from the uncertainty of a voluntary merger review which did not in fact appear that voluntary, leaving companies with open to significant regulatory risks on deals that ran any chance of antitrust scrutiny. The OECD identified this as a major weakness of Chile's economic regulatory system, and in response to these calls Chile reformed a wide range of aspects of its antitrust system, including making the merger notification process streamlined and mandatory. By clearly delineating who had to disclose which transactions to the government, and from which specific authority the merging parties had to seek approval, the government aimed to provide much-needed certainty to Chilean markets.

This paper does not seek to be argumentative, but rather descriptive and informative for those seeking a cursory summary of changes in Chile's merger notification regime.

⁶⁵ Id.

⁶⁶ Id (internal quotation marks omitted).

⁶⁷ Moraels y Besa, *Chile: Law and Practice* (Chambers Global Practice Guides Corporate M&A 2017) available at http://moralesybesa.cl/esp/wp-content/uploads/2016/11/CHILE_LP1.pdf.

However, this summary of the recent legal changes calls for a few general observations about antitrust and the nature of Chile's regulatory structure, especially with regard to the increased certainty for businesses.

At first, there would seem to be a contradiction in Chile's antitrust reforms. The reforms were intended to benefit businesses.⁶⁸ Yet, they also changed the review system from voluntary to mandatory—a system of greater regulation on the corporations. Previously, some mergers may have been able to skate through without interacting with the FNE or TLDC, and yet now will have to seek approval. Businesses will be subject to regulation in ways that they were not previously. We might normally think that business would prefer an environment which includes less government oversight. Nevertheless these pro-business reforms take the form of requiring that the government supervise every transaction above certain thresholds.

The key to resolving this contradiction is to remember that business dislike uncertainty as well as regulation. The issue with the previous voluntary merger regime was not the level of government regulation, but rather the uncertainty about whether the given transaction would be subject to government oversight at all. When third parties could submit mergers to review, and the regulators could initiate proceedings *sua sponte*⁶⁹, the voluntary merger review was in fact more of a Russian roulette merger review, giving companies little predictability in their affairs.

An interesting direction for further research is to assess whether the voluntary merger regime helps businesses by reducing antitrust risk or by reducing antitrust

⁶⁸ See text accompanying notes 48–53.

⁶⁹ See text accompanying note 46.

uncertainty. I have been using the term antitrust risk to refer to both, but that is technically inaccurate. As economist Frank Knight points out, there is a difference between risk and uncertainty.⁷⁰ To simplify Knight's point, risk is a future event with a probability attached.⁷¹ Most of the common ways we would think about future events take this form. If there is a fifty-percent chance that it will rain tomorrow, you would say there is a fifty-percent risk of rain. Firms can price events when they know the risk, or in other words take the chances of events into account of their assessment of their future profits or losses. On the other hand, uncertainty is the possibility of a future event without this ability to assess probability and price the event, as with risk. As Knight put, uncertainty is when an actor "no possibility of forming in any way groups of instances of sufficient homogeneity to make possible a quantitative determination of true probability" of a future event.⁷²

Mandatory antitrust review could help businesses by reducing risk, allowing more accurate assessment of risk, or by reducing uncertainty. If mandatory antitrust review reduced risk, then firms would benefit because they now believe that their overall chance of accruing regulatory costs from Chilean antitrust enforcement are lower under this new regime. Perhaps the ad hoc voluntary review structure before the recent legal change lead firms to end up spending more antitrust counsel and compliance than they had previously. This is plausible if one considers that the mandatory review streamlines the process through the FNE, where previously it had gone through a mix of the TLDC

⁷⁰ See generally Frank H. Knight, *RISK, UNCERTAINTY, AND PROFIT* (Sentry Press, 1964).

⁷¹ *Id.* at 223.

⁷² *Id.* at 231.

and the FNE.⁷³ Therefore mandatory review streamlined the process, reducing overall regulatory costs and perhaps the overall rate of enforcement actions.

On the other hand, the change to mandatory review could benefit firms by allowing them to more accurately price the risk of Chilean antitrust enforcement. Under the voluntary regime, merging firms might have seen 60% of similar mergers get review half of past years, and 40% of similar mergers get review in the other years. The firm knew that the overall risk of review was 50%, but at some level this risk estimate has flavors of uncertainty since the firm could not have as much confidence in its risk assessment as if it knew that about 50% of similar mergers were subject to review year after year. Perhaps firms were already able to price the risk of antitrust review to some extent, but are now able to do so with greater precision because mandatory review brings more regularity to the process. By allowing firms to make more accurate risk assessments, they are able to make investment decisions with greater confidence knowing how likely they are to be hit with a significant regulatory cost from Chilean antitrust enforcement.

Lastly, mandatory merger review could help firms by changing uncertainty about Chilean antitrust enforcement into risk. In this scenario, firms were unable to make any assessment of whether they would be subject to Chilean merger review because of the voluntary process. With mandatory review, the overall regulatory risk may increase, but because firms are able to plan better they still benefit from these reforms. It is unlikely this scenario occurred in its true absolute form—lawyers were probably able to give their clients at least some sense of the risks of antitrust enforcement before the recent legal

⁷³ See text accompanying note 42.

changes. Therefore the uncertainty element more likely resembled an ability to assess risk with greater accuracy, as detailed in the previous paragraph.

Considering this range of possibilities, it is an interesting question whether the shift to mandatory merger review benefited businesses by reducing risk of antitrust review or by reducing the uncertainty surrounding antitrust review. Depending on which benefit regulators had in mind, this might change the shape and direction of how the FNE implements these policies. If the point is to reduce risk, then mandatory merger review will accompany a lower quantity of agency actions to stop these mergers. On the other hand, if the point is to reduce uncertainty, then the mandatory merger notification does not need to accompany a significant decrease in quantity of enforcement actions to achieve the desired effect.

This paper is intended to serve as a brief, informal primer on Chile's antitrust system and the recent changes to the country's merger notification regime. There is an interesting question of how Chile intended to improve its business environment. Since there did not seem to be a problem of Chile missing problematic mergers, the reforms would seem oriented towards helping businesses gain certainty over the antitrust risks of their deals. However, it remains an open question how this reform helps businesses. Does it reduce the risk of antitrust enforcement, or does it allow businesses to price the risk? This is an open question, but an interesting one for future scholarship.