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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ROUNDTABLE ON MARKET STUDIES

-- Note by Chile --

This document is submitted by the Chilean Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 11-12 June 2008.

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1. Background

1.1 *The Context*

1. Chile has an important tradition in competition enforcement. The first statute on competition and market access was enacted in 1959, although the current institutional framework was established by Decree Law n° 211 (DL 211) in 1973 and its subsequent amendments which were approved during the past decade. In its first article, this legal statute establishes that the Law's target is "to promote and defend free competition in markets", and in subsequent articles it defines the institutional framework.

2. The current Competition System is integrated by two authorities, the competition agency, the *Fiscalía Nacional Económica* (FNE, or National Economic Prosecutor's Office), which has investigative powers, but no remedial ones, and the *Tribunal de Defensa de la Libre Competencia* (hereinafter, TDLC), a Competition Court with remedial and adjudicative powers, part of the Judiciary. These institutions are in charge of the prevention, investigation –the FNE–, and sanction –the TDLC– of the conducts that infringe the competition law for the protection of market competition.

3. In June 2006 the Government presented before Congress an important bill that includes a number of amendments to the competition law regarding the FNE, providing for additional investigative powers and limited remedial powers (consent agreements for mergers and antitrust enforcement requiring judicial approval), and in relation to the TDLC, providing for the strengthening of its independence, amendments to its procedures, and raising its maximum fines. This bill is currently before the Senate for the second stage of legislative discussion.

1.2 *Faculties of the Agency*

4. The FNE is an independent public service with legal capacity and budget of its own, administratively linked to the Government through the Ministry of Economy (Article 33 of DL 211). Its faculties and duties as an enforcement agency are defined in Articles 39, 40 y 41 of Title II of DL 211.

5. In compliance with DL 211 in force, the FNE deals with the promotion and enforcement of free competition, by detecting, investigating and prosecuting violations to the competition statute, and subsequently submitting complaints to the Competition Court and other Courts of Law if necessary. The FNE also acts as an expert elaborating technical reports to the Competition Court in cases not initially prosecuted by the agency. And last, the agency plays an increasing role in competition advocacy.

6. Finally, and for the agency to compel market participants to provide data for market studies and research, the bill under discussion before the Senate now explicitly provides for the FNE to conduct sectorial enquiries and market surveys; the lack of this power has, in some cases, lead to the opening of a formal investigation which allows the request of information from private parties.

1.3 *The agency's internal organisation*

7. From the first term of 2007 onwards, the FNE has adopted a new internal structure, organising its staff in four divisions -Legal, Economic, Research and Management Divisions- and an Institutional Affairs Department. The Executive staff also encompasses the Prosecutor's Advisory units (Auditor and Attorney General).

8. This restructuring arose basically from the need to increase the professional expertise of the investigative units –Legal and Economic Divisions- and the resources devoted to prosecution, and also to strengthen a research unit confined to capacity building and non contingent issues. The Research Division

aims to provide the investigative units with a wider and deeper assessment of markets –not limited to a specific case-, exploring potential risks for competition and anticipating anti-competitive strategies from their players. In this way the Research Division aims at increasing the impact of the enforcement actions that the FNE initiates, achieving an effective contribution to fulfilment of the FNE’s mission: *“To enable the benefits of exchange in a market economy based on free and sound competition, thus allowing the largest general welfare of citizens; and to prevent agents enjoying individual or joint market power from harming the public interest by violating the economic freedom of others”*.

2. Market Studies

2.1 What does the FNE considers a “Market Study”?

9. The FNE understands as market studies all those activities enhancing its current knowledge on specific economic activities, on the grounds of a systematic method of analysis (scientific method) and internally peer reviewed. They can be carried out by professionals at the FNE or by external consultants, whose fees are paid from the FNE’s own funds or by means of external resources received by the FNE.

10. These market enquires have lead to internal working papers and data bases, so their results and main conclusions are treated as internal information and knowledge within the FNE; nevertheless, these studies can and have been made public in the context of cases or reports submitted to the Competition Court. Thus, these market studies feed the professionals works of the enforcement units, as well as serve as material that can also be considered a baseline for technical reports to the Competition Court, and for the National Economic Prosecutor’s founded opinions when responding consultations made by Legislators (an advocacy working line of the FNE). The agency frequently acts as a technical support for the Legislative power and other agencies of the Executive. In this sense, market studies help the FNE by strengthening its requested opinions on specific topics in relation to markets and economic activities not necessarily covered by current or past investigations.

2.2 Objectives of these Market Surveys

11. The goals of markets surveys to be developed by the FNE are the following:

- to gain insight into the market structure of particular sectors, identifying their players and the business practices prevailing therein;
- to improve the understanding on how firms operate and the conditions under which their business practices are likely to be anticompetitive;
- to assist the enforcement units (Legal and Economic Divisions) in its investigative and prosecuting roles;
- to identify entry conditions in different markets, while assessing whether there are elements which turn the entrance of new players to the markets more difficult, or affecting its opportunity or sufficiency. Note that the examined entry conditions consider both legal barriers (particularly the competitive impact of norms and sector regulations) and strategic barriers raised by incumbents;
- to identify the policies and practices of governmental agencies and sectorial regulators that might have substantial adverse effects on market competition; and

- to identify whether the agency's previous enforcement efforts were necessary and successful, that is, to measure the impact of its actions on market performance.

12. The market surveys can also provide a ground for launching an *ex – officio* investigation whenever their outcomes suggest that in a market a certain feature, structure or condition, or combination of them, prevent, restrict or distort competition therein.

2.3 *Determination of the Industries to be surveyed*

13. In an initial stage, market studies have been conducted under a strategic focus based on current challenges for the FNE raised by its contingent investigative duties. As the number of the general market studies already concluded rise, it has become possible to explore new markets outside of the contingency, thus building up the capacity of being proactive and to better respond to eventual challenges on these markets.

14. In a first stage, consideration was given to the following criteria as general guidance to decide in which markets to conduct studies:

- those economic sectors which have not been discussed or investigated before and with high impact on consumers;
- those markets with high entry barriers;
- those markets with few players;
- potentially conflictive, based on the number of complaints or public notoriousness;
- the likelihood of mergers;
- where previous studies suggest the convenience of further inquires, and those that for any other reason need to be studied in greater depth.

2.4 *Where to get the required information: the relevant role of strategic partnerships*

15. Despite the fact the FNE cannot currently compel stakeholders and other market participants to provide data for market studies, the latter comes both from those who are willing to provide it and also from public sources —other agencies and market agents, seminars, publications, institutional Web sites, or financial sheets and statements. In some cases, the data comes from those who trade it: consultants, research and information companies and other firms. The FNE can resort too to information elaborated in previous cases, provided it does not violate due confidentiality or affect the informant or related third parties.

16. As already explained, the agency can request information from the market participants but our statute only considers for mandatory information requests in cases were a formal investigation is brought up. Acknowledging that the competition agency needs to cope with this problem, the Government has sought to grant the agency's powers to compel market participants to provide data for market studies, and not just for investigations been conducted. Accordingly, and as underlined before, this is an issue currently being discussed before the Senate along with the other amendments to the DL 211.

17. Furthermore, in the case of investigations in process, the FNE can lay claim on other agencies' information (Article 39, letters f), and g)). This is in addition to public information available and hence

likewise obtainable and only limited by the reach of other laws concerning the use of private data and statistical confidentiality.

18. Notwithstanding the above, concerning market studies, the FNE has signed cooperation agreements with other agencies and sectorial regulators. An example of this is the cooperation agreement signed between the competition agency and the National Consumer Service (*Servicio Nacional del Consumidor*-SERNAC in charge of consumer protection in Chile. SERNAC has been involved in the raising of field information for studies on matters of common interest. Other examples of strategic partnerships between agencies are:

- *Junta Aeronáutica Civil* (JAC), sectorial regulator for air transport. The strategic relationship with this agency had adopted the form of roundtables with the object of improving the sector's competitiveness, following the FNE recommendations, including the submission of information by JAC to the FNE on a permanent base.
- *Superintendencia de Servicios Sanitarios* (SIS), the Chilean sanitary services regulator (water and sewage). There has been a collaborative relationship originated by the investigation of a specific case that triggered judiciary actions by the FNE. In this case, the strategic partnership led to the timely communication and access of relevant information by the competition agency, and also to an adequate coordination between the competition and the sectorial regulator in order not to affect each other's objectives.
- *Superintendencia de Electricidad y Combustible* (SEC). Coordination has taken place in the gas and fuel markets, in those cases in which companies' actions have exceeded the reach of the regulator faculties. In these cases the regulator submits to the FNE both the case and all its available information for the FNE to consider prosecution.

19. Finally, it is worth to consider that a new market study is jointly being carried out by the Health Superintendency and the FNE, to examine medical and health services' markets from the competition perspective, following their common interest in assuring that this markets work in an efficient way.

2.5 Budget constraint for Market Surveys

20. Hiring external consultants with the purpose of elaborating markets studies is a relatively recent practice in the FNE. Yet in the recent years this has meant an expenditure of about 3% to 4 % of its budget, a figure that is expected to increase over the following years. Considering internal human resources allocated to this activity, this figure reaches about 6% to 8% of FNE's total budget. As an estimation, each market study takes, on average, four to six months of full dedication by a qualified professional or a small team with the related institutional support.

2.6 Main experiences

21. During the recent years, the FNE has conducted several market studies. They have served both to back up the FNE's position in judiciary procedures and to enhance the institutional knowledge on specific markets of high concentration or in which there may be a high probability of future investigations.

2.6.1 Health Insurance Companies industry

22. A series of studies on this market conducted both internally and externally, served as a basis for the FNE's actions taken against the main providers of health insurance companies in 2005.

2.6.2 *Supermarket industry*

23. The Chilean supermarket industry has become increasingly concentrated over the last decade, due to both the organic growth of the main actors and to mergers that have reduced the number of firms in the former. This has affected the relationships between supermarkets and their trading partners, both 'up-stream' (suppliers) and 'down-stream' (customers). The study analysed the relationship among participants upon the base of publicly available empirical evidence, and its results were one of the elements considered in the recent actions of the Competition authorities in this market.

2.6.3 *Banking sector*

24. The Chilean banking industry has rapidly grown since the latest 80's, at a rate much higher than the GDP's. This expansion has simultaneously come about and has been caused by an ongoing sector's deregulation and technological changes of great magnitude. For its part deregulation has allowed the banking market, among other effects, to develop new products and trading platforms. This diversification has been followed by the rise in fees and the introduction of commissions for the new services provided, affecting the income structure of the industry, with implications to the industry's organisation. Alongside, during the 90's and in this decade a decrease was seen in the number of banks in the market due to a wave of mergers and acquisitions that significantly increased the industry's concentration and introducing additional challenges to competition authorities.

25. With all this in mind, the Economic Division prepared its first banking survey in 2005. Two years later, the FNE funded an external study which was undertaken by academic researchers, which consisted mainly in an econometric analysis measuring the competitiveness of the Chilean banking industry as a whole. Nevertheless, the new products and platforms of services currently supplied made the aggregate analysis insufficient to assess the ongoing competition in each of them, and therefore further research is currently conducted as an extension.

2.6.4 *Petroleum market and Gasoline stations*

26. In 2007 the FNE funded some research carried out by external economists, oriented to testing the existence of collusion at gasoline retail distribution using structural and *screening* econometric models.

2.6.5 *Sanitary Services*

27. Following a complaint submitted by a group of housing construction companies, which alleged against the main water and sewage services companies to be charging excessive tariffs in geographical areas not subject to a concession system, the FNE hired an external team to produce a study and to strengthen its position in the claims brought following the respective investigation. This is another example in which the participation of external advisors complements the internal expertise of the permanent team, with benefit for both current actions and to boost internal preparation for future challenges in a specific field that requires a high degree of specialisation and which is subject to permanent changes in technology and regulation rules.

2.6.6 *Telecom*

28. Such as it was the case of banking, the telecom sector has been studied several times and by different teams, both internal and external. It is also the case that this industry is subject to vertiginous technological change and modifications on regulatory rules. The following are the main studies on this subject:

Mobile telephony market

29. There are two studies on this particular matter, one of them was internally produced, and the second one, by external advisors. Both of them are complementary and help to explain how the mobile telephony market operate therein and interact with other connected markets (as local telephony and long distance carriers) and facilities. Both studies contributed to identify competition issues and imperfections, and were used as a basis for the National Economic Prosecutor's opinion in the congressional discussions concerning new legislation on this market.

Third generation technology in mobile telephony (3G)

30. Once again, external and internal research efforts were successfully combined in order to develop the necessary technical expertise to intervene in this highly complex market. These studies focused on how do the bidding procedures of new radio spectrum to be awarded to enhance 3G services affect the mobile telephony market, and to a lesser extent, the new mobile Internet services market. Besides, as a result of these studies, the FNE presented recommendations for the design of further bidding auctions of the radio spectrum, as requested by the TDLC in a consultation filed by the telecom regulator.

2.6.7 *Air transport market*

31. In 2007, an external study was contracted by the FNE, to evaluate the determinants that affect the entry on air transport market (particularly for the route Santiago – Lima), with special emphasis in the analysis on air traffic rights as an asset that affects entrance in this market. As a result, the FNE is now studying how the traffic rights bidding procedures need to be established to lower the barriers for new competitors.

2.6.8 *Some ongoing in 2008*

Health services providers

32. Health benefits (or medical and health services) are a set of essential health activities and procedures for diagnosis, treatment and monitoring of disease. In general, they can be grouped in: 1) medical care; 2) diagnostic tests; 3) clinical and / or therapeutic support procedures; 4) surgical interventions and 5) other services. At present there is considerable information from the Health Superintendency regarding the number of medical attentions, available beds, existing health institutions and other public and private data. Yet the FNE can benefit from enhancing its knowledge and comprehension of the industry and of the way its participants interact, and therefore reaching a general diagnosis or appraisal of competition in the market for medical and health services in Chile.

33. This is of the utmost importance since one of the government's priorities is to ensure the whole population's timely access to health care, neglecting neither its quality nor the efficiency in resource use. This, coupled with the social welfare to be obtained at improving competition and therefore efficiency in the provision of health services, urge a thorough study of this economic sector.

34. The proposed study aims at answering what is meant by a "market" of health benefit providers, thus becoming a systematic effort to identify and understand the sector's performance from the perspective of competition.

Construction

35. From the economic point of view the construction industry is highly complex, not only because of the interaction of several markets, both upstream -diversity of inputs- and downstream, but also because

this industry has a high impact on the national economy as a whole, particularly given its pro-cyclical nature, its high incidence in GDP and its multiplier effect on output and employment.

36. International experiences strongly suggest the convenience of focussing on these economic activities, and therefore the Chilean agency is clearly interested in enhancing its knowledge on the actual working of these markets, to identify and describe the relevant markets involved and to better understand the interactions therein.

Next *steps* concerning procedures

37. Further research on market studies will be orientated according to the priorities pointed out within the FNE, by the directives team, following the criteria resulting from the current process of strategic planning. Despite there are other challenges and commitments for the research team in 2008-2009, such as the elaboration of methodologies and internal guidelines, including for the making of market studies, the FNE will continue to increase the resources allocated to this activity and complement its internal resources with the search of external funding and partnerships, thus allowing the continued expansion of its internal knowledge on the working of markets.