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STANDARD SETTING

-- Chile --

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STANDARD SETTINGS AND COMPETITION POLICY: THE CHILEAN EXPERIENCE

1. A *standard* is a public document prepared and agreed upon by an acknowledged body, which provides rules, criteria or principles for public use in common, frequent activities and/or their results, meant to achieve an optimal order in a given context. In Chile the adoption of standards is voluntary unless a legal provision¹ makes it mandatory; the mandatory ones are known as *technical regulations*.

2. As in many jurisdictions, *standards* and *technical regulations* have been thoroughly employed in Chile to establish a common array of rules and/or minimum requirements on variables related to the production and supply of assorted goods and services. We shall therefore understand *standard setting* as the process by which such standards and technical definitions are determined. Their connection to competition policy will be relevant in as far as the standard/technical regulation or its enforcement has anti-competitive effects in the corresponding markets.² Sometimes standards point at providing the same information to all players, thus solving markets' information asymmetry. In such cases the standards setting must ascertain whether its potential restrictions (a private and/or social cost) exceed the benefits of imposing them, an assertion that must be built in them from the very start.

3. This contribution describes the Chilean institutional arrangements for standard settings and technical regulations and their policy purposes –not always noticeable– for a sample of standards. This includes their potential anti-competitive impacts, although the competition impact on markets of many of these standards has not been properly assessed by *Fiscalía Nacional Económica* (FNE³, the competition agency) as part of its regular functions.

1. Chilean institutional arrangement for standard and technical regulations setting

1.1 Technical standards for quality processes

4. The Chilean institutional arrangement for standard settings is ascribed to the *Instituto Nacional de Normalización* (INN⁴, or National Standards Institute), a private, non-profit entity set up by CORFO (Chilean Economic Development Agency) in 1973,⁵ to endorse the use of metrology and other technical

¹ Be it limited (i.e., "it must comply NCh 720") or general (i.e., "according to Chilean standards on elements security...").

² This is particularly relevant for Chile, given that under our Competition Act (DL 211/1973, amended inter alia by Law 20361/2009), anticompetitive infringements are "...any deed, act or contract that prevents, restrict or obstruct free competition, or that tends to produce these effects [on markets]". Consequently, the analysis of any potential transgression necessarily includes the definition of the relevant market and conditions affecting the entry of potential competitors.

³ The FNE is an independent government competition agency in charge of detecting, investigating and prosecuting competition law infringements, issuing technical reports and performing competition advocacy. The FNE's website is at www.fne.gob.cl.

⁴ The INN's website is at www.inn.cl

⁵ Supreme Decree No. 678 / July 5th, 1973.

principles (NCh) in productive processes in a number of economic sectors.⁶ Its main lines draw up their disclosure and approval criteria, the coordination of the National Metrology Network and training in specific rules and quality management systems. The goal of the NCh is to strengthen national quality components, enhancing their competitiveness in domestic and in foreign markets alike.⁷

5. The local procedure for standards drafting was set out in Chilean Standards NCh 1 of 2004, consistent with internationally criteria (International Organization for Standardization (ISO) and the International Electro technical Commission (IEC)). Following the WTO Secretariat Report on Chile's Trade Policy Review (TPR)⁸ «*The process of preparing a standard is initiated by the INN or at the request of any interested government or private entity. If the necessary financing is available, a technical committee is established to draw up a provisional draft taking into account the relevant international or regional standards. The private sector (producers, importers, traders and consumers), the competent authorities and representatives of academia take part in this committee. Once the standard is drawn up, the draft is put up for public consultation for 60 days on the INN website and its text is made available to any concerned person. The comments received in the course of the public consultation are delivered to the technical committee, which decides whether they are relevant or not. Once there is a consensual text, the technical committee submits it to the INN Council for approval. In some cases... it is sent to the competent ministry for endorsement and publication in the Official Journal*». Accordingly, a Chilean standard (NCh) is a presentation analyzed by a technical committee and approved by the INN Council, while an *Official Chilean standard* (NCh Of) is an NCh approved upon order or resolution, by a Ministry.

6. According to the INN, as of December 2009 there were more than 3,000 NCh in operation.

1.2 Technical regulations

7. These are issued by sectoral regulators, that is, government entities regulating their respective areas of competence, *inter alia*, the Ministries of Economy, Health, Agriculture, Transport and Telecommunications, Housing and Urban Planning, and the SEC (Supervisory Authority for Electricity and Fuel). These technical regulations involve laws, decrees or resolutions; for instance, the *Handbook of Technical Standards for Signs, Traffic Control and Regulation on roads where works are being carried out*, approved by Resolution No. 1826, Ministry of Public Works, 1983; or the *Technical Standard No. 57, for clinical tests of pharmaceuticals drugs in human beings*, approved by Resolution No. 952, Ministry of Health, 2001.

8. Despite there being no catalogue or inventory of all technical regulations currently in force –so as to know their quantity–, a Website⁹ records the competition criteria of regulatory agencies in their respective subjects when and if these criteria affect tradable goods. According to the authorities, many of these technical regulations follow international benchmarks. Technical (mandatory) regulations compelling locally traded goods only –that may or may not be uploaded to said website– are presumed

⁶ Such as: Risk prevention, health and quality of life; Energy; Construction; Agriculture and Food; Chemistry; Metallurgy and mining; Electricity; Forest, among others.

⁷ Regarding international trade, in 1995 the INN adopted the Code of Good Practice for the Preparation, Adoption and Application of Standards, annexed to the WTO – Agreement on Technical Barriers to Trade (TBT).

⁸ WTO (2009), Secretariat Report on Chile, TPR, October. WT/TPR/S/220, Section 102, page 47, downloadable at http://www.wto.org/english/tratop_e/tp320_e.htm.

⁹ This inventory can be viewed at www.reglamentostecnicos.cl. Sanitary and phytosanitary measures having been left out, they are to be consulted at the corresponding institutions' websites.

known to those whom might be concerned, since they are published in the official gazette and/or in the website of the regulatory agency that issues them.

1.3 Further arrangements: registers of suppliers and other agents

9. These refer to standards or technical regulations that are not properly such, yet have the same connotations standards have. Standards other than NCh or NCh Of directly affecting the number of players in the markets are imposed by different accreditation system of suppliers provided by *register of suppliers of goods and services* currently in force in some public agencies or State-owned enterprises (SOE). Here are some examples:

1.3.1 Public procurement and contracts

10. A wide range of public agencies must quote, tender, contract, award, request delivery and, in general, develop all their procurement and contracting processes for goods, services and works only by means of the technological platforms established by the Public Procurement and Contracting Bureau (*ChileCompra*), as are *MercadoPublico.cl* and *ChileProveedores.cl*.¹⁰ Following this, every individual or legal entity wanting to do business with the government must access the above-mentioned virtual markets and comply with all legal requirements included there.¹¹ This platform is a voluntary, formal, online supplier registry, where eligible bidders freely upload the credentials necessary for trading with the State.¹² By this registering and storing, *ChileProveedores.cl* allows interested parties to verify the suppliers' legal/financial situation and technical qualifications online, in this way diminishing the transactional costs (i.e., complex, time-consuming procedures and paperwork for buyers and sellers alike) associated to government commercial affairs.

1.3.2 Ministry of Public Works' Registers of Contractors and Consultants

11. This Ministry (MOP), has a specialised department for the management and updating of centralised registers, one for contractors –for major and minor public works– and the other for consultants.¹³ By these means that department certifies that registered persons and legal entities fully fulfil the corresponding prerequisites,¹⁴ and qualifies the performance of contractors/consultants holding valid contracts. Because the General Registry for Contractors serves all MOP's directorates and services as well as a number of public entities dealing with infrastructure, it has wide application, significantly affecting the construction industry, mainly the one linked to the government.

¹⁰ Both created as part of the amendments to Chile's public procurement system carried out by ChileCompra, aimed at improving the standards of transparency and efficiency of public tendering processes. More information available at www.chilecompra.cl.

¹¹ Generally speaking these are Accreditation of financial, commercial and legal nature, technical suitability, fulfilment of its workers' social security and health care obligations; no tax debts outstanding, and not having been found guilty of monopoly practices.

¹² This Registry stores information on these online businesses, and offers suppliers accreditation in order to facilitate their participation in future public tendering processes. Public agencies can thus make fast and accurate decisions, while suppliers do not have to deliver paperwork and certificates several times, submitting the same documentation to each procuring entity in each tendering process.

¹³ Review [here](#) for further details.

¹⁴ This is the Regulation for Public Works Contracts, enacted in 2004 by the Supreme Decree No. 75 of the Ministry of Public Works; and the Regulation for the Procurement of Consulting Services, enacted in 1994 by Supreme Decree No.48 of the same ministry.

12. The MOP's General Registry for Contractors defines different disciplines and categories within each one, according to the economic capacity, experience and professional staff to be met by contractors. Being enrolled in a particular record allows the contractor to execute only works covered by the Register. A contractor cannot be enlisted in more than one category, whether as an individual contractor or as a member of a construction society. Regarding sanctions, the Registry ascertains that if any violation of their obligations occurs, contractors are automatically suspended and disabled from forwarding new offers or integrating other registered companies' teams until the failure has been resolved.

1.3.3 Register of suppliers of goods and services for ENAP

13. ENAP –the Chilean State-owned oil company- has a contracts and procurements system of its own, where any interested local or foreign supplier can apply for registration. There are two registrations: with or without previous accreditation. The accreditation process is carried out by an entity outside ENAP and its cost, charged to the supplier, may vary according to its character, *i.e.*, whether is a natural or legal person, local or foreign, and to the size of the company. This accreditation process includes the following aspects: legal, financial, tax, technical, work experience, safety and quality management, all of these stated in the “ENAP - Accreditation System of Suppliers of Goods and Services”. ENAP's local and foreign suppliers must be accredited, all except suppliers of minor or specific services, provided they are subject to the surveillance and regulation of authorities such as Superintendences and the like.

1.4 Others: Liberal professions licensing

14. These are definitions, standards or accreditation systems currently in force, affecting some liberal professions. They are mandatory or imposed by a professional association or society. Same as the above-mentioned standards, these ones affect the number of players in the market and can sometimes mean barriers to the entrance of new professionals. Examples of this are the following:

1.4.1 Structural calculation projects reviewers

15. Due to the seismic history of the country, the quality of building and construction is of the utmost importance and addressed in several ways. One is the National Registry of Structural Calculation Project Reviewers,¹⁵ assigned to the Ministry of Housing and Urbanism (MINVU), which in turn entrusts it to the private “Construction Institute”.¹⁶ According to this regulation, all individuals or legal entities who act as Reviewers must fulfil all professional¹⁷ and minimum experience requirements made there for the corresponding category, being qualified to act as such only while enrolled in the Registry. Besides, reviewers in different categories can examine and inform different structural calculation projects according to particular requisites.

1.4.2 Professional practice and professional societies

Society of Professional Engineers

16. This national professional society was created by law,¹⁸ and one of its articles expressly establishes that “Those listed in the Professional Engineers and Technicians Association and with their fees

¹⁵ Decree No. 134/2002, Housing and Urbanism Ministry.

¹⁶ According to this regulation, the Registry is unique and excludes similar registries in any other public or private institution.

¹⁷ They must be in possession of the professional licence as Architect or Civil Engineer with Civil Work specialization.

¹⁸ Law No. 12,851 / 1958.

duly paid are the only ones who may exercise the relevant profession and be appointed to administrative positions of public, semi, municipal or private character...” (Art. 31, which also sets directives for foreign engineers’ practice in Chile). Moreover, higher education is regulated by the Education Law,¹⁹ which defines professional licences as those “granted to a student of a technical institute or university, who has successfully gone through the career program, the contents of which ensure the general and scientific training necessary for a proper job performance” (Art. 35). According to this, no adscription to any professional society should be needed by a licensed engineer to join his profession’s labour market; in practice, though, there are not one, but two yardsticks for the practice of the profession in Chile.

17. Similar situations are found in the health sector, especially among some medical practitioners and technical medical, where the deficient precision or their boundaries or the lack of normative definition of certain medical specialities²⁰ has resulted in frictions between interest groups -even a competition case law-, as the following sections show:

1.4.3 Physiotherapy accreditation: Competition Court’s Ruling 35/05,²¹ Technical Institute vs. the Physiotherapists Association of Chile

18. In 2004 an educational Technical Institute started the career of Physiotherapy, immediately receiving the strong oppositions of the Association of Physiotherapists. The Institute then charged the Association with anticompetitive behaviour —attempts of imposing barriers of entry, boycott and exclusion of the would-be graduates and professors. The Association asserted that the offering of the career by a technical institution was at odds with the Public Health Law, the article 12 of which grants university graduates only the right to practice medical professions. The Competition Court, however, ruled out the argument on the grounds that said article had been actually repealed by the Education Law, which regulates higher education and records all professions requiring a university degree, not including Physiotherapy. Here too, therefore, there is not one but two standards enforced for professional practice. In July 2005 the defendant was pronounced guilty, ordered to stop the boycott and fined with the equivalent of US\$ 1,500.00 of that time.

1.4.4 Eye care professions: The Association of Ophthalmologists against the licensing of optometrists

19. As mentioned before, article 12 of the Public Health Law establishes that only university graduates may practice medical professions. This provision has founded the Association’s position against a bill currently under discussion in Congress, seeking to modify the sanitary code to allow the provision of optometrists’ services in Chile. Opticians, in turn, have complained to the FNE that because of the dominant position conferred by Art. 12 of the Sanitary Code, the Association of Ophthalmologists will create entry barriers to the development of a new market, such as the optometrists’. The FNE declined an investigation on the matter, considering its advocacy in that potential market instead.

1.5 Mandatory standards for information in social markets

1.5.1 Chile’s private pensions system – AFPs

20. The creation of the AFP system in 1981 entailed a deep cultural change for Chilean workers, who moved from government managed pay-as-you-go regime —where people worried about their retirement only at the end of their working life, to a fully-funded system based on individual accounts managed by

¹⁹ Law No.18,962 / 1990 amended by Law No. 20,370 / 2009.

²⁰ Chilean Public Health Law, article 12.

²¹ See details at www.tdlc.cl/DocumentosMultiples/Sentencia_35-2005.pdf.

private companies. In the new system workers are allowed to choose the AFP they want to affiliate with, to transfer their funds among these, and to have voluntary savings accounts; the government's supervision and regulation of the system is entrusted to the Pensions Superintendence.²²

21. For years the Superintendence and academic analyst have been devoted to the reduction of managerial and sales costs which lower the return of the funds—in the early 1990s marketing and sales costs, highly related to the expansion of the sale force, exceeded total cost by one third. This was particularly baffling since the affiliation to the system had grown fully mature and so the sales effort could focus only on switching affiliates among AFPs and not on securing new ones. To curb participants' switching ability proved an efficient way of reducing administrative costs, but greatly reduced competition. In addition, the Superintendence made an information standard mandatory whereby AFPs send their members a quarterly report in a standardized format, on their personal account's profitability and commissions paid, in this way making the AFP comparison easier. The overseeing body also regulates the AFPs' advertising, promotion and information disclosure.

1.5.2 Chile's private health insurance providers – ISAPREs

22. This is a case similar to the one referred to above, also related to a social system and to the regulatory imposition of a common form for information disclosure. ISAPREs are also required to offer their insurance plans according to a standard format designed by their Superintendence in order to facilitate comparisons by the affiliated. This format includes information about common medical services and their coverage by the most acknowledged private medical providers. In spite of that, the Health Superintendence has found it very poor the ability of customers for understanding all that information when making their choices. This stems from the fact that health providers and insurers negotiating different services for assorted medical plans, making it nearly impossible for the ordinary consumers to ascertain final prices for health services—out-of-pocket health payments. This subject has been analysed by the FNE in a joint effort with the Superintendence, so to advocate for competition among private health providers. Both government entities investigated what are the main factors in consumers decision-making regarding affiliation and contracts in the private health market, and concluded that consumers need a scheme for valuing estimated out-of-pocket payments for a great deal of health services by different health providers, which the Superintendence is currently working on.

²² Additional information at www.safp.cl.

2. Potential anticompetitive effects of standards and technical regulations

23. The following table summarises the potential anticompetitive effects of the standards here included:

Table 1: Summary of potential anticompetitive effects of the sample of standards considered

Standard	Enforceability	Ground of standard application	Potential effects on competition	Scope of Application
NCh	Voluntary	Technical standards for productive processes	<i>Anticompetitive:</i> Likely increase in costs derived from the standard might delay the entrance of new competitors.	Wide: Any tradable sector can apply NCh on a voluntary basis
NCh Of	Mandatory	Technical standards for productive processes	<i>Pro competitive:</i> By subjecting domestic markets to international standards, it lowers entry barriers	Markets regulated by rules from Ministries of Economy, Health, Agriculture, Transport, Telecom, Housing and the Authority for Electricity and Fuel
Registers of suppliers	Mandatory for suppliers wanting to become State's trade partners	Suppliers' experience, and technical and financial situation	<i>Anticompetitive:</i> Entail entry barriers and/or affect relevant market boundaries in bidding <i>Pro competitive:</i> Reduce search and transaction costs	<i>Public works:</i> Construction sector , consulting services Public procurements
Liberal professions licensing	Voluntary	None	<i>Anticompetitive:</i> Entail entry barriers; mainly foreclosing the professional market	Liberal professional services
Standards regarding "social markets"	Mandatory	Information disclosure	<i>Pro competitive:</i> Allow comparison among entities	Pension funds, Private health insurance market
		Advertisement expenditure	<i>Anticompetitive:</i> Reduce qualitative differentiation among AFPs by controlling advertisement expenditure,* despite constant commissions	Pension funds

* Currently the anticompetitive effect is less relevant due to the reform to social security introduced in 2009.