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COMPETITION COMMITTEE**

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**Working Party No. 3 on Co-operation and Enforcement**

**ROUNDTABLE ON THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES**

-- Chile --

**20 October 2009**

*The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 20 October 2009.*

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1. The Competition Act, DL 211/1973 and its amendments does not provide special treatment to publicly owned or managed enterprises. Public entities are subject to the enforcement of the Competition Act in the same terms than private ones.

2. In Chilean law, the regime of public enterprises is very strict and constitutionally regulated, and carefully balanced with private individuals' constitutionally granted economic freedom and with the principle of subsidiarity. The State and its bodies may develop or participate in entrepreneurial activities only when authorized by a law that has been approved by a qualified quorum of the Congress. In such cases, those economic activities are subject to the common legislation applicable to private individuals, notwithstanding the exceptions on justifiable motives established by law, which must also be approved by a qualified quorum of the Congress.

3. If the State violates the restrictions established for participating in entrepreneurial activities or the subsidiarity principle, there are constitutional recourses available for affected private parties to initiate procedures before courts. Some parties have argued that the TDLC (The Competition Tribunal) should also guarantee these constitutional principles, and one recent decision might support this idea<sup>1</sup>.

4. Two types of public enterprises can be identified in the Chilean system:

(i). Stated owned Public Enterprises, created by a special statute. They are public entities in nature. Entities of this kind may be identified in the following markets:

- Banks: Banco del Estado de Chile;
- Postal Services: Correos de Chile;
- Copper: Corporación Nacional del Cobre –Codelco-;
- Transport (railways and trains): Empresa de Ferrocarriles del Estado –EFE-;
- Mining: Empresa Nacional de Minería –Enami-;
- Petroleum: Empresa Nacional del Petróleo –Enap-;
- Television broadcasting,: Televisión Nacional de Chile –TVN-;
- Aeronautics and avionics,: Empresa Nacional de Aeronáutica de Chile–Enaer;

(ii). Stated owned Corporations, private entities in nature. The State either controls or participates in the corporation ownership. This is the case of, among others:

- Most of the Chilean ports. The corresponding corporations' function is to grant concessions to private parties for the management and operation of port facilities;
- Santiago's subway, Metro S.A.;
- A public owned lottery, Polla Chilena de Beneficencia S.A., also follows this regime;

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<sup>1</sup> TDLC, 06.17.2008, Ruling N° 67/2008, involving several actions of a nonprofits public entity in the market for fire fighting services by aircrafts in forests, detailed below.

5. Any anti-competitive action initiated by or against these public enterprises (both (i) and (ii)) would be subject to the Competition Act and the competition authorities, as if they were private companies.

6. In addition, it is worth remembering that private parties can submit complaints not only before the FNE but also directly before the TDLC<sup>2</sup>.

7. Apart from the two types of public enterprises described above, entrepreneurial activities developed by non-profit government or state entities may also be examined by the TDLC.

8. A brief overview of recent case law where public entities have been accused of anticompetitive conducts may illustrate the above description:

9. In a pending procedure before the TDLC, the Government was sued in its role of regulator of a concessionaire of a land port, jointly with the concessionaire.

- The “*Consejo de Defensa del Estado*” (the public entity in charge of the judicial defence of fiscal patrimonial interests), claimed lack of competence of the TDLC, arguing that the Government was not an economic actor in the sense of the Competition Act and that, in this case, it was not performing an economic activity. Conversely –it argued–, the Government, by the intermediation of the regulatory agency (*Dirección General de Obras Públicas*), was performing its duties of public provision of public utilities;
- In an intermediate decision dismissing the claim of lack of competence, the TDLC held that, according to the Competition Act: it has jurisdiction on any situation that could violate free competition or tend to such effects, and that there are no exemptions or limits for public entities involved in the violation. The offender does not require any special quality and may either be an individual person or a legal entity, whether private or public. Moreover, the Competition Act rules any type of economic activity, whether it consists in the public supplying of public utilities or not, and irrespectively of whether this supplying is made available directly by the Government or public entities, or by the intermediation of a concessionaire. Given the public interest character of the Competition Act, an explicit exemption would be required to exclude the Government or public entities from its scope, and this exemption does not exist.<sup>3</sup>

10. In a 2008 decision, several complaints submitted before the TDLC by small mining companies against a public entity in the mining market (ENAMI), were dismissed.<sup>4</sup> The claimed violations were abuse of dominance which consisted of abusive purchasing prices and predation. The TDLC dismissal was grounded on competition analysis and no consideration was given to the nature of the defendant.

11. Another interesting decision was issued, also in 2008, in the market for fire fighting services by aircrafts in forests.<sup>5</sup> The defendant in the case was CONAF,<sup>6</sup> a non-profit public entity which is in charge of several duties related to the administration of public woodlands and national parks.

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<sup>2</sup> Complaints before the FNE may or may not result in an administrative investigation by the agency. Conversely, claims before the TDLC usually give place to a judicial procedure, adversarial or non adversarial, unless the presentation lacks significant grounds.

<sup>3</sup> TDLC, 12.20.2007, Intermediate Decision in file C N° 127-07.

<sup>4</sup> TDLC, 07.02.2008, Ruling N° 70/2008.

<sup>5</sup> TDLC, 06.17.2008, Ruling N° 67/2008.

- In this case, the TDLC stated that: It is the nature of the activity and not the nature of its executor which determines whether an ‘economic activity’ is subject to the Competition Act. Every economic actor, i.e., any natural person or legal entity, whether for profit or non-profit entity, who individually or collectively comes into a marketplace, for offering or demanding products or services, performs activities which fall within the scope of the application of the Competition Act. The Statute does not make any distinctions based on entities aims or capacities. The Tribunal has issued several decisions in cases where the defendants were non-profit persons or public entities (9° and 10° Grounds);
- The plaintiff, a private company which leases helicopters for fire fighting, submitted a claim before the TDLC. The plaintiff argued that CONAF had incurred in predation and unfair competition practices (i) by developing remunerated economic activities without legal authorization and in more favourable conditions than private companies and (ii) by misusing confidential information of market competitors;
- Even though the TDLC dismissed the predation claim, the unfair competition accusation was upheld and an injunction ordered against CONAF directing it to refrain from developing remunerated activities related to fire fighting services by aircrafts in forests other than those under its supervision, until a legal authorization by qualified quorum was passed in Congress;<sup>7</sup>
- The fact that the defendant, CONAF, was a public entity was not an obstacle for the TDLC to issue injunctions against it.

12. In another case, ENAP, the State petroleum company, was accused of abuse of dominance before the TDLC by an intermediary reseller, arguing refusal to deal, discrimination and exclusionary practices.<sup>8</sup> The action was dismissed, giving no consideration to the public nature of the defendant’s ownership for the dismissal. The case was on vertical contracts between the parties where the claimant did not satisfy the common technical and financial standards required by the defendant for this sort of contracts.

13. State owned lottery, *Polla Chilena de Beneficencia*, was involved in two processes before the Tribunal, one adversarial and one non adversarial. In these cases, while analysing tendering conditions<sup>9</sup> and the terms of contract for distributing agencies,<sup>10</sup> the Tribunal did not regard the public character of the State Lottery as a motive to apply any special consideration to the case and its decisions. The cases was analysed under a standard antitrust approach such as if *Polla Chilena de Beneficencia* was a private entity and, finally, no infringement or anticompetitive practice was found in either case.<sup>11</sup>

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<sup>6</sup> Corporación Nacional Forestal.

<sup>7</sup> This statement may support those who argue that the TDLC should also guarantee constitutional principles such as subsidiarity of the State in economic activities and the private parties’ right to of economic freedom.

<sup>8</sup> TDLC, 04.18.2008, Ruling N° 64/2008.

<sup>9</sup> TDLC, 10.06.2005, Ruling N° 32/2005.

<sup>10</sup> TDLC, 09.13.2006, Decision N° 17/2006.

<sup>11</sup> As an obiter dictum, one can find in N° 32/2005 Ruling, an objection against the tendering condition that required suppliers to, ex – ante, relinquish judicial actions, particularly those before the Competition Tribunal.

14. Another decision (2008) involved the railway and trains company EFE<sup>12</sup> (*Empresa de Ferrocarriles del Estado*), a state owned Public Enterprise.

- EFE is the monopolist in train services running from Santiago to the South of Chile.
- It was accused by the Telecommunications company GTD of abusing its dominant position on an essential facility, the provision of access to pipelines for crossing railways either through underground or aerial facilities, which is used by gas, electricity and telecommunications companies. EFE was accused of excessive pricing.
- The decision explicitly stated that competition law applies to EFE, “*such rules apply to it as they do to any other economic agent*” (10<sup>th</sup> ground).
- EFE was found guilty of abusing its dominant position and fined.
- On January, 2009, the Supreme Court affirmed the ruling by the TDLC.

15. In conclusion, the resolute actions of the FNE, the independence of the TDLC, the right of private parties to directly submit complaints before it, and the constitutional and legal framework in which the Competition Act operates -where principles of subsidiarity, non-discrimination by public entities and economic freedom prevail- are adequate guarantees to address competition concerns that may arise in cases where public entities are involved in commercial activities.

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<sup>12</sup> TDLC, 10.14.2008, Ruling N° 76/2008.