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LATIN AMERICAN COMPETITION FORUM

-- Session I: Competition Principles in Essential Facilities --

Contribution from Chile (FNE)

8-9 September 2010, San José (Costa Rica)

The attached document from Chile (FNE) is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held in Costa Rica on 8-9 September 2010.

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LATIN AMERICAN COMPETITION FORUM

8-9 September, San José (Costa Rica)

Session I: Competition Principles in Essential Facilities

-- CONTRIBUTION FROM CHILE --

Fiscalía Nacional Económica

1. Chilean Legislation on Competition and Essential Facilities

1. Chilean legislation on free competition contains no provision that expressly deals with the concept of essential facilities or installations.

2. National jurisprudence has alluded to this doctrine in an explicit fashion in cases of refusal to sell and in discrimination cases, and in turn has analysed the illicit nature of such practices in light of the general provision on abuse of dominant position, as set forth in article 3(b) of DL 211 of 1973. The current revision of this law stipulates that: *"Anyone who, either individually or collectively, executes or participates in any act or agreement that impedes, restricts or limits free competition, or that tends to further such effects, shall be sanctioned according to the measures indicated in article 26 of the present law, without prejudice to any preventive, corrective or prohibitive measures regarding such acts or agreements that may apply in each case… Among those considered to be acts or agreements that impede, restrict or limit free competition or that tend to further such effects, are the following:… (b) The abusive exploitation by an economic agent or by a group of such agents that, occupying a dominant position in the market, set purchase or sales prices, condition the purchase of one good on the purchase of another, assign market zones or market share, or impose similar abusive practices on others."*

2. Chilean Jurisprudence regarding Conditions for Determining whether a Facility is Essential

3. Despite the fact that a number of decisions on the part of Chilean competition agencies have characterised certain installations/inputs/services or "facilities" as essential,[1] this designation has in most cases been used without, in the authors' view, there having been a robust examination of the concept of "essential facility" or an analysis of what determines whether such inputs are "essential".

4. Following, in an attempt to try to determine and specify the conditions required in order to establish whether an installation is essential, is a review of some of the most important decisions of the Court for the Protection of Free Competition (Tribunal de Defensa de la Libre Competencia, or TDLC) and of the Commissions that previously carried out that court's functions, regarding these issues, with distinctions drawn between decisions emanating from adversarial proceedings and those handed down in the course of non-adversarial proceedings.

2.1 Adversarial proceedings:

2.1.1 TDLC, Ruling No. 29/2005 of 9/12/2005, in the "FNE v. Transbank" case

5. In this case, the National Economic Prosecutor's Office (Fiscalía Nacional Económica, or FNE) brought suit against Transbank[2] for discriminatory practices, alleging that the firm had abused its dominant market position by charging discriminatory and abusive prices to merchants that accept bank credit cards, and accusing the company of having a rate structure that discriminated against card issuers.

6. In its decision, the TDLC states that "the platform on which bank credit card services operate appears to qualify as an essential installation for users and issuers. Evidence of this has been the gradual, though sustained, increase in concentration within the sector… In other words, an industry that began with a number of platforms ended up having only one. The charge maintains… that, in this industry, there are strong economies of scale. If Transbank were an essential facility, as suggested by the background facts cited above, and being at the same time owned by the principal financial institutions, which in turn act as issuers of credit and/or debit bank cards, the creation of a parallel system of credit cards would be, by any reasonable standards, impracticable or nearly so" ("Considering" clause 32).[3]

2.1.2 TDLC, Ruling No. 47/2005 of 12/5/2006, in the "FNE v. Sal Punta de Lobos (SPL)" case

7. The "Punta de Lobos" (SPL) case involves the salt market and the port market of the Tarapacá region, and may shed light on the TDLC's likely analysis in determining whether an installation is or is not essential in nature.

8. In its charges, the FNE stated that the markets cited in the previous paragraph would be linked, inasmuch as the ports suitable for the Tarapacá region are an important market and, at the same time,

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1 Court for the Protection of Free Competition (Tribunal de Defensa de la Libre Competencia, or TDLC), Judgement No. 29/2005, Judgement No. 47/2006, Judgement No. 88/2009, Ruling No. 02/2005, Ruling No. 6/2005, Ruling No. 7/2005, Ruling No. 8/2005, Ruling No. 13/2006, Ruling No. 22/2007 and Ruling No. 25/2008, among others.

2 Transbank S.A. oversees the country's bank credit and debit card operations, in addition to internet purchase services. Transbank is owned by the largest of Chile's banking and financial entities. The list of Transbank shareholders is available at: https://www.transbank.cl/transbank.nuestra.accionistas.asp.

3 See reference to the decision and measures adopted in the case (§ 35-36, below).

constitute essential infrastructure for the salt market. The TDLC seeks to require owners of the ports of Patillos and Patache to permit the loading of salt produced by third parties.

9. In this regard, the TDLC's assed "whether the port of Patache constitutes an essential facility, in the sense of not being replicable under viable technical and economic conditions, or whether there are other economically viable port alternatives for firms competing with SPL". After completing this analysis, the TDLC determined that "in a case where a private port has the economic characteristics of an essential facility, and in the absence of technical restrictions or lack of capacity for loading salt, along with conditions that lack sufficient accreditation, in the case of automobiles, it could be considered contrary to free competition if the port operator denies its services to third parties that request them" ("Considering" clauses 60, 71 and 72).[4]

2.1.3 TDLC, Ruling No. 88/2009 of 10/15/2009, in the "OPS et al. v. Telefónica Móviles Chile (TMCH)" case

10. This decision grew out of a suit by several providers of services for converting fixed-network calls to cellular networks (known as *celulink*), against TMCH, the principal provider in the national mobile telephone market. The TDLC determined that TMCH engaged in a practice of arbitrary discrimination in the setting of prices, which resulted in cutting off competition at the margins for competitors who provide fixed-mobile ("*on-net*") call termination services, and had engaged in a practice of refusal to sell, for the purpose of extending its dominant position in the mobile telephone market to the market for providing fixed-mobile (*on-net*) call termination services.

11. In analysing the relevant market, the TDLC distinguishes two related markets: that of mobile telephone services (upstream market), and downstream fixed-mobile (*on-net*) call termination services, stating that providers of fixed-mobile (*on-net)* call termination services must necessarily use the mobile telephone network of the corresponding firm, requiring it to rely for such purpose on a minutes plan of the concessionaire that owns the mobile network that serves as the final processor of the calls. The TDLC determined *"that the above is equivalent to there being an essential facility or input owned by the mobile-telephone companies, namely, the mobile telephone plan that allows firms providing fixed-mobile (on-net) call termination services to access a given network and to compete with the other suppliers of such a service, among which are also the mobile telephone companies"* ("Considering" clause 35), and "*that such input is essential in that it is indispensable to participating in the "downstream" market and because there is no reasonably priced substitute for providing this service"* ("Considering" clause 36).

12. The TDLC then analyses the conduct of TMCH, examining the linked occurrence of traditional conditions surrounding refusal to sell as established in jurisprudence,[5] in order to classify such conduct as constituting an abuse of dominant position. The TDLC did not indicate whether the fact that the refusal to

[4] The TDLC ultimately rejected this part of the requirement, since there was no finding that there had been a refusal to provide port services to small salt producers, determining that, in the case of automobiles, no company had requested them.

[5] Chilean jurisprudence has held that, in order to establish illicit refusal to sell, the following general circumstances must be present: (a) that a person's ability to act or continue to act in the market be substantially affected as a result of the inability to obtain the necessary inputs to carry out his/her economic activity under normal economic conditions; (b) that the cause of such person being prevented from accessing necessary inputs be the result of insufficient competition between the providers thereof, such that one or more of those providers refuses to supply that person; (c) that such person be willing to accept the commercial conditions normally established by the provider vis-à-vis its clients; and (d) that the party refusing to sell possess market power (Judgment No. 1016/1997 of the Central Anti-Monopoly Preventive Commission, and Ruling 19/2006 of the TDLC).

sell would affect the mobile telephone plan (an essential input, in the opinion of the TDLC) was or was not dispositive in assessing the anticompetitive nature of the refusal to sell.

13. Based on the three decisions reviewed, it is clear that the conditions analysed by the TDLC in determining whether a facility is essential would be: that such installation not be replicable under viable technical and economic conditions or under any reasonable standards; that replicating it would be impracticable or nearly so; and that such input is indispensable for participation in the "downstream" market, given the absence of a reasonably priced alternative.

14. In Chile, as a result of judicial rulings regarding free competition, and based on an adversarial proceeding, no doctrine of essential facilities has ever been expressly invoked to explicitly and directly mandate access.

2.2 Non-adversarial proceedings:

15. Nevertheless, competition authorities have indeed recognised that open access to certain installations whose replication is economically inefficient is necessary in order to introduce competition in downstream markets and, in some cases, have mandated access on companies with monopolistic power over such installations. These mandates have largely been ordered by the TDLC or by the antimonopoly commissions that preceded them, as conditions/requirements within non-adversarial proceedings initiated by regulatory entities or agencies.

16. Such non-adversarial proceedings have taken place, for example, for the purpose of analysing or approving vertical integration operations (concentration), in making determinations regarding services provided by dominant telephone companies subject to rate setting (by the regulatory authority), or in establishing, among other things, the underlying conditions for bidding on port concessions, adopting the single-operator model (rules for single-operator ports). Three illustrative decisions are reviewed below.

2.2.1 Resolution Commission, Ruling No. 389/1993 of 4/16/1993, on multicarrier systems in long-distance telephony

17. This decision was handed down in the course of examining whether competitive conditions were being negatively affected by having local telephone companies (incumbents) enter the national or international long-distance segment of the market,[6] which resulted from the adoption of a multicarrier system (allowing users of fixed telephones to choose their long-distance carrier for any given call).

18. The Resolution Commission (Comisión Resolutiva, or CR) recognises that the local telecommunications market was monopolistic and that the national and international long-distance market could become competitive, as long as an efficient and strictly controlled regulatory framework was established. In its ruling, the CR concluded that local telephone companies could participate in the long-distance market under specific conditions, among which are the following:

- The companies providing local telephone service must provide the same type of access or connection to all providers of long-distance telecommunications services, so as to provide them with service of identical quality.

- The companies currently providing local telephone services must introduce, at their own cost, modifications in their local switchboards in order to provide access to all long-distance carriers,

6 As well as the participation of companies that offer national and international long-distance services in supplying local telecommunications services.

without prejudice to recovering these investments through non-discriminatory rates that would charge long-distance providers for the use of their installations, with such rates subject to approval by the regulatory authority.

- The access charge levied on the corresponding local company, which shall not be discriminatory, must be approved by the regulatory authority, with the cost being borne by each long-distance company. Such charge shall reflect the direct cost of this service, so as to avoid having long-distance services subsidised by local telecommunications companies.

19. The CR also established obligations with regard to transparency and provision of information, the societal structure in the event of vertical integration, and other conditions to prevent incumbent companies from adopting discriminatory measures against new entrants.

2.2.2 Resolution Commission, Ruling No. 515/1998 of 4/22/1998, on classifying services for purposes of rate regulation

20. This decision was handed down in the context of the power of the CR[7] to determine whether a given service market exhibits competitive conditions that would allow for unrestricted rate setting for telecommunications services that are subject to legal regulation.[8]

21. After determining the specific services that are to subject to rate regulation, the CR makes observations regarding certain factors that it believes must be taken into consideration at the time the rates are established, in order to properly safeguard competition. In this regard, the CR states that *"The setting of rates for services that process and/or transmit signals provided through private circuits, as well as access charges, must facilitate the disaggregated provision of local network facilities to allow for the introduction of greater competition in local telephone service*" (4b).

2.2.3 TDLC, Ruling No. 8/2005 of 6/30/2005, on the EDELNOR advisory consultation

22. This ruling was issued in response to the advisory consultation of Empresa Eléctrica del Norte Grande S.A regarding conformity with the obligations imposed on that company by the previous ruling of the Central Preventive Commission, in the context of the new legal framework regulating electric transmission activities.

23. The TDLC states that, in its judgment, "in the electricity sector, caution must be exercised to ensure that providers that compete in this market have open access, under reasonable conditions that are not illegally discriminatory, to given networks that house the service they provide and that constitute monopolistic segments or essential installations that coexist with other segments in which competition is possible. That is precisely one of the objectives that legislators envisaged in setting forth law 19. 940, by defining and clarifying access to the electricity transmitting network and the associated conditions" ("Considering" clause 5).

3. Role of the Competition Agency and of the Sectoral Regulator in Determinations on Essential Facilities

24. Sectoral regulations as a whole establish regimes governing open access to installations considered "bottlenecks", with sectoral regulators being responsible for evaluating the sector involved.

7 Article No. 29 of the General Telecommunications Law, No. 18.168 of 1982.

8 Public local and international long-distance telephone services, and signal switching and/or transmission services provided as an intermediate service or through private circuits.

Without prejudice to the foregoing, the FNE and the TDLC and its predecessors have agreed on an evaluation of the installations or facilities and on the regimes that govern access to them. Thus, they were involved in privatisation processes that took place, particularly during the 1990s, first analysing the conditions under which public services were to be privatised and issuing reports on relevant factors related to competition.

25. In the last 20 years, highways, ports and airports have been handed over as concessions, and bidding procedures intended to generate ex ante competition have been designed in cases where actual competition "in the field" was impossible – designs which the competition agencies have been involved in formulating.[9]

26. A number of sectoral regulations explicitly require that the TDLC evaluate existing market conditions in order to, for example, make decisions on issuing rate regulations[10] or establish the conditions under which a given concession may be offered.[11]

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9 *"In Chile, at the beginning of the 1980s, and prior to the privatisation of enterprises, the regulatory frameworks for the electricity and telecommunications sectors were modified. These frameworks draw a separation between potentially competitive segments and monopolies. However, insufficient attention was given to the circumstances necessary for new providers to enter the market under conditions equal to those of established enterprises in segments where competition was possible. First of all, the degree of horizontal concentration of the industries at the time of privatisation was high, with no economic justification based on economies of scale. Furthermore, regulation permitted vertical integration between essential facilities and competitive segments. Lastly, and perhaps more serious, the regulation of technical and economic conditions for access to essential facilities or for interconnection in industries with network economies was inadequate. Thus, while it was required that there be free access both to the electricity transmission network and to the communications network, the parties remained free to negotiate rates. This situation contrasts with the case of monopolistic services for end-users (electricity and fixed-telephone), which continued to be subject to a rate-setting regime. The problems that arose as a result of the vertical and horizontal integration of the privatised industries led agencies charged with protecting competition to examine these markets and issue a number of decisions aimed at creating conditions in which the markets would function more efficiently. The agencies also had to resolve a wide range of litigation between individuals. The entry of new competitors, along with the lack of regulation over some essential inputs, led to multiple conflicts that usually pitted the owner of an essential facility against its competitors in other segments of the industry. The new enterprises brought suit in connection with predatory practices by established enterprises as well as for discriminatory practices with regard to accessing essential facilities."* Serra, P., "Las Facilidades esenciales en la doctrina de los organismos de competencia chilenos". CEA Working papers, University of Chile, No. 104 (2001).

10 The General Telecommunications Law, No. 18.168 of 1982, states that *"in the case of national and international local and long-distance public telephone services… and in that of signal switching and/or transmission services provided as an intermediate service or through private circuits, there is an express determination by the TDLC that where existing market conditions are insufficient to guarantee a system of free rate-setting, prices or rates for services shall be set pursuant to the guidelines and procedures set forth in this Title"* (Article 29).

11 Law 19.542 of 1997, on Modernisation of the State Port Sector, provides that *"enterprises may lease their port assets or offer them as concessions for up to thirty years. However, when the purpose of the leasing or the concession is unconnected to the port activity, its duration may not exceed ten years. With regard to berthing facilities, the participation of third parties is to take place only through port concessions. In order for these concessions to be granted, there must be, at State ports or terminals in the region, another berthing facility – capable of receiving ships – that is of the same design as the berthing facility that is the object of the port concession; if such is not the case, the board of directors must have a report from the Court for the Protection of Free Competition… In such a case, the concessions shall be made under the terms established in the report referred to"* (Article 14).

27. The FNE can examine existing regulations to ensure that they do not unnecessarily restrict free competition. When the FNE believes that certain regulations could harm competition in a sector, it can take action to promote competition (advocacy), joining other regulatory entities to analyse the relevant regulations and discuss the rationality of their underpinnings. Likewise, the FNE can request that the TDLC make recommendations to the Government to eliminate or amend such regulations.

28. At the same time, the FNE is to issue reports requested by the TDLC in cases where the FNE is not a participating party or at the request of the Court in non-adversarial proceedings.

4. Powers of the Competition Authority with Respect to the Vertical Integration of an Essential Facility and to Vertically Integrated Monopolies

29. With regard to the powers of the TDLC to order the break-up of an enterprise or to impose conditions on a vertically integrated monopoly, section 2 of article 26 of DL 211, of 1973, establishes that *"In the definitive ruling, the Court may adopt the following measures:*

- "Modify or terminate actions, contracts, pacts, systems or agreements that are contrary to the provisions of the present law;
- "Order the modification or dissolution of firms, corporations and other private-law juridical persons that have been involved in the actions, contracts, pacts, systems or agreements referred to in the previous item;
- "Impose fines or levy sums to be paid to the government, up to an amount equivalent to 20,000 annual tax units…"

30. Regarding the use of these powers, the following decisions can be cited:

4.1 Resolution Commission, Ruling No. 389/1993 of 4/16/1993, on multicarrier systems in long-distance telephony (See above § 17 – 19)

4.2 Central Preventive Commission (Comisión Preventiva Central, or CPC) Judgment 1045/1998 of 8/21/1998, on the single-operator port concession scheme

31. The port enterprises of Valparaíso and San Antonio – both located in the same region – and of Talcahuano, all State-owned and charged with operating the ports, decided to simultaneously offer four concessions for bid. The port enterprise concessions of Valparaíso and San Antonio oversaw three of the total six berthing facilities in the two cities' ports. The enterprises chose the integrated operation (single-operator) scheme, viewing it as the most efficient system for reducing the problems in co-ordinating port activities and facilitating investment in equipment for transferring cargo. These decisions required them to request a report from the Central Preventive Commission, predecessor to the TDLC, with respect to the overall conditions relating to bidding requirements.

32. In addition to requesting the report, the port enterprises attached a study outlining the general conditions for bidding, which appeared to be a necessary element, pursuant to the provisions of the law, to avoid the risk of abuse of dominant position.

33. Among the conditions were limitations on the horizontal integration[12] that were less restrictive than those defined in the law, restrictions on vertical integration,[13] additional standards for transparency, the possibility of imposing price ceilings, and, indirectly, quality standards.

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12 In terms of restrictions on the horizontal integration of port operators, the judgment stipulated that a concessionaire, any of its shareholders holding more than 15% of the enterprise's capital or voting rights or

34. These limitations do not constitute an impediment to participating in tenders. However, in the event that the concession is awarded, the company that is awarded the concession must comply with the restrictions on participation mentioned above, reducing any excess participation in other ports within the time periods determined by the ruling in each case.

5. Procedures followed to Deal with Anticompetitive Practices on the part of Essential Facility Controllers

5.1 TDLC, Ruling No. 29/2005 of 9/12/2005, the "FNE v. Transbank"[14] *case*

35. This decision sets forth the FNE determination that the conduct of Transbank S.A. had been discriminatory in returning part of the commissions charged to card issuers that were their partners, a practice that it did not follow in the case of the one card issuer Transbank provided services to that was not a partner. The TDLC stated that *"The reverse payments in question discriminated in favour of Transbank partners, with there being no other apparent justification for the action. Moreover, such discrimination could come to constitute a barrier to entry to the financial system, in that Transbank, in the Court's opinion, has the characteristics of an essential installation… Thus, potential new financial institutions not accepted as Transbank partners would face costs in operating their credit and debit card services not incurred by entities that are partners of said enterprise"* ("Considering" clause 27).

36. In terms of remedy, the TDLC approved the partial compromise between Transbank and the FNE establishing that "Transbank will provide free access to card operation services for issuers that are authorised by the Central Bank and whose card operations are overseen by the Superintendency of Banks and Financial Institutions (Superintendencia de Bancos e Instituciones Financieras, or SBIF). The rates to be charged to issuers for the services provided shall be applied across the board, shall be objective, and shall not be arbitrarily discriminatory, and they must meet the requirements of SBIF circulars…" ("In view of" clause 8.6.).

5.2 TDLC, Ruling No. 88/2009 of 10/15/2009, the "OPS et al. v. Telefónica Móviles Chile (TMCH)" case

37. In this decision, the TDLC determined that TMCH engaged in a practice of arbitrary discrimination in pricing that resulted in cutting off competition at the margins for those competing against it in providing fixed-mobile (on-net) call termination services, and in a practice of refusal to sell, for the purpose of expanding its dominant position as a mobile telephony service provider to the related market of fixed-mobile (on-net) call termination services.

38. Consequently, the TDLC imposed the following measures:

> *"(3) PROHIBIT TMCH from charging companies that offer fixed-mobile (on-net) call termination services arbitrarily discriminatory prices compared to the prices it charges its other mobile telephone service clients;*

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receiving more than 15% of its earnings, directly or indirectly, as well as those with more than a 15% share in the ownership or operation of private ports in the region, may not hold more than a 15% share in the ownership or voting rights, and may not receive more than 15% of the earnings, of a concessionaire firm of another State berthing facility in the same region.

13 With regard to the limitations on vertical integration, said judgment established the category of "major users", which may not hold, in total, directly or indirectly, more than 40% of the capital or voting rights, or receive more than 40% of the earnings of the concessionaire enterprise of a berthing facility.

14 See above § 5-6.

"(4) ORDER Telefónica Móviles de Chile S.A. to refrain in the future from engaging in any action or agreement that entails discriminations based on the characteristics of those accessing its services, unless such action or agreement is based on objective circumstances and is applicable to all parties in similar conditions…"[15]

6. Powers to Investigate and Sanction Acts of Discrimination on the Part of the Owner of an Essential Facility – Technical Knowledge of the Competition Authorities

39. Pursuant to article 39 of DL 211, the FNE may "(a) Initiate investigations it deems appropriate to identify any violations of this law". At the same time, article 18 of DL 211 empowers the TDLC to "be apprised, at the request of the interested party or of the National Economic Prosecutor, of situations that could constitute violations of the present law"; and, pursuant to article 26 of the same law, the TDLC may sanction violators with fines and may adopt measures designed to change or end actions, contracts, pacts, systems or agreements that undermine free competition.

40. In terms of technical capacity, the FNE currently has a staff of approximately 88, organised by a Directorate that oversees the Service (made up of the National Economic Prosecutor's Office and the National Deputy Prosecutor), four divisions – two line divisions (covering investigations and litigation), one Research Division, and an Administration and Management division – one department (Institutional Relations) and a set of units (Internal Accountability, Internal Audit and Regional Co-ordination).

41. Seventy-five percent of the economists and 50% of the attorneys at the FNE have postgraduate training (general-education master's degrees in economics or specialised training in competition policy, masters or other post-graduate degree in competition law or economic law). The academic level of training provides a good theoretical foundation for these experts and indicates the professional capacity of the staff to conduct complex economic analysis. Moreover, frequently these professionals, as part of their training, take academic courses or participate in international specialised forums or workshops, such as the International Competition Network Workshops. Thus, the professionals of the FNE have significant analytical capacities for dealing with complex economic and legal issues.

42. In addition to the above, the FNE, in certain cases, commissions economists in the market to conduct their own studies, which serve to support the FNE in its competition litigation. These studies, which enter the public domain once the FNE has presented them as background material in cases that are ongoing at the TDLC, are financed with resources specific to the Service, with in-house staff serving as the institutional counterpart.

43. Lastly, all competition cases dealt with at the FNE are analysed by an interdisciplinary team made up of at least one attorney and one economist.

44. The TDLC, for its part, is composed of five members (Ministers), of which two, by express provision of the Competition Law, must be university-degreed professionals or have post-graduate degrees in economics. Similarly, the Competition Law envisages that the TDLC will have on staff two university-degreed professionals in the area of economics who will assist in analysing the cases. The foregoing highlights the high level of specialisation at the TDLC and its capacity to analyse and duly consider the technical-economic factors involved in specific cases being examined.

[15] Numbers 3 and 4, section II of the operative part of Ruling No. 88/2009 of the TDLC. The TDLC also imposed a fine on the enterprise against which suit was brought. Ruling confirmed by the Supreme Court, Ruling 07.07.2010, case No. 8077/2009.

ANNEX: SECTORS IN WHICH THERE IS A LEGAL MANDATE TO PROVIDE ACCESS TO ESSENTIAL FACILIITIES

(A) Law No. 19.940, which amends DFL No. 1 of 1982, General Electricity Services Law (Ley General de Servicios Eléctricos, or LGSE)

1. During the 1980s, the electricity sector underwent deregulation and privatisation. In the last 10 years, a series of modifications in the legislation were introduced. In 2004, Law No. 19.940 was passed. Its purpose was to "*eliminate or reduce the obstacles to investment in the sector, improve and regulate the quality of service, and specify or clarify aspects of the regulations that caused uncertainty or disputes between stakeholders".*[16]

2. Among these modifications, the law established that transmission and subtransmission systems constitute a public service (article 7, section 3), and introduced a new Title III in the LGSE, making transmission a totally regulated sector. This put an end to the high degree of uncertainty surrounding pricing for transmission, which previously occurred through free negotiation between generating and transmission companies.

3. The new law established a regime of open access to the installations connected with the trunk transmission systems and the subtransmission systems of each electricity system.[17] Article 71-5 of the law states: *"The installations of trunk transmission systems and of the subtransmission systems for each electricity system shall be subject to a regime of open access, and may be used by third parties, under technical and economic conditions that do not discriminate among users, by paying for use of the transmission system, pursuant to the rules established in Title..."*

4. The owners of installations for trunk transmission systems and subtransmission systems may not deny any interested party access to transportation or transmission services for reasons of technical capacity, without prejudice to the fact that, by virtue of the powers provided by law or through regulations to the economic load dispatch centre to operate the electric system in a co-ordinated fashion, inflows and outflows shall be limited, without discriminating against any user.

(B) Law No. 19.542, which establishes Standards for Modernisation of the State Port Sector

5. This 1997 law transformed the existing public ports into autonomous State enterprises and made them part of the Public Enterprise System (the agency responsible for supervising and monitoring the management of State enterprises).

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16 MALDONADO Pedro, HERRERA Benjamín: "Sostenibilidad y seguridad de abastecimiento eléctrico: estudio de caso sobre Chile con posterioridad a la Ley 20.018". ECLAC, United Nations, Chile 2007, p. 56.

17 Article 225(a) of the General Electricity Services Law defines the Electric System as the *"set of installations of mutually connected electricity-generating plants, lines of transport, electricity substations and lines of distribution that make it possible to generate, transport and distribute electric energy".* The interaction between the segments of generation, transmission and distribution make up the Chilean electricity market which, further, is divided geographically into four sections: the Large Northern Interconnected System (SING), the Central Interconnected System (SIC), the Aysén System and the Magallanes System.

6. The objective of this law was to ensure that State ports be developed with a view to the possibility of incorporating private capital, by allowing port enterprises to concession the management of berthing facilities and of the ferry terminals that they oversee – this with an eye to fact that the rapid expansion of Chile's foreign trade made for insufficient freight transfer capacity at State ports over the short term, particularly in places within the central zone, where for geographic reasons the possibility of developing new ports is highly limited.[18]

7. Law 19.542 contains a number of provisions related to safeguarding competition and the provision of port services under non-discriminatory conditions. The relevant provisions are as follows:

- Article 14, section 4: "The concessionaire, shall be required to use the assets provided through the concession to serve ships and move freight, provide adequate maintenance and other services, and establish pubic rates under non-discriminatory conditions."

- Article 21. All port services provided by firms, even when the services are provided to the central government, municipalities or other State entities, shall be compensated pursuant to current rates, which shall be public and may not be arbitrarily discriminatory.

  Without prejudice to the characteristics of the enterprises carrying out these functions, when these companies provide services or use berthing facilities, they may not engage in or execute actions or contracts that affect free competition.

- Article 22. Each enterprise shall have a set of internal regulations on the use of berthing facilities for each port it oversees, which it shall propose to the Ministry of Transportation and Telecommunications for its approval, rejection or modification.

  This set of regulations, to be published in the *Diario Oficial*, shall meet objective technical criteria and be non-discriminatory, shall further the efficient use of port infrastructure and the harmonious conduct of port activities, and shall guarantee the right of free choice on the part of users with respect to the services provided at berthing facilities and the independence of individuals who carry out functions therein, limiting their involvement to what is indispensable for proper functioning. This set of regulations shall be an integral part of all berthing facility bidding.

(C) General Telecommunications Law No. 18.168

8. The criteria introduced by the Resolution Commission at the beginning of the 1990s were later incorporated in legislation and are part of the regulatory framework governing the telecommunications sector. Article 24 bis of said law establishes that:

- The concessionaire of public telephone services shall offer, supply and provide all concessionaires of intermediate services that provide long-distance service the same type of access or connection to the telephone network. Likewise, the concessionaire may not discriminate in any way whatsoever in regard to, among other things, quality, extent, term, value or price of the services it provides for the purpose, or with the motive, or for reasons, of access or use of the multicarrier system.

[18] "Further, the ports, for geographic reasons, are an essential facility for the transport of maritime freight. Moreover, they are an essential activity for the economy, given the importance they have for foreign trade, the country's development, and maritime transport. For this reason, port services can become an instrument for gaining competitive advantages in other businesses." Pablo Serra, Las Facilidades esenciales en la doctrina de los organismos de competencia chilenos.

- The concessionaire of public telephone services shall offer, supply and provide all concessionaires of intermediate services that provide long-distance service, under the same economic, commercial, technical and informational conditions, the facilities they need to establish and operate the contracted multicarrier system.

9. Article 25, for its part, refers to the obligation to accept interconnections for the purpose of permitting communications.

10. Recently, Law No. 20.453 of 2010, which amended the General Telecommunications Law (Ley General de Telecomunicaciones, or LGT), introduced criteria of neutrality in the use of the network for internet users and consumers. Article 24(h) of the LGT currently establishes that:

- The concessionaires of public telecommunications services that provide service to internet access providers, as well as these latter providers…: (a) May not arbitrarily block, interfere with, discriminate in permitting the exercise of, impede or limit internet users' right to use, send, receive or offer any legal content, application or legal service through the internet, or any other type of legal activity or use carried out through the network. They must offer each user internet access service, or connectivity with the internet access provider, as the case may be, that does not make arbitrary distinctions, in terms of content, applications or services based on the source of origin or ownership thereof, taking account of the different internet connection configurations that are part of the contracts in force with users. In short, the concessionaires of public telecommunications services and internet access providers may take measures or actions needed to manage traffic and oversee the network, within the exclusive sphere of activity for which they have been authorised, provided that this is not for the purpose of carrying out actions that affect or could affect free competition.

(D) Regulations on provisional and definitive concessions for the distribution and transportation of gas. Supreme Decree 263, Ministry of Economy, Development and Reconstruction

11. The relevant provisions of this set of regulations are as follows:

- Article 3. Enterprises interested in providing public services to distribute gas in a given geographic area shall have a definitive gas distribution concession that is authorised to provide such services and to construct, maintain and operate the corresponding gas distribution network in said geographic area.

- Article 11. Concessionaires of transportation shall operate under the "open access" system. "Open access" shall be understood to mean the offering of transportation services on the part of licensed enterprises under the same economic, commercial, technical and informational conditions with respect to the available transportation capacity.