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Working Party No. 2 on Competition and Regulation

COMPETITION CONCERNS IN PORTS AND PORT SERVICES

-- Chile --

27 June 2011

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1. The Framework

1. Chile is situated in the South-West region of South America and has a coast line of 3,998 miles. It is an open economy that has followed a highly export oriented growth model during the past decades. Thus efficiency in maritime transport and hence development in port facilities is crucial for the competitiveness of our products.

2. In the mid-nineties, Chile faced significant constraints that prevented investment in development of new port facilities and the extension of existing ones. The main public ports at the time were owned by *Emporchi*, a state-controlled enterprise that was unable to attract investors to participate in the construction of new port facilities. Since the privatization wave of the late seventies, *Emporchi* was not the only port owner and manager. A few privately-owned ports begun to challenge *Emporchi*'s business in some segments. Some of these privately-owned ports were for private use only, but some others allowed open or public use. In addition, long-term contracts between *Emporchi* and private parties for ports' management reduced the scope of activities *Emporchi* had performed in the past.

3. These restraints were seen as a threat to the Chilean growth model that was highly dependent on exports and foreign trade. Capacity of existing port facilities was considered insufficient and thus unable to support this growth model. Furthermore, the coastal morphology and the absence of natural harbours did not facilitate the construction of new ports at a reasonable cost. Facilities for supporting activities in ports, such as warehousing, were also scarce and due to their location –most of them in urban areas– there were limited alternatives for expansion.

4. In order to overcome this adverse scenario, the government designed a long-term program for developing state-owned ports. The purpose of the program was to attract investment and to promote intra-port competition as well as competition between ports. The program included submitting a bill to the Congress, which was finally approved as Act N° 19.542/1997 (hereafter, 'ports' Act'). The Act replaced *Emporchi* by 10 state-owned companies (hereafter 'port SOEs', or, in singular, 'port SOE'), each of them in charge of exploiting one state-owned port, mainly by means of private participation (concessions). Their main duty was to allocate by means of concessions port facilities (in particular, anchor fronts or terminals), among interested parties. Two concession regimes for terminals were applied: one allowing for vertical integration between the concessionaire of port services and the supporting services in the dock area (*mono-carrier* system), and the second allowing for different companies providing supporting services in the dock area (*multi-carrier* system).

5. This regulatory change has proved to be successful. Tenders for concessions began progressively in order to facilitate adaptation. In 2006 there were 10 state-owned ports for public use who's facilities had been granted in concession or were about to be granted, in addition to 15 privately-owned ports for public use and 11 privately-owned ports for private use.

6. In relevant cases and for the reasons mentioned above, port facilities have been considered crucial by competition authorities. In fact, port facilities in Chile present producers of exported goods with significant advantages, which are very difficult to duplicate. This highlights the importance of stimulating investment and competition in port services.

7. This contribution presents the provisions of the ports' Act and the subsequent regulations that attempted to remedy competition concerns present since the very design of the long-term program for developing state-owned ports (II). Section III mentions how these provisions have been enforced by Competition Authorities, followed by an overview of recent relevant case law around the assessment of ports' competitive impact (IV). Concluding remarks are presented in the final section (V).

2. Ensuring competition in the ports' Act provisions

8. The ports' Act and the subsequent regulation (*reglamento*) consider different provisions aimed at safeguarding competition principles in the sector of ports.

9. First, the provisions define a number of activities that can be performed by the private sector only, such as loading and unloading cargo and carrying it between the dock and the ship or vice versa. Several other activities, such as warehousing, are considered best to be performed by the private sector instead of the port's SOE itself (ports' Act, article 5).

10. Second, any form of participation by a private party in the exploitation of port facilities, whether by concession, lease, or by joint corporation with the port SOE, should be preceded by an open tender (ports' Act, article 7).

11. Third, the exploitation of anchor fronts is a major activity that the port SOE should perform through of private party, by granting concession for up to 30 years (ports' Act, article 14).

12. Fourth, article 21 of the ports' Act makes Competition Act explicitly applicable to port SOEs' conducts.

13. Fifth, the use of each anchor front is subject to internal regulation issued by the corresponding port SOE and approved by the Ministry of Transports. The internal regulation should be based on technical criteria, be objective and ensure compliance with non-discrimination principles. This internal regulation is included in the tender conditions (ports' Act, article 22).

14. Sixth, among other, the port SOEs boards' statutory functions include: to promote competition within the corresponding port; to ensure non-discrimination among the port users; to preserve and reinforce levels of productivity, efficiency and competitiveness in the port's management. (ports' Act, article 31).

15. Seventh, the ports' Act calls for additional regulation (*reglamento*) to define the aspects of tender design, with the aim to –according to the ports' Act– set up stable conditions for tender proceedings, facilitate competition and ensure fairness among port facilities concessionaires and between them and private port owners. (ports' Act, article 51).

16. Eighth, aiming to safeguard competition, the ports' Act considers three cases where the Competition Authority (formerly, the *Comisión Preventiva Central*, today, the Competition Tribunal or 'TDLC'[1]), should review the conditions of tenders called by port SOEs, when granting concession of an anchor front:

1. If in the corresponding administrative region, the only anchor front capable of supplying services to the largest ship model (*nave de diseño*) is about to be granted in concession, tender conditions for the concession should be reviewed by the Competition Authority (ports' Act, article 53);

2. If in the corresponding administrative region, the only anchor front capable of supplying services to the largest ship model (*nave de diseño*) is being operated under a multi-carrier scheme (i.e. various companies offering services in the dock area), and it is about to be granted in concession under a mono-carrier scheme, tender conditions should be reviewed by the Competition Authority (ports' Act, article 23);

[1] TDLC stands for *Tribunal de Defensa de la Libre Competencia*.

3. If a concessionaire is interlinked with concessionaires of other anchor fronts capable of supplying services to the largest ship model (*nave de diseño*), in the same port or any other port in the same region, tender conditions should be reviewed by the Competition Authority (ports' Act, article 14).

17. The conditions determined by the Competition Authority should be abided by the port SOEs in the design of tenders.

18. The following section (III) describes cases where Competition Authorities have, as required by the Act, defined tender conditions aimed to reduce risks in competition associated with vertical or horizontal integration. A description of cases regarding competition and ports with broader considerations is contained in section IV.

3. Enforcing ports' Act competition provisions

19. In 1998, a year after the enactment of the ports' Act, three major port SOEs requested the Competition Authority to review the competitive conditions for the tenders of port facilities in the three main ports of the country. The request had been submitted by the port SOEs of Valparaiso, San Antonio and Talcahuano-San Vicente, jointly representing 60% of the total cargo transferred by Chilean ports. The three companies had decided that a mono-carrier scheme would be more appropriate than a multi-carrier scheme[2].

20. The Competition Authority in charge at the time (*Comisión Preventiva Central*) reviewed the proposed tender conditions submitted by the port SOEs and issued a report (*Dictamen N° 1045, August 21st, 1998*). The authority considered that the proposed provisions of tender conditions ensuring equal access, non-discrimination and duty to deal by the concessionaire (i.e. preventing abuse of dominance) were already in the Act and the subsequent regulation and hence concluded that there was no need to repeat them in the tender terms. On the contrary, the authority was cautious and strict regarding vertical and horizontal integration caps, as detailed in what follows.

21. On horizontal integration, the Competition Authority set the following conditions: (i) If a business group owns more than 15% of the corporate concessionaire of an anchor front, the group or its members are not allowed to own directly or indirectly more than 15% of another corporate concessionaire of an anchor front in a public port of the same administrative region; and (ii) Business groups or its members owning private ports in more than 15% of the capital are not allowed to own directly or indirectly more than 15% of a corporation concessionaire of an anchor front in a public port of the same administrative region.

22. Parties involved are given a period to adjust to these conditions which should also be included in the bylaws of any corporate concessionaire. Port SOEs have the power to terminate the concession in case of infringement.

23. On vertical integration, the Competition Authority set the following limitation: The group of 'relevant users' cannot own more than 40% of political rights, economic rights or both in the corresponding corporate concessionaire. 'Relevant users' is a concept defined by the Competition Authority as, by and large, any user –or the business group it belongs to or any member of the latter– who transfers a significant amount of cargo in the corresponding administrative region and in the corresponding anchor front.

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2 According to the ports' Act, in a mono-carrier scheme only one company is allowed to offer services in the dock area; in a multi-carrier scheme, several.

24. The corporate concessionaire's bylaws should include the aforementioned limitation and instruct the stockholders to divest shares, in case of exceeding the limits. Concessionaires should report to the port SOE every three months about their stockholder interlinks deemed relevant for these purposes. Port SOEs can unilaterally terminate the concession in case of infringement of these conditions, considered as a serious breach of the concession contract.

25. These provisions regarding restrictions on horizontal and vertical integration should last for the entire concession term, though they can be subject to revision after request of a concessionaire after the completion of 5 years of the concession contract. The revision of conditions, by the port SOE, should be preceded by a review by the Competition Authority, who should evaluate the current competition conditions in the market and the impact of potential reduction of the ownership limits.

26. As was likely to expect, the report of the Competition Authority was challenged by potential bidders of tenders for concessions already members of the ports and/or maritime services' industries. However, challenges were dismissed. It was understood that the *Comisión Preventiva* was acting not in its general jurisdiction as a Competition Authority, but under a special clause of the ports' Act that did not provide for appeal against the issued report[3].

27. More than five years have passed since the first concessions were granted. In 2006, the concessionaire of San Antonio port SOE requested a revision of the limits on vertical integration. The Competition Tribunal was entitled to decide on the issue. It reduced the restriction, allowing the concessionaire's corporation to be owned by the group of relevant users by up to 60% (instead of the former 40% cap)[4].

28. Beyond this first group of concessions in the ports of San Antonio, Valparaíso and Talcahuano-San Vicente, subsequent concessions were initiated by other port SOEs. Iquique (2000)[5], Antofagasta (2002)[6] and Arica (2004)[7], followed a quite similar path before the competition authorities.

29. Since the Competition Tribunal was established, in 2004, additional tenders for concessions have been subject to review, particularly in 2009[8]. In some cases, the TDLC has challenged the tender criteria for adjudication[9].

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3 Challenges motivated the issuing of the following decision: *Comisión Preventiva Central, Dictamen N° 1046, September 1st, 1998; Comisión Resolutiva, Resolución N° 529, September 9th, 1998; Comisión Resolutiva, Resolución N° 530, September 30th, 1998; and Supreme Court, December 9th, 1998, docket number 3177-98.*

4 *Tribunal de Defensa de la Libre Competencia, Resolución N°11, January 24th, 2006.*

5 At the time of the tender for concession, no request was submitted before the Competition Authority. However, in 2004, the concessionaire and a stockholder submitted a consultation before the Competition Tribunal regarding whether the limitations contained in *Dictamen N° 1280* –basically the same as *Dictamen N° 1045*– were applicable in their case, allegedly, no. The Competition Tribunal dismissed the submission, ruling that limitations were in force and applicable. *Tribunal de Defensa de la Libre Competencia, Sentencia N°3, June 29th, 2004.*

6 *Comisión Preventiva Central, Dictamen N° 1209, June 20th, 2002.*

7 *Comisión Preventiva Central, Dictamen N° 1280, January 16th, 2004.*

8 San Antonio port SOE requested a review twice in 2009, and others included Coquimbo port SOE and Valparaíso port SOE, both in 2009. *Tribunal de Defensa de la Libre Competencia, Informes N°3, N°4, N°5 and N°6, 2009.*

4. Recent case law on competition and ports

4.1. Competition constraints in ports

30. In competition authorities' decision making, several elements have been identified as potentially limiting concessionaire's abuses. This section explores the significance of constraint mechanisms with a special focus on alternative modes of transport, use of ports located in nearby areas and competing terminals within a port.

4.1.1. Alternative modes of transport

31. Substitution by alternative modes of transport have been explicitly analysed when a competition case regarding transportation services has been raised[10]. So far, alternative modes of transport are not considered as an effective constraint in the framework of analysis for assessing ports' market power.

32. For international exports cargo, considering the geographical location of Chile as well as the type and destination of products exported, it is unlikely that alternative modes of transport can substitute maritime transport in many relevant sectors. Hence, alternative modes of transport are not considered as an effective constraint to ports' market power. On the contrary, for cabotage, alternative modes of transport seem a likely constraint. However, there are no available cases to illustrate the point so far.

4.1.2. Ports located in nearby areas (inter-port competition)

33. One of the aims of the ports' Act was to promote and reinforce competition among ports. From the point of view of users, a port has a scope of influence which may overlap with the scope of influence of another port. Being this the case, the likelihood of competition between these ports increases as does the effectiveness of reciprocal discipline. This is the case of San Antonio and Valparaíso as well as Talcahuano and San Vicente. In addition, sometimes there is a privately owned-public use port which scope of influence also overlaps with the others[11].

34. The existence of an actual or potential competitive port restricting potential abuses by the port in question has been assessed in a few cases.

35. In *Sal Punta de Lobos* a salt producer challenged exclusionary conducts (mainly, sham litigation) by an incumbent who vertically integrated salt production and private port services –including facilities for salt transportation and warehousing. The Competition Tribunal's condemnatory ruling in this case assessed

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9 For instance, imposing the lowest tariffs for users as the adjudication criteria, challenging broad discretion powers of the SOE to declare the tender void, and challenging the basis for calculating the rent to be paid by the concessionaire to the SOE, *Tribunal de Defensa de la Libre Competencia, Informe N°6, October 15th, 2009, section 9.2.*

10 *E.g. Tribunal de Defensa de la Libre Competencia, Sentencia N° 55, June 21st, 2007,* discarding substitution of land and maritime transportation for air cargo transport, held that international cargo carried by air is particular in nature (light weight, small volume, need of expedient service) and different from cargo carried internationally by land or sea (Rc. 16°, 17°), upheld by the Supreme Court. *Tribunal de Defensa de la Libre Competencia, Sentencia N° 95, January 14th, 2010,* held that air transport from the continent to Eastern Island may be considered as an imperfect substitute for maritime transportation (Rc. 15°), upheld by the Supreme Court.

11 This is the case, for instance, of *Ventanas* port, who's scope of influence overlaps with San Antonio's and Valparaiso's scopes of influence, even though *Ventanas* is oriented to bulk transfer rather than containers.

the likelihood for the plaintiff to build an alternative port. An expert's report submitted during the proceedings had identified no less than 6 locations available for building a new port for salt transportation. However, the TDLC taking into account the distance from the salt production sites, first reduced the alternatives to only two. Later, it totally discarded alternative ports, the main reason being the lack of production volumes significant enough to justify the costs of building an alternative port[12].

36. In the case of *AES Gener vs. Electroandina,* these two power carbon generator companies discussed the access to carbon port facilities owned by one of them. The option of constructing another competitive port or using alternative ports was assessed during the trial. Parties settled before the issuing of the ruling by the TDLC. The TDLC only ruled on the price adjustment clause, under the request of the parties[13].

37. The analysis performed by the TDLC when issuing reports, as required by the ports' Act, demonstrates that the mere existence of a port which scope of influence overlaps with the scope of another is not a sufficient condition to guarantee effective competition. There are several additional criteria to consider such as the kind of cargo (containers vs. bulk), size of the ships available to anchor (panamax vs. post-panamax) and operational efficiency (i.e. volume of cargo transferred), which are crucial for identifying the real degrees of substitution. In this sense, evidence of substitution should be submitted for each case, in order to demonstrate, for instance, whether it is effective for users to switch ports along a relevant period of time. Capacity restrictions and the likelihood of new investment in order to extend capacity are also crucial factors for this task[14].

4.1.3. Competing terminals within a port (intra-port competition)

38. So far, intra-port competition has taken place mostly between the corresponding port SOE and the concessionaires. This is so, because only recently multiple anchor fronts have been granted in concession by the same port SOE[15].

39. In order to guarantee a level playing field, the port SOE has the legal duty to not discriminate and to issue regulations for the use of each anchor front. In addition, the port SOEs' boards have the legal duty to promote competition within the corresponding port among different terminals.

4.2. Port facilities and market power

40. Many decisions of the Competition Authorities have identified elements conferring market power to port services whether regarding a specific case or ports in general in Chile. Reasons around entry barriers are the most common.

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12 *Tribunal de Defensa de la Libre Competencia, Sentencia N° 47, December 5th, 2006* (Rc. 59°-72°)

13 *Tribunal de Defensa de la Libre Competencia, Sentencia N° 36, January 31st, 2006.*

14 For an illustration on these points, *Tribunal de Defensa de la Libre Competencia, Informe N°6, October 15th, 2009, section 8 and subsequent,* where degrees of competition between specific terminals of the ports of Valparaíso and San Antonio were assessed.

15 In fact, port SOE San Antonio granted in concession in May 2011 a second terminal for 20 years. For this tender, the current concessionaire of the other anchor front in San Antonio was not allowed to participate, according to the TDLC's report. The press highlighted the outcome of the tender since the incumbent and the new concessionaire each represent major business groups in Chile (Luksic/Claro and Matte/Angelini, correspondingly). El Mercurio, B6, Friday May 6th 2011.

4.2.1. Entry barriers

41. The first decision of the Competition Authority under the new publicly-owned ports framework in 1998, identified the following entry barriers for ports' services in Chile: (i) scarcity of natural harbours; (ii) limited availability of areas for extension of supporting services in ports; (iii) the ability of optimizing ports' capacity by means of improving management, which reduces incentives to new entry[16].

42. In particular, more recently, analyzing the entry conditions for new port services in the administrative region of Valparaíso (where San Antonio and Valparaíso ports are located) the TDLC held that the area has only a few natural harbours for building new ports and, even though it is technically feasible to adapt a new harbour for these purposes, this would imply very high costs (such as building a mole and dredging costs). These being sunk costs, trying to replicate incumbents' facilities was considered highly risky for potential entrants. Moreover, there was no specific project regarding construction of new ports for public use in the Valparaíso region. Thus, the entry of new competitors for port services by means of new ports was unlikely for the short and the medium-run, which was the relevant period for the purposes of constraining the market power of the would-be concessionaire in San Antonio. In addition there were no specific projects aimed at extending Valparaíso or San Antonio ports, other than the long run projects associated with the terminals already granted in concession or the investment projects of the terminals that were about to be granted in concession in San Antonio. Finally, the possibility of current privately-owned-privately-used ports to turn into publicly-used facilities was also discarded. All the above led the TDLC to conclude the existence of significant entry barriers and to reaffirm that the following tender for concession was the only opportunity for new entry. This justified a careful tender design aimed at ensuring effective *ex post* competition[17].

43. In *Sal Punta de Lobos* a different kind of entry barrier was identified. Since port facilities in this case were considered as an essential facility for the production and distribution in salt market, the incumbent's abuse, in its right to petition, aimed at obstructing the construction and use of an alternative port, were considered as a strategic or artificial entry barrier raised by the incumbent with the sole purpose of deterring and retarding new entry[18].

4.3. Harm to competition

44. In a previous OECD roundtable regarding *harm to competition* our contribution, based on the review of our case law, led us to conclude that Chilean competition authorities do not follow a single theory in terms of harm to competition. In case law, identifying harm to competition seems easier in cartels and exploitative abuses than in exclusionary conducts[19].

45. Since most interventions by Competition Authorities regarding port services have taken place on an *ex ante* basis, the approach followed has been mainly structural rather than impact-based.

46. In this sense, avoiding or restricting vertical and horizontal integration as well as minimizing the risk of exploitative abuses by concessionaires against users, appear to be the underlying reasons of several decisions.

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16 *Comisión Preventiva Central, Dictamen N° 1045, August 21st, 1998, p.24.*

17 *Tribunal de Defensa de la Libre Competencia, Informe N°6, October 15th, 2009, section 8.4.*

18 *Tribunal de Defensa de la Libre Competencia, Sentencia N° 47, December 5th, 2006* (Rc. 75°-95°)

19 "Roundtable on the quantification of Harm to Competition by National Courts and Competition Agencies." Note by the Delegation of Chile, February, 2011.

4.4. Remedies

47. As mentioned in the previous section, most competition law remedies have been imposed on an *ex ante* basis, being preventive and structural in nature. The most significant have been the vertical and horizontal integration caps described above[20].

48. In *Sal Punta de Lobos* in spite of the settlement between the plaintiff and the defendant, the FNE's complaint continued and the TDLC issued a condemnatory ruling including fines and the request that the defendant notify the TDLC future acquisitions of ports with salt transfer facilities[21].

49. In 2010, the TDLC issued a ruling regarding a complaint by a port user against the corresponding concessionaire and the port SOE. The plaintiff claimed to be affected by the establishment of an abusive system of priorities in port services that was contained in a guideline issued by the concessionaire. Unfortunately, the TDLC had to dismiss the complaint since the facts occurred beyond the statutory limitations period[22]. The decision on remedies in such a case could have been very interesting.

5. Concluding remarks

50. A new wave of concessions has been initiated during 2011. San Antonio, Valparaíso and Talcahuano port SOEs are seeking to grant new terminals in concession.

51. In May, a second concession was allocated in San Antonio. This turns public-private intra-port competition into private-private intra-port competition, for the very first time.

52. The outcome was not similar to the last tender at Valparaíso. The latter failed to attract interested bidders due to concerns regarding the investment project design. Even if the incumbent concessionaire showed interest in extending its concession by committing to new investments, such an extension- and omitting a new tender- could be challenged in Court, since the purpose of the ports' Act is to promote intra-port competition, with different private parties participating as concessionaires.

53. Finally, Talcahuano is currently managing a tender for granting a new terminal in concession.

54. As this contribution describes, the role played by competition principles and Competition Authorities in the development of Chilean ports competitiveness has been very significant in the last fifteen years. Competition authorities' decisions have ensured a competitive structure for the port services restricting integration and preventing dominance abuses by concessionaires.

55. The role of private parties and competition in the future development of port services industry will certainly increase. Intra-port competition between private companies will become a reality, which will increase the likelihood of anticompetitive behaviour, whether unilaterally or collectively.

56. Thus, it is reasonable to expect in the future an increased involvement of competition authorities in monitoring and, eventually, prosecuting anticompetitive behaviour. A set of tasks not just limited to a structural or preventive approach will be needed, in order to achieve a close working partnership with port SOEs.

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20 *Supra*, section III.

21 *Tribunal de Defensa de la Libre Competencia, Sentencia N° 47, December 5th, 2006*.

22 *Tribunal de Defensa de la Libre Competencia, Sentencia N° 96, January 21st, 2010*, upheld by the Supreme Court.