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Working Party No. 2 on Competition and Regulation

EXCESSIVE PRICES

-- Chile --

17 October 2011

The attached document is submitted to Working Party No.2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 17 October 2011.

Please contact Mr. Frank Maier-Rigaud if you have any queries regarding this document [phone number: +33 1 45 24 89 78 -- Email address: frank.maier-rigaud@oecd.org].

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English - Or. English

1. Principles of pricing regulations in Chile

1. Where a pricing regulation scheme is in force, regulation is justified from an economic point of view and regulation is actually enforced or at least likely to be enforced by a regulator, Chilean competition authorities' intervention is unlikely. The absence of any of the said conditions or their weakness turns intervention more likely.

2. Even though a free price system is the general principle in Chilean economy, exceptionally, several products and services are regulated by legislation or derivative regulation[1]. These products and services belong nowadays mainly to the following sector utilities: telecommunications, electricity distribution, water distribution, sewage and disposal, infrastructure concessions and ports.

3. The most commonly used regulation model is known as the 'efficient company model', a mechanism that tries to emulate prices fixed by a company producing the demanded quantity at the minimum possible technical costs[2]. There are some exceptions: for example, in the case of infrastructure concessions, tariffs for users are the outcome of the competitive process among the bidders at the auction, provided that bids are under maximums fixed by tender conditions on the basis of historical records.

4. Competition authorities have a major role in pricing regulation. Sector regulations in different fields mandate that the Competition Tribunal (hereinafter, "TDLC") issues a report in order to define whether these products or services are provided on competitive or monopoly terms[3]. Only if provided on monopoly terms, regulation is justified. Several TDLC decisions have been issued on these grounds having also considered a technical report by Fiscalía Nacional Económica (the competition agency, hereinafter, "FNE"). A report of this kind is described in the following paragraph[4].

5. ***Local telephony tariffs*** **(TDLC, Report N° 2, January 30th, 2009)**[5]. The telecommunications regulator requested a report from the TDLC in order to obtain its technical assessment on whether local telephony services were provided under competitive or under monopoly terms, aiming at moving forward on tariff liberalization. The TDLC's report performs an extended overview of the sector, incorporates into its evaluation the development of technological convergence and defines as desirable the promotion of both inter-network and intra-network competition. The TDLC also held that mobile telephony is an actual and effective discipliner of fixed telephony, not considering the same regarding VoIP services. The broad

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1 By and large, regulation adopts different forms. Price regulation is one of these forms. Other means for regulation in Chile include entry restrictions, regulating market structure (e.g. limits to integration), ensuring open access and/or regulating interconnection duties, ensuring efficient allocation of limited resources and quota determination.

2 The main feature of the model is that company sustainability is directly considered for calculating tariffs. This translates into pricing at long term medium costs. This is the optimum when the company should self-finance and it is similar to the conditions defining prices in competitive markets. For details about this regulation model compared with others, Bustos, A., and Galetovic, A., "Regulación por Empresa Eficiente: ¿Quién es realmente Usted?", 86 Estudios Públicos, 2002.

3 Examples of these regulations are contained in gas regulations (DFL N° 23, 1931, article 31); telecommunications regulations (Act. N° 18.168, 1982, article 29 h)); water distribution and sewage regulations (DFL N° 70, 1988, article 12 A); electricity regulations (DFL N° 4, 2007, articles 147 and 184).

4 A similar task has been played by the TDLC even in decisions regarding adversarial excessive pricing cases. In this sense, TDLC recommended access price regulations in *Sanitarias* and amendments to internal regulations on tariffs in *Efe*. See summary of cases chart in Annex 1.

5 The report is available in this URL link: http://www.tdlc.cl/DocumentosMultiples/Informe_02_2009.pdf

and comprehensive analysis performed by the TDLC allowed it to conclude that even though companies identified as dominant in local services are still dominant, current market conditions do not make indispensable pricing regulations (maximum caps) for services related to local telephony. However, since their dominance still allows companies to incur in anticompetitive exclusionary conducts, behavioral regulations are still needed. TDLC's report additionally issued several recommendations to the regulator in order to promote competition in the sector.

6. In addition, the TDLC in different proceedings has criticized the corresponding regulation model[6] or, in order to assess defendants' arguments, has had to review the grounds behind pricing regulations[7]. A similar role has been played by the FNE when reporting on these cases.

2. Enforcement of pricing regulations by regulators

7. By and large, when a pricing regulation is in force, it is among the legal duties of the regulator to enforce the corresponding regulations.

8. However, it may be possible that the regulator holds that there is no infringement or for other reason refuses to enforce price regulations. In such a case, experience shows that the FNE would be reluctant to bring a suit grounded on excessive pricing infringement against the service provider and the regulator, however, private parties may submit a complaint directly before the TDLC and such scenario has motivated a few TDLC's decisions on excessive pricing in regulated sectors[8]. In some excessive pricing cases, however, such as *Edelmag, Sanitarias* or *Emelat*, the FNE has filed a complaint against the regulated entities, but not against the regulator.

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6 For example, in *SCL parking AE 2011* case, the TDLC's decision (May, 19th, 2011) approving the non-judicial settlement between the FNE and Santiago Airport Concessionaire (SCL) held that an ex – post amendment to a concession contract in matters such as its duration or tariff liberalization may be considered as an anticompetitive act, which may justify, at least, an ex – ante assessment of its potential anticompetitive risks. For the TDLC, these amendments alter in fact the tender object which had been considered by competitive bidders. In another case known as *Celulink* –a margin squeeze case- (TDLC Ruling N° 88, October 15th, 2009), the TDLC criticizes distortions in access charges tariffs regulations that have led companies to price discriminate between on-net and off-net calls and at the same time have triggered technology companies to develop arbitrage mechanisms to avoid this discrimination (Rc. 54°-56°).

7 For example, in *Voissnet I*, an exclusionary abuse case, the defendant argued that the alleged anticompetitive restrictions that had prevented the development of VoIP services were needed in order to protect revenues allowed by the proceedings for regulating tariffs. The TDLC dismissed the argument, holding that regulations provide for maximum caps and not for minimums: the purpose of regulations was to avoid excessive pricing and monopoly rents but not to ensure revenues in order to promote investment. (TDLC Ruling N° 45, October 26th, 2006, Rc. 54°-55°). In *PTLAndes,* the TDLC evaluated the methodology for costs calculation used in a report prepared by an expert witness, since the defendant had argued that tariffs charged were based on the costs of providing the corresponding services. The TDLC dismissed the argument disagreeing in part with the expert testimony by reasoning that costs that are explicitly related in the concession contract to other revenues and tariffs should not be considered among the costs of providing the questioned services. (TDLC Ruling N° 100, July 21st, 2010, Rc. 77°-80°). In *Edelmag* the TDLC held that the regulation of the monopolist energy distributor, i.e. tender conditions, do not guarantee a prefixed amount of benefits for the tender winner and nor cover effective cost, being both elements part of the inherent business risks. (TDLC Ruling N° 73, August 28th, 2008, Rc. 30°)

8 In these cases, the TDLC may request a technical report by the FNE, and this has been usually the case, but the legal action is handled and defended by the private plaintiff.

3. Excessive pricing under competition law jurisdiction. Experience in Chile

9. The Competition Act in Chile does not consider a specific provision on excessive pricing but includes pricing infringements among the many means an abuse of dominance may take place[9]. These broad grounds for excessive pricing infringement do not help too much with regards to the elements of the infringement or the criteria leading to intervention and those leading to refrain from any intervention. It is only by reviewing recent experience on excessive pricing enforcement by competition authorities that some light can be brought[10].

10. An active role of the FNE is indeed identified in 4 of the 7 excessive pricing cases summarized in the chart in Annex 1. In 2 of them, final consumers were directly harmed by excessive prices (*Edelmag* and *SCL Parking*) whereas harm to final consumers in the other 2 cases was more indirect. In the remaining 3 cases where the FNE played a role issuing a technical report, harm to final consumers was indirect too. The FNE has filed complaints against concessionaries of electricity distribution services and against concessionaries of water distribution & sewage services; it has settled with a concessionaire of infrastructure (airport) through a non judicial settlement approved by the TDLC. But in the other three cases, private claims against concessionaires and against a state owned company have not motivated FNE's intervention as a complainant.

11. As to the TDLC, since it is a judicial body in charge of adjudication, unless it dismisses its competence for adjudicating on a specific case at the beginning of a trial[11], it should decide on an excessive pricing case issuing either a condemnatory or acquittal ruling. From the 7 cases summarized in the chart in Annex 1, 5 TDLC's decisions are condemnatory[12], 1 decided on acquittal and 1 is a decision approving a non-judicial settlement. The decision on acquittal was based in the circumstance that the items challenged had a reasonable economic justification which excluded its abusive or excessive character. The following paragraphs describe the main common features of the 5 condemnatory TDLC's decisions, in order to identify what are the frequent grounds for enforcement.

3.1. Entry Barriers

12. Most of TDLC's condemnatory decisions on excessive pricing identify the corresponding entry barriers that grant market power to the defendant(s).

13. For instance, in *Sanitarias* the TDLC held that the defendants had economies of scale and scope that constitute entry barriers even beyond their concession area, particularly in geographic areas close to the concession area[13].

14. In *Edelmag* the TDLC identified that geographic conditions –an isolated region, impossibility of interconnection with other electric systems and its small size –low demand and small network, made unfeasible having more than one company serving the market[14].

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9 The wording provides as follows: "*Among others, the following shall be considered as acts, agreements or conventions that hinder, restrict or impede free competition, or which tend to produce said effects: b) Abusive exploitation by an economic agent or a group of economic agents, of a dominant position in the market*, **fixing sale or purchase prices***, tying the sale to the purchase of another product, allocating territories or market quotas or imposing other similar abuses*". Article 3, Competition Act (DL 211, 1973).

10 The main excessive pricing cases in the last years are summarily described in the chart in ANNEX 1.

11 The TDLC has never dismissed its competence for adjudicating on an excessive pricing case.

12 Among these five cases, one was overruled by the Supreme Court.

13 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 76°-81°)

15. In *Atrex* an excessive tariff imposed by the concessionaire for 'transit users', made economically unviable the operation of courier companies located outside the concession area[15].

16. In *PTLAndes*, the defendant being a concessionaire, legal entry barriers of its exclusive privilege were mentioned in broad terms and assumed rather than identified[16].

3.2. Dominant position

17. There are no condemnatory excessive pricing cases in Chile without the concrete identification of market power, dominant position or monopoly power.

18. This identification took place in Sanitarias in the following terms: a water distribution concessionaire has market power in those areas where it has scale and scope economies that cannot be replicated by entrants and its market power extends until the point where economies are completely compensated by the costs of extending its networks. All the real estate projects that were part of the trial where located within those areas where defendant had market power in the above terms[17].

19. In *Edelmag* the TDLC held that the grant of a contract to the defendant linked with its ownership of relevant facilities for generation and transmission of electricity gave the defendant a monopolistic position only restrained by the contractual obligations of the concession[18].

20. In *Atrex* as well as in *Efe* the exclusive rights over a facility or its ownership, its indispensability for the plaintiff, and the absence of alternative or substitute sites were considered factors giving the defendant a dominant position; sites in the first case were considered an essential facility for plaintiffs whereas in the second case essential facilities doctrine was explicitly discarded[19].

21. In *PTLAndes,* the defendant was a concessionaire, thus having an exclusive legal privilege for the exploitation of a service. The absence of substitutes economically viable was identified. Besides, the services provided by the concessionaire were required by law as mandatory for imports, hence turning demand into a completely inelastic one. All these factors were considered as giving defendant an 'absolute market power'[20].

3.3. Benchmark for competitive prices

22. From a formal point of view, if there are regulations setting up caps for tariffs or other tariffs regulations, these will be the first source as a benchmark for evaluation on the excessive or abusive character of tariffs. Two complements must be added to this statement. First, the TDLC clearly

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14 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 9°)

15 TDLC, Ruling N° 75, September 30th, 2008. (Rc. 36°). And, by this mean, alternative sites were not substitutes to the sites within the concession area.

16 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 24°). Overruled by Supreme Court, January 28th, 2011, docket number 6100-2010.

17 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 86°-87°)

18 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 10°)

19 For *Atrex*, TDLC, Ruling N° 75, September 30th, 2008 (Rc. 37°). For *Efe*, TDLC, Ruling N° 76, October 14th, 2008 (Rc. 24°-25° and 31°-33°).

20 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 24°, 29° and 42°). Overruled by Supreme Court, January 28th, 2011, docket number 6100-2010.

distinguishes between a breach to the concession contract or infringement to regulations on the one hand and an infringement to the competition law on the other hand; the first not automatically causing the second[21]. Secondly, in some cases, in addition to the absence of regulations that deems for grounds for imposing the challenged tariffs, the TDLC evaluates more extensively whether the challenged tariffs have justifications from an economic point of view, and hence it builds a second benchmark -a substantive one- for assessment.

23. As mentioned above, corresponding regulations were the first source for evaluation in *Edelmag, Atrex, Efe* and *PTLAndes*. Defendants in *Edelmag*, *Atrex* and *PTLAndes* were concessionaires that had obtained their concessions through a competitive tender process. Thus, regulations were contained in the tender conditions and in the concession contract as well as in other related norms. In *Efe* the defendant was a state owned company that had issued by its own an internal regulation on tariffs. In this case, rather than an infringement to its internal regulation, the problem was the criteria followed by the said regulation. Adjudicating in favor of the plaintiff, the TDLC held that these criteria lacked economic justifications and thus the internal regulation unduly discriminated among equivalent customers.

24. In Edelmag, for instance, the TDLC summarizes the controversy as the following: we should determine whether the price increase was justified according to tender conditions or there is an abuse of defendant's monopolistic position by means of infringement to tender conditions and breach of concession contract. The case was relevant and not a mere breach of contract because price increases had been borne by final consumers that were not part of the contract and hence lacked standing for claiming a breach of contract [22]. Then, the TDLC analyses the indexation structure of tariffs that tender conditions provided for, concluding that a specific tax reimbursement claimed by the defendant was not covered by the regulated structure and also discarding that the enhancement in service quality could compensate price increases, since enhancement corresponded to defendant's contractual duties[23]. So an infringement to the regulations contained in tender conditions had been the mean for an excessive pricing abuse of dominance.

25. In *Atrex,* the TDLC took into account the options on tariffs that tender conditions provided for. It easily concluded that the criteria for tariffs effectively imposed by the defendant to plaintiffs lacked of basis in tender conditions. In addition, the TDLC analyzed the tariffs charged in fact by the defendant, concluding that this mechanism was inappropriate and impracticable. Differences between the charged tariffs and maximum tariffs allowed by tender conditions were considered the basis for determining the fine[24]. Another benchmark used in this case was built by comparing the tariffs charged to other users in similar conditions; this evidenced an arbitrary price discrimination against the plaintiffs[25]. Again, an infringement to the regulations contained in tender conditions has been the basis for an excessive pricing infringement.

26. In *PTLAndes,* again, what is provided by the tender conditions sets the first approach of the TDLC for evaluating defendant pricing behavior. The case presents several additional insights. First, it was identified that the defendant was charging the maximum tariff allowed by the tender conditions for a service that it was in fact not supplying; this was considered abusive in itself[26]. At the same time, however,

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21 Such a holding can be found, for example in *Edelmag* and in *Atrex*. For *Edelmag,* TDLC, Ruling N° 73, August 20th, 2008. (Rc. 21°). For *Atrex* TDLC, Ruling N° 75, September 30th, 2008. (Rc. 43°).

22 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 14°, 21°, 22°).

23 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 24°-28°, 32°).

24 TDLC, Ruling N° 75, September 30th, 2008. (Rc. 40° - 49°)

25 TDLC, Ruling N° 75, September 30th, 2008. (Rc. 53°)

26 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 46° and ff.)

the TDLC held that charging the maximum tariff allowed by the concession regulations, even if this maximum is evidently anticompetitive -if the service was effectively supplied- could not be considered abusive and punishable, without disregarding other TDLC's powers in such a situation[27]. Secondly, in order to evaluate whether the tariffs imposed were or not justified from an economic point of view, the TDLC evaluated the methodology for cost calculation used in an expert report. The TDLC agreed in part with the report but the assessment allowed it to determine the lack of justification from an economic point of view, since tariffs evidenced duplications and even triplications in costs charged. The lack of legal and economic basis for the tariffs imposed in fact led to a condemnatory decision for abuse of dominant position[28].

27. In *Efe,* the evaluation was slightly different. The formal benchmark was an internal regulation on tariffs issued by the defendant company. There was no infringement to this regulation, so the TDLC analysed the criteria behind regulated tariffs. Plaintiff claims were, on the one hand, that prices charged lacked objective criteria, uniformity and that they unduly discriminated. On the other hand, it claimed that charged prices were excessive. What the TDLC identified was a price discrimination system implemented by the defendant whose grounds were not differences in costs but differences in the willingness to pay among customers. The absence of grounds for differences in costs led the TDLC to qualify the discrimination criteria as unreasonable and arbitrary, and then the ruling was condemnatory regarding this claim[29]. However, on the basis of the information available, the TDLC was not in conditions to hold that defendant's prices were excessive in magnitude[30].

28. In *Sanitarias,* the TDLC confronted the only case where he had no regulation to use as a benchmark for regulation. The services in question were provided by regulated companies (water distribution & sewage concessionaires) but beyond their regulated areas and under unregulated terms. The only item that was considered excessive by the TDLC was a factor or item charged by defendants with the alleged purpose of compensating reductions in their revenues for services in concession areas as a result of supposed displacements of customers in concession areas towards new real estate projects located in unregulated areas. The TDLC analyzed the mechanisms and regulations in place for financing water distribution facilities for new real estate projects beyond concession areas and then concluded that imposing such an item would be a duplication of charges for real estate developers for which there were no justifications[31]. In order to hold that other items were also anticompetitive, the TDLC used as a basis their unduly discriminating character instead of its excessiveness[32].

29. The review of these cases regarding the benchmark used as competitive prices allows to conclude that the assessment used by the TDLC for building the corresponding benchmark are rather simply and formal, mainly because of the nature of the cases and the available information. The regulations in force provide the benchmark in most of the cases and the comparison commonly performed is between tariffs imposed in fact and tariffs allowed by regulations. It is only when defendants have presented arguments regarding economic justifications that in depth reviews of costs have been made by the TDLC. These economic analyses tend to identify duplications in charges that prove the lack of justification or

27 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 47°)

28 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 88°-90°). The Supreme Court (January 28th, 2001, docket number 6100-2010) overruled TDLC's ruling.

29 TDLC, Ruling N° 76, October 14th, 2008 (Rc. 44°-51°).

30 TDLC, Ruling N° 76, October 14th, 2008 (Rc. 54°-56°).

31 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 95°-103°)

32 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 128°-130°)

excessiveness. However, in order to ground a condemnatory decision, the TDLC has used the basis of unduly discrimination (i.e. lack of objectivity, uniformity, etc.) rather than excessive pricing[33].

3.4. Remedies and the role of advocacy

30. The imposition of fines is the common remedy in excessive pricing cases. Indeed, fines were imposed in the five condemnatory cases described above (*Edelmag, Atrex, PTLAndes, Efe* and *Sanitarias*)[34].

31. The basis for calculating the amount of the fine to be imposed is the wrongful benefits or unjustified revenues obtained during the excessive pricing period[35]. For evaluating the seriousness of the conduct, a reference to a 'particular duty of the legal monopolist' is contained among decisions' grounds[36]. Recidivism is considered as an aggravating factor as well[37]. Deterrence effect of fines is also an explicitly justification for the imposition of a fine higher than benefits obtained or expected[38]. In some cases, a reduction of the amount of the fine is based on the regulator's behavior whose deficient enforcement of regulations made defendants believe they were acting legally[39].

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33 To underline this conclusion, in *Emelat* the TDLC held: "*[T]his Tribunal considers that the mere fact of having a company charging excessive prices without intervening its abusive behavior is not an abuse of dominance infringement [according to the wording of the Competition Act]. / [T]he role of this Tribunal while punishing restraints to competition is to try to keep those conditions by which free market will constraint companies having market power in order to restrict prices in such a way that they will charge a price the closest to the competitive levels and to induce them to optimal production. It is wrong to argue that this Tribunal -by determining in a specific case whether prices are excessive or not- would be turning itself into a retail prices regulator, because such a regulation may take place only by an explicit legal provision in those markets in need of, for instance, in cases of natural monopolies with significant market power, such a regulation proceeding having all the guarantees that sector legislation grants to the regulated company, guarantees not available in an adversarial proceeding such as this one"*. TDLC, Ruling N° 93, January 6th, 2010. (Rc. 30°-31°) The Supreme Court, (August 18th, 2010, docket number 1022-2010, Rc. 3°), reviewing TDLC's decision granted more scope for the excessive pricing anticompetitve infringement, holding: "*One of the modalities an abuse of a monopolistic position may adopt is charging excessive prices that have no economic justification. If such an unfair charge has been imposed by a company having this position due to the pressure on the counterpart who lacks an alternative supplier, it should be punished by the antimonopoly court"*.

34 For the amount of fines imposed, please refer to chart in Annex 1.

35 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008. (Rc. 37°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008. (Rc. 72°). For *Sanitarias*, TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 188°). For *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 105°-106°).

36 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008 (Rc. 38°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 74°). For *Sanitarias*, TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 189°). For *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 108°).

37 For instance, in *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 75°).

38 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008 (Rc. 39°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 76°). For *Sanitarias*, TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 193°).

39 For instance, in *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 67°, 74°) and in *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 110°).

32. A cease and desist order or the warning that prices should comply with regulations usually complement remedies in condemnatory rulings on excessive pricing[40].

33. The TDLC has not the authority to grant damages to plaintiffs. Plaintiffs should claim for damages before civil judges[41].

34. In some cases, the TDLC has defined more elaborated remedies, such as the following.

35. In *Efe* the defendant was ordered to amend its internal regulation on tariffs within 60 days deadline considering objective and non-discriminatory criteria and to communicate to the FNE the content of the amended regulation for its supervision[42].

36. In *Sanitarias* the TDLC's ruling considered the imposition of duties to defendants regarding their negotiations with real estate developers for financing new projects, recommending to the sector regulator the effective monitoring on the conditions for issuing negotiable instruments by defendants in these transactions[43]. In addition, the TDLC proposed regulatory amendments aimed at providing open access to facilities for water distribution, including access tariffs regulation and, additionally, changes on the mode of calculating interest rates[44]. A private plaintiffs' request regarding the imposition of downstream tariffs regulations was dismissed by the Supreme Court which also overruled the regulatory modifications recommended by the TDLC[45].

37. Finally, in a case settled between the FNE and the party, the company also agreed in modifying its tariffs structure[46].

38. Some of the remedies mentioned above have an inherent advocacy character. The power of the TDLC for issuing recommendations for regulatory amendments is provided by the Competition Act, but recommendations are not binding for the addressee who does not have the duty to explain its decision if reluctant to adopt any initiative to follow the recommendation[47].

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40 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008 (cease and desist order, remedy number 4°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (order to comply with tariffs provided by tender conditions, remedy number 5°). For *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 104°, cease and desist order, remedy number 6°).

41 In *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008, (Rc. 40°) the TDLC, instead of ordering disgorgement of profits, makes reference to the provision regulating damages actions following a condemnatory decision by the TDLC. The provision (art. 30 Competition Act) grants competence for damages actions to civil judges.

42 TDLC, Ruling N° 76, October 14th, 2008 (remedy number 6°).

43 TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 186° and remedy number 8°).

44 TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 155°, 186° and remedy number 9°).

45 Supreme Court, May 18th, 2010, docket number 5443-2009.

46 SCL Parking AE 04-2011 Case. Settlement between the FNE and SCL (Santiago Airport Concessionaire) apporve by the TDLC's decisión of May 19th, 2011.

47 According to article 18 number 4) of the Competition Act, the TDLC has the power and duty to "*propose to the President of the Republic, through the relevant State Minister, the modification or derogation of any legal and regulatory precept that the Tribunal deems contrary to free competition, as well as the dictation of legal and regulatory precepts necessary for promoting competition or regulating the exercise of certain economic activities that are provided in non-competitive conditions.*"

39. The FNE may advocate before the corresponding regulator before deciding to file a complaint for excessive pricing in order to explore a possible solution that may be adopted by the regulator on its own powers. But unless these efforts succeed at a very early stage, they usually reveal a reluctance of the regulator to adopt the views of competition authorities.

3.5. TDLC views about regulator and regulation's roles

40. The TDLC has made explicit its views on the role of the regulator and the regulation in its decisions. The TDLC, for instance, has criticized the weak performance of regulators monitoring the compliance with competition law by the regulated entity. It has held that this performance is not a circumstance that hinders the TDLC from holding a violation to competition law or imposing a fine. However, such a situation has been taken into account as a factor for reducing the amount of the fine imposed[48].

41. The TDLC assesses carefully petitions regarding tariff regulation. Such a petition, if approved by the TDLC, would translate into a remedy consisting in a recommendation for regulating prices, unless sector legislation grants the power to the FNE of issuing a report about whether pricing regulation is or not justified. In neither case this will mean that the TDLC will be actively involved in the corresponding price regulation proceedings, a duty of the corresponding regulator. The petition for recommending regulating prices has been dismissed in some of the cases reviewed[49] and admitted in others[50].

42. In addition, the TDLC may issue recommendations to regulators to effectively perform their duties regarding competition law compliance[51].

43. ven though concession contract regulations consider the remedy of bringing the concession to an end in case of serious infringements -such as infringements to competition law- the TDLC has never invoked such a remedy, which may be considered as a deference attitude regarding regulator's powers. Another demonstration of deference was a TDLC's holding that charging the maximum tariff allowed by the concession regulations, even if this maximum is evidently anticompetitive, could not be considered abusive and punishable, without disregarding other TDLC's powers in such a situation[52].

4. Final remarks

44. In preparing this contribution we had the opportunity of reviewing Chile's recent experience on excessive pricing cases.

45. OECD's Competition Committee has taken a praiseworthy initiative by organizing this roundtable and would fruitfully contribute to the FNE's tasks if, as an outcome of the meeting, some orientations are achieved in order to define policy criteria on intervention and priorities regarding excessive pricing cases. At the same time, a discussion on the remedies in these cases would be very

48 For instance, in *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 67°, 74°) and in *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 97-100°, 110°).

49 Thus was in *Efe* TDLC, Ruling N° 76, October 14th, 2008 (Rc. 61°- 63°), *Sanitarias*, Supreme Court, May 18th, 2010, docket number 5443-2009, and *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 114°)

50 Thus was in *Sanitarias* TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 155°, and remedy number 9°), overruled by the Supreme Court.

51 Regarding a specific obligation, in *Sanitarias*,TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 186° and remedy number 8°).

52 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 47°)

interesting since literature questions not only the convenience of the enforcement of excessive pricing infringements in general, but also the reasonableness of considering fines as a remedy.

ANNEX 1: CHART SUMMARIZING RECENT CASES ON EXCESSIVE PRICING

Case	Who led the legal action	Defendant	Services affected by excessive pricing	Grounds for excessive pricing/competitve pricing benchmark	TDLC's decision (C: condemnatory; A: acquittal	TDL remedy	Supreme Court review
Edelmag 73/2008	FNE	Concessionaire of electricity distribution services	Electricity distribution	Maximum tariffs fixed by tender conditions (infringement to the tariffs fixed by tender conditions)	C	Cease and desist order Fine USD$350.000.-	Upholds TDLC decision; reduces fine in 25%
Atrex 75/2008	Private plaintiff	Concessionaire of infrastructure (airport)	Leasing of spaces and facilities for courier services within the concession area	Maximum tariffs fixed by tender conditions (infringement to the tariffs fixed by tender conditions)	C	Order to comply with tariffs of concession regulations Fine USD$1.5 m..-	Upholds TDLC decision
Efe 76/2008	Private plaintiff	State owned enterprise (train & railroad)	Services of providing facilities for crossing the railroad required by network companies	The company internal regulations on pricing for these services, issued by the company itself, allow charges that unduly discriminate and lack a reasonable economic justification	C	Order to modify internal regulations and to communicate new regulations to FNE Fine USD$9.000.-	Upholds TDLC decision

Sanitarias 85/2009	FNE & private plaintiff	Concessionaire of water distribution & sewage	Services and facilities charged to real estate developers and construction companies, in the rural area (beyond the regulated area of concession)	One among the items charged by defendants ('factor nuevo consumo') implies duplicity in charge and lack economic justification Other charges imply undue discrimination	C	Several proposals of amendments in regulations and recommendation to regulators Two defendants were fined: USD$4.5 m.- (in total)	Upholds in part and overrules in part (reduces fine)
Emelat 93/2010	FNE	Concessionaire of electricity distribution services	Services of providing security on the power network allowing the circulation of big trucks	Items challenged do have a reasonable economic justification	A	-----	Upholds
PTLAndes 100/2010	Private Plaintiff	Concessionaire of infrastructure (inland port)	Services of providing support to customs and other administrative agencies monitoring freight vehicles in the concession area	Charging the maximum tariff allowed by the concession contract for a service that is not provided in fact Tariffs charged are not based on concession regulations Expert report on costs for services is also assessed by the TDLC	C	Order to refrain from charging a specific tariff Fine: USD$300.000	Overrules TDLC decision (in total)
SCL Parking AE 2011	FNE	Concessionaire of infrastructure (airport)	Parking services within the concession area	Tariffs structure that not considers parking periods inferior to 2 hours	Settlement	Agreement on a new parking tariffs structure and new alternatives for users	-----