

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Competition Issues in Aftermarkets - Note by Chile

21-23 June 2017.

This document reproduces a written contribution from Chile submitted for Item 4 of the 127th OECD Competition committee on 21-23 June 2017.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/aftermarkets-competition-issues.htm

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JT03414025

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1. The Chilean competition law is contained in the Decree Law N° 211 (“**DL 211**”), which purpose is to promote and defend competition in the markets.¹ This task is conferred on the Economic National Prosecutor’s Office (“**FNE**”) and the Competition Court (“**TDLC**”), within the scope of their respective powers.² The FNE is entrusted with the investigation and prosecution in courts of the antitrust infractions, representing the general interest of the collective economic order.³ On the other hand, the TDLC is a special and independent jurisdictional body, whose function is to prevent, correct and sanction affronts to competition.⁴

2. The DL 211 does not contain any provisions regarding aftermarkets, and there has been no jurisdictional decision by the TDLC dealing specifically with them. There have been, nevertheless, investigations carried out by the FNE regarding aftermarkets, which have considered the legal and economic theories on this issue.

3. In its investigations, the FNE has acknowledged the three markets configurations that have been recognized in aftermarkets: dual markets; system markets and multiple markets.⁵ The main concern for the FNE in aftermarket cases arises in multiple markets, where each secondary product is compatible only with a certain primary product. In case of a systemic market, there is only one market to analyze the conduct, and the competition in the secondary product will tend to discipline any abuse in the primary product. On the other hand, in case of dual markets, even though there are two markets to analyze, the secondary product should be competitive due to the compatibility existing between all the secondary products or services.

4. In order to assess the market configuration of a specific case, the FNE has considered many circumstances, such as the relative costs of the equipment and the aftermarket products, lifecycle of the product, consumer’s sophistication, and switching costs.

5. In the last few years, the FNE has had at least three investigations dealing specifically with problems in aftermarkets.

6. In 2010, the FNE opened an investigation in the automobile industry, after receiving a complaint regarding excessive prices charged by the Chilean Audi dealer for original spare parts. The FNE considered that this was a case of multiple markets: a

¹ Article 1 of the DL 211.

² Article 2 of the DL 211.

³ Articles 33 and 39 of the DL 211.

⁴ Article 5 of the DL 211.

⁵ See for example, Office of Fair Trading, Market definition, OFT 403, para 6.1.; Robert O’Donoghue and Jorge Padilla in *The Law and Economics of Article 102 TFEU*, Hart Publishing, second edition, 2013, p. 136; and John Temple Lang, ‘Practical Aspects of Aftermarkets in European Competition Law’, in *International Competition Policy*, volume N° 7, number 1, Spring 2011, p. 201.

primary market for cars⁶ and separate secondary spare parts markets for each car brand. In order to assess the dominance of Audi in the secondary market, the FNE considered if the prices charged by Audi in the secondary market would affect their sales in the primary market. The FNE decided to close the investigation since it considered that Audi did not have any incentives to charge excessive prices to their consumer. In such connection, the FNE observed that the primary product was more relevant than the secondary product (it represented circa 90% of their incomes), and any abuse in the secondary market would affect Audi in the primary market, since the latter was a competitive market.

7. Also in 2010, the FNE received a complaint against Philips for tying the sale of spare parts of a magnetic resonance imaging (MRI) with the after sales service for the installation of such spare parts. According to the claimant, he acquired directly from the manufacturer spare parts that are yearly changed in the MRI he purchased from Philips, but that such company refused to install those parts unless they were purchased directly from them. The investigation performed by the FNE showed that this was a case of a single system market for MRIs including the spare parts and maintenance and repair services. The FNE arrived to such conclusion considering several circumstances, such as: (i) the existence of important switching cost due to the high cost of the MRIs and the absence of a second hand MRI market; (ii) the sophistication of its users (hospital, clinics and medical centers) which should know at moment of its purchase the total cost of the equipment and of its secondary products; and (iii) the complexity of its installation. Therefore, the FNE decided to close the investigation since one of the requirements for a tying conduct is the existence of two separates markets, which did not exist in this case.

8. During 2015, the FNE opened an investigation in the elevator industry. The investigation focused in the existence of exclusionary conducts in the market of maintenance and repair services for elevators, such as tying the sale of spare parts to the hands labor services and the refusal of supply of spare parts. The FNE considered that the elevator market was prone for abuses in the secondary markets for spare part and repair and maintenance services due to several characteristics of the primary market. A preliminary assessment of such market showed that elevators have a very long lifecycle and its switching cost, both in time and in prices were very high, and that its purchases were sophisticated buyers. However, in case of residential buildings, the consumer of the primary and secondary products were different, therefore, the costs of the secondary product, although known by the builders or developers at the moment of the purchase of the elevator, could be considered as irrelevant since they did not face such cost. On the other hand, the elevator companies could exploit the market power they have in the secondary market, since it would not cause them a reputational cost in the primary product. Notwithstanding the above, the FNE decided to close the investigation since it showed that the secondary market was competitive. In such connection, the investigation showed that there exist several independent companies that offer repair and maintenance services for the different brands of elevators. Those independent companies are able to buy spare parts, either original or alternative, directly from several national and international suppliers.

⁶ It was considered that the primary market could be reduced to luxury cars, but for the purpose of the investigation, it was not necessary to make that distinction.