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LATIN AMERICAN COMPETITION FORUM

-- Session IV: Competition Issues in Telecommunications --

Contribution from Chile (FNE)

9-10 September 2009, Santiago, Chile

The attached document from Chile is circulated to the Latin American Competition Forum FOR DISCUSSION under session IV of its forthcoming meeting to be held in Chile on 9-10 September 2009

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**LATIN AMERICAN COMPETITION FORUM
- 9-10 September 2009, Santiago, Chile -**

Session IV: Competition Issues in Telecommunications

**INTERVENTION OF COMPETITION AUTHORITIES IN THE
TELECOMMUNICATIONS SECTOR**

Contribution from Chile (FNE)

1. Ever since the privatisation process was launched in the early 80's, the regulatory frame for the telecommunications sector has focused on improving competition wherever possible. In those situations which peculiarities do not allow for free competition, regulation is set to replicate a competitive market.
2. The Telecommunications General Law (TGL), Law N° 18.168, enacted on October the 2nd, 1982, the main regulatory instrument in the sector, is grounded upon traditional telecommunications services, in place at the time of the passing of the law. With respect to these services, which are classified in the third article of the law, a concession or authorisations system is considered according to each service's nature. Only for services regarded as complementary, as the exception, the necessity of authorisation or concession is disregarded.
3. Chile's telecommunications regulatory frame was unusually forward-looking for its time and allowed the early liberalisation of this sector and the constant enhancement of competition standards within the industry, which was began as a natural monopoly model with incontestable market power.
4. Throughout the last ten years, our country has witnessed the most dramatic increasing in telecommunications services and the application of new technologies. However, this increase in commercial supply has not always been accompanied by the necessary regulatory innovations. This does not mean, though, a total disregard to new ventures in the area, since sector regulation commitment's towards competition has permanently been strengthened by the intervention of competition authorities, through their opinions and decisions concerning consultations and specific conflicts. This participation has permanently meant adjustments in sector regulation introducing greater incentives for competition, thus becoming a tool for rectifying distortions and obstacles arising in the regulatory frame, as the result of

technological developments and obsolescence which the TGL is increasingly exposed to. These competition authorities' initiatives have often preceded changes in sector regulations.

5. Beside the rulings of our former Resolutive and Preventive Commissions, and of the current Competition Tribunal (TDLC) —many times issued at the *Fiscalía Nacional Económica's* (FNE, Chile's Competition Agency) request— the latter has encouraged competition principles by itself, and has not necessarily sought decisions before the TDLC. They have indeed affected policies of the sector authority, the Undersecretary of Telecommunications, Subtel.

6. One such case was the Agency's advocacy action before the Subtel in order to modify the latter's criteria for the SIM blocking of mobile phones by firms operating in Chile (2006). More recently, following a consultation before the TDLC by Subtel on the participation of mobile phone companies in public tenders for the provision of advanced digital services (2008), both Subtel and the Competition Agency appeared before the Supreme Court to attain an amendment of the TDLC's ruling in order to restrict the amount of spectrum for each operator thus avoiding possible barriers for the entry of new competitors.

7. A greater convergence is nevertheless necessary between the Subtel's and the FNE's views on particular telecommunication services —such as VoIP services, GSM gateway allocation by mobile convertors, MVNO (Mobile Virtual Network Operator), unbundling of local loops— and on the urgency of reconsidering the regulatory framework in general.

8. To illustrate the need for reviewing the general frame, let us take the case of broadband access, a service in this market yet not addressed by the TGL. Neither the TGL mentions that service, nor is this submitted to the concessions/authorisation scheme, yet it has been considered as a 'complementary' service. Regardless of that, and just as everywhere else, the principles of competition are fully applicable to broadband.

9. Likewise, there is no legal standpoint in Chile concerning IP telephony, despite the blueprint of a by-law on VOIP¹ proposed by Subtel granting this service an intermediate position, that is, as a —regulated— telecommunication service, yet subject to a regime other than the one that binds the traditional phone system. The application ended up in the enactment of the VOIP regulation on June 2007. Thus, so far modifications have not been legislative but rather administrative in nature.

10. Competition authorities issued no opinion whatsoever on that particular service up until the TDLC's ruling which approved the merger of the broadband cable TV firms, VTR and Metrópolis (2004)².

11. In Ruling N° 686 of 2001 the Honourable Resolutive Commission —assessing the telephone system's competition conditions in order to qualify the pertinence of tariff setting to fixed phone services—, excluded ADSL resale by the dominant party. Consequently, a couple of years ago this service was regarded as accessory whilst it is noteworthy nowadays in the Information Society, and provided on an unregulated basis³.

¹ VoIP Services Regulation, July 2004.

² NC 02-04, Request for approval of Liberty Comunicaciones de Chile Uno, and Cristal Chile Comunicaciones, on the merger-to-be between Metrópolis Intercom and VTR.

³ LGT, Art. 29: "... *if on public local phone and national and international long distance services —mobile phones excluded—, and signal commuting / transmission as a intermediate services or as private circuits, should there be an explicit statement from the Resolutive Commission... as to the market (competition)*

12. Aside from that, in its Ruling N° 683, of April 2003 —dealing with the introduction of the Power Line Communications (PLC) technology, the H. Resolutive Commission stated that “*firms providing transport or intermediate telecommunication services by means of the PLC system, shall grant the same access or connections to all firms willing to supply services to end-users, so to enable those firms to offer the same quality in response time to users’ applications, good service and so on*”.

13. In its Ruling N° 45 / 2006 the TDLC partially confirmed the actions filed by Voissnet and the FNE, declaring that Telefónica Chile, the dominant landline operator, had attempted to prevent the plaintiff Voissnet, as well as other potential competitors, from entering the market for those services. In that Ruling the Competition Tribunal analysed broadband IP and its relationship with Telefónica CTC Chile, which dominated the corresponding facilities.

14. It is worth noting that in its latest rulings, the TDLC has addressed all markets arising from new technologies and joint offerings in telecommunications. It actually considers the mobile phone market separately from the market for data transmission⁴ and its relation with fixed and mobile broadband technologies.

15. The TDLC’s Report N° 2/ 2009⁵ examines the current degree of competition in the telecommunications sector, both in the fixed-mobile system level and in the fixed-VOIP and other technologies throughout the country. It issued its views on the possibility of geographically discriminating among plans and joint provisions, services resale, on-net and off-net calls differentiation and the portability of fixed and mobile phone numbers.

16. The current telecommunications legal frame in Chile does not explicitly acknowledge technological convergence, and leaves a clear distinction of the various economic sectors where convergent technologies operate. This includes sectors that simply are not regulated, as it is the access of internet broadband.

17. Regarding the sector authority’s plans, three legal propositions have been disclosed: a) the setting up of a panel of experts; b) the implementation of a Superintendence of Telecommunications; and c) a modification to the concessions regime. All of these aim at a greater dynamism for an industry that plays a key role in the productivity and competitiveness of our economy.

18. The setting up of a panel of experts takes after a model currently applied in the regulation of the electricity sector, which has proved to be efficient. The goal is to rely on a team of specialists in this matter, able to solve conflicts among firms and between these and the regulator. This would reduce this industry’s current overuse of court procedures.

19. The creation of a Telecommunications Superintendence is, as the Undersecretary of the sector said, “critical to improve consumers’ protection and the supervision of a 19 million customers market”.⁶

conditions do not allow a free tariffs scheme, the particular public service’s prices or tariffs will be determined following the arguments and proceedings herein...At any rate, if said conditions are modified and were there a declaration in that sense from the Commission, the service will no longer be subject to the tariffs regime”.

⁴ NC 198-07 Subtel application on the participation of mobile phone licensees in public tenders for the provision of advanced digital mobile phone services.

⁵ NC 246-08 Report requested by the Transports and Telecommunications Ministry on the tariff scheme for the fixed phone service.

⁶ Telecommunications World Day, SUBTEL 2007.

20. Finally, the adjustment to the spectrum rights scheme entails a lighter, more flexible regulatory frame for the country's companies and for the development of new business in the area.

21. All of these facts, plus the lack of convergence between regulation and operation in the sector, -as shown for instance by the coexistence of IP services which do not recognise geographical anchorage, and the existence of primary zones or multicarrier, geographically grounded-, strongly suggest that for stronger competition and developments in telecommunications to take place, the revision of the sector's general framework is crucial. This should take into consideration both the principles of competition and the peculiar traits of this market's investments, dynamism and development.

22. The current regulatory shortcomings and inaccuracies constitute a source of obstacles both for Subtel and for competition authorities, impairing the gains supposedly brought by the Information Society to the country's economic development.

23. It is also noteworthy that Subtel has released some fundamental principles for the sector's development, such as consumer benefit and protection, openness towards innovation and investment; *strong competition* and maximum efficiency; the least State intervention, and non-discrimination. Furthermore, the main targets of the public policy in telecommunications are the regulatory incentives for the deployment and maintenance of networks, and the maximisation of competitive solutions in the services.

24. As to the network coverage in Chile, Subtel highlights the necessity of an appropriate return on investments and of increased competition in network services, so as not to yield regulations when confronting the reality of technological convergence. That is why, according to Subtel, it must be borne in mind that networks are a device of access to services, and not that the service is unavoidably attached to the network.

25. From our standpoint as a competition agency, it is convenient to promote a regulation and competition model for technological convergence. This model must lean on technological neutrality and equality in dealing with firms, thus promoting competition in networks access and developing it among service providers.

26. In addition, the analysis of relevant markets should remain bestowed on the competition authorities, that is, the TDLC and the FNE, for the assessment of which of those markets reveal no effective competition, and to identify telecom operators with 'significant market power'. That would entail the necessary enforcement concerning transparency, non-discrimination, separation of accounting items, mandatory access, cost accountancy and so forth, in the resultant relevant market.

27. In summary, and in order for the telecommunications sector to achieve a fully competitive development, *it is crucial to ensure accesses to the telecommunication networks to be open, non-discriminatory and neutral, in regard to the available services*. In this way, internet voice and other services that may arise will increase competition in this still highly concentrated market. In this way, competitive telecommunications markets will foster new services to satisfy the growing expectations of all users in this sector.