

QUESTIONNAIRE

Interface between Competition Policy and other Public Policies

(SPECIAL PROJECT 2010)

Thank you for taking the time to complete this questionnaire about your agency's experience with the interface of competition policy and other public policies. Reconciling competition policy objectives with other public policy objectives can be challenging, and through an exploration of agency experience in this area with a particular focus on the role of competition authorities in implementing and advocating competition policy objectives, the Turkish Competition Authority (TCA) aims to distill some of the lessons learned for the benefit of all ICN members. Responses from this survey will be used in preparing for a showcase session at the 2010 ICN annual conference in Istanbul. We hope that you will provide sufficient information that will allow us to follow up with you directly for more detail.

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Confidentiality Statement: While the individual responses to the questionnaire will not be made public, for research and dissemination purposes, the TCA would like to be able to use the data collected on this questionnaire in preparing a background report for the panel discussion in Istanbul. As specific examples may be given in the background report including the agency name/country, please indicate if you do not want your agency name/country to be disclosed.

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Definitions: For the purposes of this questionnaire, competition policy refers to all government measures having an impact on the conditions of competition in the markets which is wider than implementation of competition law. Other public policies which can conflict with competition policy objectives because they serve different objectives include, inter alia, policies designed to promote economic development, increase the competitiveness of the economy, and protect environment, health, and security.

Note: In Chile there are two Competition Institutions: The Fiscalia Nacional Económica (National Economic Prosecutor's Office or "FNE") in charge of investigating and prosecuting anticompetitive conducts; and the Competition Tribunal, a special court that decides on competition matters and orders remedies and sanctions.

1. Objective and Design of Competition Policy

1.1. What is the objective of competition policy in your jurisdiction? Which factors are taken into account in the design of the competition policy? *In your answer, you may wish to address:* Apart from economic efficiency objectives, what other public policy concerns/objectives (such as environmental protection, ensuring financial stability, redressing regional disparities in terms of economic development) are taken into account? To what extent do these other public policy factors/objectives have an impact on the design of the competition policy?

The Competition Act does not state a specific competition policy objective, but it asserts that the purpose of the law is "to promote and defend free competition in the markets". Chile's government regards the main objective of the competition law to be the promotion of economic efficiency, with the aim of maximising consumer welfare in the long run. The economic efficiency goal represents a shift from the early years of Chile's competition policy, which stressed the importance of economic freedom and the goal of preventing restrictions on firms' autonomy.

1.2. How is competition policy designed in your jurisdiction? What government agencies are responsible for the design of competition policy in your jurisdiction and what is the role of the competition authority?

The Ministry of Economy is in charge of designing competition and regulatory policies. The FNE is also regularly consulted on these issues.

2. Implementation of Competition Policy by the Competition Authorities in the Context of Other Public Policies

2.1. Competition Law

a- Is there any industry or economic activity completely or partially excluded from competition law enforcement? If any, please state which policy objectives have been considered to justify the exclusion.

The scope of application of the Competition Act is broad. In general, it contains no exclusions or exemptions from its coverage, nor are there general exemptions authorized under other regulation. Therefore no entity, firm, person, or economic sector is excluded or exempted.

In addition, the Competition Act does not provide special treatment to State-owned or managed enterprises. These entities are subject to the enforcement of the Competition Act in the same terms as private ones are.

b- Is the competition authority consulted when the decision to exclude a certain activity or sector from the implementation of competition law is taken?

N/A

c- Does competition legislation empower the competition authority to exempt/exclude any activities of undertakings from the application of competition law?

No, it does not.

If so, does the competition legislation include factors aiming to reach other public policy objectives among the conditions for exemption/exception?

N/A

Are there other public policy factors/concerns taken into account by the competition authority or the courts in practice? If any, please give examples from the case law?

Traditionally, fairness in economic activities has been one of the purposes of competition law. In this regard the law used to be considered by some as a tool for protecting the SMEs. However, as it was concluded by the 2004 OECD/IDB Peer Review, in recent years Chilean competition law has increasingly become pro-efficiency oriented. In fact, in some of its rulings the TDLC has emphasized that the goal of competition law is not the protection of small competitors but of competition¹ and efficiency, though some very exceptional decisions have considered, in addition, other-than-efficiency goals, such as fairness, consumer protection and the protection of the SMEs. Such considerations have been made for pragmatic reasons or to uphold rulings by former competition authorities.²

d- Does competition legislation or its implementation in practice provide for other public policy objectives apart from economic efficiency in substantive assessments in general and merger assessments in particular? If yes, please give examples.

First, it is worth noting that the Chilean Competition system does not encompass a premerger notification procedure and that mergers are reviewed in a voluntary process or in an adversarial proceeding upon request by the FNE or any interested party. The substantive law applied to mergers is Article 3 of the Competition Act, which does not address mergers or acquisitions directly.³ The two instruments that contain the underlying policy objectives that the Competition Authorities consider when examining a merger- *the 2006 FNE's Internal Guide for the Analysis of Horizontal Concentration Operations and the 2009 TDLC Instruction on the information that must be provided in merger consultation proceedings-* do

¹ E.g. TDLC, 05.08.2008, Ruling N° 65/2008, stated that *the use of buying power* [understood as asymmetric bargaining power] *can only affect competition when it permanently influences market's total supply of products, whether by the reduction of quantities, retail price increases or the reduction of research and development investment.* (Gr. 104)

² E.g. TDLC, 06.06.2007, Ruling N° 53/2007, fined a gasoline wholesaler with US\$150.000 for violating the decisions N° 435 and 438 concerning vertical restraints on gasoline distribution (ruling overturned by the Supreme Court, 09.25.2007, file 3506-2007); or TDLC, 08.03.2006, Decision N° 15/2006, where, reviewing a franchising contract in a non-adversarial procedure, in spite of the absence of competition violations, it ordered injunctive relief, reproducing a traditional jurisprudence on the fairness and independency of the arbitration clause (nomination of the arbitrator). In the same line, the TDLC, by Ruling N° 33/2005, 11.08.2005, imposed pharmaceuticals laboratories fines between US\$6.000 and US\$48.000 for the violation of a general instruction of transparency on trade conditions and wholesale price discrimination affirmed by Supreme Court. Later, in a non-adversarial procedure, pharmaceuticals requested the TDLC the abrogation of the general instruction on transparency. The TDLC dismissed this petition stating, among others, that *«the goal of this general instruction was to enhance competition of pharmaceuticals sales to final consumers, and that was the reason why publicity of prices and other commercial terms was required. Thus, more transparency was achieved and so was the possibility for small drugstores to compete fairly with big-retail-pharmacies-chains.»* Decision N° 12/2006, 13.06.2006 (Gr. 3°). The 2004 OECD/IDB peer review had previously identified these general instructions as fairness-oriented.(p. 23-24)

³ A merger or acquisition can be considered an infringement of the Competition Act if it prevents, restricts or hinders free competition or tends to produce such effects, in which case the parties could be penalized after they undertook the merger

not state any consideration other than the assessment of the likely anticompetitive risks against the efficiency gains that could outweigh those risks. Thus we have to turn to the substantive analysis underlying the TDLC's decisions found in the existing case law, where there are two opposing examples. Fifteen years ago, in the approval by the *Comisión Resolutiva Antimonopolios* (Former Competition Authority) of the merger of the two most important Chilean airlines, the fact that the operation would strengthen the position of the merging companies outweighed the assessment of the anticompetitive risks that the creation of a monopoly in the domestic routes would bring about⁴. In contrast, a recent decision by the Competition Tribunal rejected the merger of two big retail companies, stating that the fact that the merger would create a national leader company that could compete internationally, was not a justification for endangering competition in the local markets. It is understood that currently the predominant view is that of the latter decision.

e- Has the competition authority in your jurisdiction ever encountered claims by the undertakings that they were encouraged by certain public authorities which aimed to achieve other public policy objectives or that they served other public policy objectives as justifications/defences for anti-competitive conduct? How did the competition authority assess such claims? Please give examples.

No.

2.2. Competition Advocacy

a- Does the competition authority in your jurisdiction have legal powers concerning competition advocacy?

Competition advocacy is conceived in broad terms in the Competition Act⁵ (... 'promote and defend...').⁶ The Competition Act also provides specific advocacy powers⁷ to the TDLC and the National Economic Prosecutor.

The FNE may pursue non-contentious advocacy before a sector regulator or public authority. If the regulator does not take into consideration the FNE position, the FNE can file

⁴ Decision 445 / 1995- *Comisión Resolutiva Antimonopolios*

⁵ Art. 1°: "*The objective of this law is to promote and defend free competition in the markets*"

⁶ Advocacy activities can include testifying, making submissions or issuing papers to the legislature, ministries, courts, sectoral regulators or municipalities, or making speeches to professional and trade associations, academic institutions and conferences and writing articles for publication. Even holding press conferences and publicly explaining the importance and implications of competition and market principles could be considered advocacy.

⁷ **Competition Act «Article 18.-** *The Competition Tribunal shall have the following powers and duties: ... [] 4. 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; ... »* **Competition Act «Article 39.-** *In exercising his functions, the National Economic Prosecutor shall be independent from all authorities and tribunals before whom he acts. He may, therefore, defend the interests entrusted to him in the manner he deems abided by law, according to his own appreciations. The National Economic Prosecutor shall have the following powers: ... [] 1) To enter into agreements or memoranda of understanding with other public services and universities, on subjects of mutual cooperation. Also, enter into agreements with foreign agencies or other entities whose objective is to promote or defend free competition in economic activities ... »*

proceedings before the TDLC. The TDLC can also act on its own initiative to issue recommendations to eliminate regulatory constraints on competition.

Non-contentious advocacy by the FNE is prominent in telecommunications, electric power and public tendering of government concessions. In telecommunications, the FNE has prepared several reports at the request of the sector regulator, on digital TV regulations, the creation of a technical dispute settlement body, amendments to licensing rules and a general study on the barriers to the development of telecommunications. In these reports, the FNE has encouraged the telecommunications regulator to lift barriers to foster competition. A notable example is the FNE's proposal, approved by the TDLC, to unblock mobile phones and eliminate a legal provision that prevented users from switching to alternative service providers (SIM blocking). The telecommunications regulator accepted the FNE's opinion, and the legal barrier was eliminated.⁸

In public concessions, the FNE recommended the amendment of a new tariff system for Santiago's airport that had been introduced by the Ministry of Public Works. The new tariff system changed the terms of the concession contract by tying the lease of the jetways and aircraft to the electricity supplying service. The FNE concluded that the new tariff system unreasonably increased the costs and created a barrier against the users of the airport (i.e. airlines), in favour of the airport operator. The regulator accepted the opinion of FNE, and eliminated the provisions of the addendum that tied the two services.

Similarly, in an older case involving the use of airport infrastructure, the Preventive Commissions (part of the former Competition Authority System) proposed establishing limits on the degree of vertical integration between airport concessionaires and airlines. The FNE sought to prevent participation of airline companies in the airport concessions. Following these recommendations, the regulator issued a notice excluding airline companies from future tendering processes, during the pre-qualification stage of the bid.⁹

A novel initiative about tendering involved university entry examinations. The FNE recommended that the Ministry of Education and the Council of Rectors introduce minimum quality standards and select exam provider firms on the basis of their lowest prices, in order to introduce competition at the tender for selecting the exam provider. This recommendation was made, among other things, in view of the fact that the students taking the exam pay for sitting it.

The **TDLC** may request any public body to amend or repeal any anticompetitive statutory or regulatory provision. The TDLC can make recommendations to the President of the Republic, proposing the elimination of legislation or rules that harm competition. It may also propose adopting new regulations or laws needed to encourage competition or to regulate the exercise of certain activities which take place under non-competitive conditions (Art. 18.4-Competition Act).

TDLC recommendations have covered a wide range of sectors. The Customs Agency (*Servicio Nacional de Aduanas*) followed a TDLC recommendation aimed at promoting competition between storage warehouses operating inside and outside the airports concessions. In the fuel distribution industry, the TDLC recommended a group of wholesale fuel distributors to grant potential competitors non-discriminatory treatment in access to a

⁸ Res. Ex. No 1498/2004 –SUBTEL; later amended by Res. Ex. No 486/2005 of 28 April 2005

⁹ Related to this issue are: Ruling No. 10/2005 –TDLC, 11 August 2005 and former decisions No.1014 of the Central Preventative Commission.

joint wholesale fuel distributor, and it recommended legislation to grant open access in the use of joint fuel transportation facilities.¹⁰ The TDLC has also made recommendations for competitive tendering of contracts at airport and seaport facilities,¹¹ and for rules about the limits to vertical integration applicable to seaports¹² and airports¹³. The TDLC has proposed new regulations for electricity network interconnection and for encouraging electric generation companies to participate in electricity supply tendering processes. These rules are intended to set requirements for electricity supply contracts bidding aimed at reducing barriers to entry.¹⁴

The TDLC has issued general instructions in the market for the collection, transportation and disposal of urban solid waste. General Instruction No. 1 recommends the municipalities to separate, for tendering purposes, competitive services (garbage collection or transportation) from non-competitive ones (land facilities offering for final garbage sewage and disposal). This measure is intended to prevent market foreclosure through leverage¹⁵ (Art. 18.3, Competition Act¹⁶).

Are there other government authorities with which the competition authority cooperates to defend competition policy objectives?

Yes. For instance:

- A formal memorandum of understanding aiming at mutual cooperation was subscribed in 2006 between the FNE and the SERNAC (*Servicio Nacional del Consumidor*), the Consumer Protection Agency.
- In May 2008, the FNE brought together several public bodies and an association of public procurement officers, in a committee called *Comité Anti-Colusión entre Oferentes en Licitaciones de Abastecimiento Público* (hereinafter, the Interagency Taskforce). This committee included representatives of the Bureau of the General Comptroller, the Public Procurement Bureau (body in charge of modernizing the public contracting through electronic purchases), the Ministry of Public Works, the Council for the Internal Auditing of Government and Redaba (association of officers and staff in charge of procurement areas of different public bodies). Delegates of the Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group.
- Collaboration agreements have been subscribed with the General Comptroller Office, the Public Prosecutor's Office and the Ministry of Public Works, among others.

b- What is the role of the competition authority in the design and implementation of economic policies such as privatization and liberalization/deregulation?

¹⁰ Ruling No. 18/2005 –TDLC, 10 June 2005.

¹¹ Ruling No. 61/2007 –TDLC, 27 December 2007.

¹² Ruling No. 11/2006 –TDLC, 24 January 2006.

¹³ Ruling No. 10/2005 –TDLC, 11 August 2005.

¹⁴ Ruling No. 22/2007 –TDLC, 19 October 2007.

¹⁵ General Instruction No. 1/2006 –TDLC, 08 June 2006.

¹⁶ **Competition Act** «**Article 18.-** *The Competition Tribunal shall have the following powers and duties: ... [] 3. To issue general instructions in accordance with the law, which shall be observed by individuals executing or entering into acts or contracts that are related to or that could infringe free competition; ... »*

The Competition Authority does not play a direct role in the design and implementation of economic policies such as the above mentioned. However, where sector regulations impose legal barriers to entry or exit, the FNE or the TDLC may examine the regulations to ensure they do not create unnecessary restraints upon competition (based on the powers referred to above). The general principle followed by the Competition Authorities is to promote competition and minimize regulation, while still considering the objectives of sector regulation. The intention is to prevent regulatory measures from unnecessarily obstructing the development of markets. In some sectors, the TDLC is also in charge of determining whether the existing market conditions are not sufficient to eliminate price regulation¹⁷.

c- In what ways does the competition authority in your jurisdiction convey competition policy objectives to policy makers to increase their awareness?

The FNE and the TDLC may ask regulators to re-examine the regulations if they would threaten competition unnecessarily. If the regulator rejects the FNE's petition, the FNE may bring a formal request before the TDLC, and the TDLC can issue recommendations to amend or eliminate the regulations. In *FNE vs. the City of Curico*,¹⁸ the FNE requested the elimination of measures restricting competition in a tender for collection services, transport and garbage disposal. Recently, in a proceeding between the FNE and the JAC (the air transport regulator), the TDLC ordered JAC to amend the awarding conditions of the bidding process to assign the traffic rights for the Santiago-Lima route¹⁹.

Has the competition authority in your jurisdiction ever shared its views with the public that a certain draft legislation/administrative measure conflicted with the competition policy objectives on its own initiative? If yes, please give examples.

No. However the FNE assesses the potential impact on competition of legislative proposals. It may do so upon requests from Congress or individual congressmen, Ministries or on its own initiative.

d- How is balance ensured when competition policy objectives conflict with other public policy objectives?

Currently, there is not a formal institutional mechanism to accomplish this balance. However the Competition Authorities may advocate for their objectives through the means described above.

If any, what are the criteria used under these circumstances?

N/A

Under what circumstances are other public policy objectives granted priority? Please give examples.

The Banking system: With the Central Bank also setting performance standards for the banking industry, which are enforced by the sector's regulator (the Superintendence of Banks

¹⁷ Art. 29- Ley general de Telecomunicaciones

¹⁸ Ruling No. 77/2008 –TLDC, 04 November 2008.

¹⁹ Ruling No. 81/2009 –TDLC 16 January 2009

and Financial Institutions), the competition system stands as a third interested party that has intervened in specific cases.

The FNE recognises the presence of policy goals for this industry, which may differ from competition goals. Yet, the Competition Authorities have the power to prevent anti competitive mergers and conducts, as in any other sector of the Chilean economy.

e- Are there any cases where the competition authority's view that competition policy objectives should have priority status or a less restrictive legislative/administrative regulation or measure could be adopted has not received acceptance because of the existence of other public policy objectives? Please give examples.

N/A

f- Is there a formal competition assessment (possibly as part of regulatory impact analysis) procedure in your country? What's its scope? Is there any criterion for balancing competition policy objectives and other policy objectives?

No, there is not.

g- Are there any quantitative techniques used by the competition authority in your jurisdiction to defend competition policy objectives against other policy objectives?

There are not quantitative techniques specifically used for that purpose, although the FNE and the TDLC have intensified the utilization of quantitative methods, mainly econometrics, to support their assertions.

3. Institutional Framework & Challenges

3.1. Are there institutional mechanisms to ensure the necessary balance if different public policies conflict when regulation, measure and laws are prepared? How is the competition authority represented in the institutional mechanisms?

No, there is not. However the FNE does assess the potential impact on competition of legislative proposals. It may do so upon request from Congress or individual congressmen, or on its own initiative.

3.2. Does the competition authority in your jurisdiction have the powers to challenge regulations or laws in court by alleging that the public agency in question has not taken into account competition policy objectives and competition is restricted more than necessary? If any, what criteria are used by the courts to reach a judgment? Please give examples.

As stated above, sometimes regulators may reject FNE's proposals. The FNE then may bring a case against the regulator before the TDLC. An example of this was adversarial procedure initiated by the FNE after the decision of the JAC, the civil aviation regulator, not to adopt the recommendations made by the FNE to amend the awarding conditions of the bidding process to assign the traffic rights for the Santiago-Lima route²⁰.

²⁰

Ruling No. 81/2009 –TDLC 16 January 2009

In the telecommunications industry, the TDLC ordered the regulator to reduce final consumer switching costs, which prevented telephone companies from offering their service in their competitors' phone units. It recommended the regulator to order mobile phone companies to make open offers of wholesale facilities for resale, in order to develop a mobile phone retail market.²¹ It issued several suggestions about the optimal voice-over-internet service regulation, aimed at ensuring free competition.²² In a recent decision, issued at the request of the Telecommunications, the TDLC strongly recommended mobile number portability.

3.3. What are the difficulties/challenges faced by competition authorities in balancing competition policy objectives and other policy objectives in their competition advocacy activities? Are there difficulties/challenges peculiar to developing countries? What are possible solutions and, if any, best practices for these countries?

One of the challenges faced is precisely the creation of a formal institutional mechanism to perform competition assessments and to balance it against other public policies.

4. Please add any comment you may want to make about the subject.

²¹ Ruling No. 2/2005 –TDLC, 01 April 2005.

²² Ruling No. 45/2006 –TDLC, 26 October 2006.