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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Chile (TDLC) --

16-18 June 2015

This document reproduces a written contribution from Chile (TDLC) submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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CHILE (TDLC)

1. Participation of the Chilean State in markets, particularly as a supplier of goods or services, is restricted in the Constitution, which establishes the principle of subsidiarity, according to which the State should only develop or subsidize goods or services that private parties are unable to provide.
2. In this sense, the second paragraph of number 19 of Article 21 of the Constitution states that “the State and its organisms will only be able to develop entrepreneurial activities or participate in them if a qualified quorum law authorizes them to do so. In that case, said activities will be subject to the common law applicable to private entities, with exceptions for justified reasons that also must be established by a qualified quorum law”.
3. Currently, a few State companies exist in sectors that are considered vital to the country, such as port infrastructure, water companies, ground transportation, as well as fuel imports and refining. There’s State presence in certain productive sectors, particularly in the mining and agricultural industries. It must be noted that all these State companies are subject to the same standards as private companies.
4. The Chilean Competition Law does not make any distinctions between State and private companies. Article 3 of this Law states that *“any person that enters into or executes, individually or collectively, any action, act or convention that impedes, restricts or hinders competition or tends to produce those effects, shall be sanctioned with the measures stated in article 26 of the present law, notwithstanding preventive, corrective or prohibitive measures that may be applied to said actions, acts or conventions in each case”*.
5. In fact, there is no provision in the Law that exempts the State from its scope. The Chilean Competition Tribunal (TDLC) has explicitly stated this in several occasions. For instance, in Decision 123, the Tribunal stated that *“in order to define if a determined activity constitutes an economic activity for the intent of defending free competition (...) one must analyze the nature of the activity and not the nature of the person who engages in that activity. Therefore, every economic agent -this is, every natural or juridical person, under public or private law, for profit or nonprofit, contributing individually or collectively in a market as a supplier or as a buyer of goods or services, engages in activities that are subject to the Competition Law”*.
6. The State has a relatively reduced participation as supplier in markets, in line with the subsidiary state philosophy that is the norm in this country; therefore, not many cases regarding advantages or disadvantages have arisen when dealing with competition between State-owned and private firms.
7. However, sometimes tensions arise between the objectives of the Competition Law and other governmental objectives, such as provision of certain public or quasi-public goods, or cases when the allocation of subsidies might eventually crowd out participation of private companies in a certain market. In those cases, the Tribunal has considered that, even though competition is a legally protected interest, in certain cases it might be contingent upon other interests of the State.
8. A very clear example of this situation is reflected in Decision 67/2008 of the TDLC. This case started with an accusation by a private helicopter company (“Helicópteros del Pacífico”) against the Ministry of Agriculture and the National Forestry Corporation (“CONAF”). The defendants were

accused of unfair competition in the market for aerial firefighting services, which were allegedly being offered without the necessary legal permissions. Regarding the first accusation, the TDLC stated that, given that CONAF's provision of aerial firefighting services in public and private property might maximize social welfare, subsidiary State intervention is justifiable as long as there's guarantee that private parties can participate in the market for these services. However, the TDLC stated that CONAF cannot charge a price to private parties for aerial firefighting services, since that would be construed as an economic activity –as opposed to providing a public or quasi-public good–, and CONAF is not authorized to engage in remunerated economic activities (a qualified quorum law is needed for that).

9. Another interesting case took place in 2008, when a telecommunications company (GTD Teleductos) sued the Chilean Railway Company (Empresa de Ferrocarriles del Estado, EFE) for abuse of dominant position. Gas, electricity, water and telecommunications companies need to lay pipes and/or cables that necessarily must cross the railway path, since the Chilean railway essentially divides the country in two, from north to south. EFE charges these companies for crossing the railway with their assets, or for supporting their assets on the railway. GTD accused EFE of fixing abusive charges.

10. When resolving this case, the Competition Tribunal analyzed the legal framework under which EFE could impose charges to other companies for crossing the railway, which is EFE's property, with their assets. After stating that EFE was legally allowed to charge for this, the Tribunal stated that *“however, the fact that EFE can charge a price for the crossings does not imply that it can infract free competition norms while doing it. This, since Competition Law is applicable to EFE, just as they are applicable to any other economic agent”* (Decision 76/2008, paragraph 18). The TDLC finally stated that EFE must modify its pricing scheme, in order to comply with competition law, and avoid arbitrary discriminations when charging for crossings in the railway.

11. In summary, the TDLC can impose sanctions against the State when: (a) it acts as an economic agent, and (b) acts against the Competition Law.

12. On the other hand, the State can affect competition in markets in other ways, particularly when crafting laws that might affect the correct functioning of the market. For these reasons, the competition authorities have been given advocacy related functions. Regarding this issue, the advocacy role of the Chilean competition authorities was explicitly taken into account in the Competition Law in article 1. More specifically, the Chilean Competition Tribunal (TDLC) has the function of promoting competition principles in the law-making process: Article 18, number 4 of the Competition Law states that one of the TDLC's duties is to *“propose to the President of the Republic of Chile, through the corresponding State Minister, the modification or the derogation of legal and statutory precepts it deems contrary to competition, as well as legal or statutory precepts, when deemed necessary to promote competition or regulate the performance of determined economic activities carried out under non-competitive conditions”*.

13. As of May 2015, the TDLC has issued fifteen different propositions to the President, suggesting various modifications to specific laws. To this date, several of these propositions have been taken into account by the government. For instance, the TDLC repeatedly recommended the instauration of telephone number portability, in order to reduce barriers faced by consumers in the mobile telephony market. In December 2010, Law 20471 of Number Portability came into effect, mandating its implementation.