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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**LATIN AMERICAN COMPETITION FORUM**

**-- Session I: Competition Principles in Essential Facilities --**

**Contribution from Chile (TDLC)**

**8-9 September 2010, San José (Costa Rica)**

*The attached document from Chile (TDLC) is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held in Costa Rica on 8-9 September 2010.*

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## **LATIN AMERICAN COMPETITION FORUM**

**8-9 September, San José (Costa Rica)**

**Session I: Competition Principles in Essential Facilities**

**-- CONTRIBUTION FROM CHILE (TDLC) --**

*Tribunal de Defensa de la Libre Competencia*

### **1. Introduction**

1. Although anti-trust legislation in Chile<sup>1</sup> contains no specific regulations on essential facilities, the rulings or resolutions issued by the Tribunal for the Protection of Free Competition (TDLC) have formed jurisprudence in this regard. Based on such rulings, it is possible to infer the principles used by the TDLC to decide whether an infrastructure has essential-facility status or not. The main defining criteria that used have been: (i) use of the infrastructure is essential for suppliers to be able to participate in the market in question; (ii) it is impossible to replicate the infrastructure under technically and economically viable conditions because it would be very costly to do so; (iii) there are no economically viable alternatives available to competitor firms; and (iv) there are no technical or capacity constraints preventing the owner from selling the services provided by the essential facility.

2. In Chile there are a number of sector regulations that include the essential-facility concept, which establish non-discriminatory access to specific infrastructure.

3. The following section will firstly provide a brief description of certain Chilean regulations that embrace the essential-facility concept; secondly it will provide a detailed description of three cases

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<sup>1</sup> <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=940&FMT=115&GUID=>

analyzed in the TDLC, which are illustrative of Chilean jurisprudence on essential facilities and make it possible to identify: (i) the aforementioned principles; (ii) the role of the TDLC and the regulatory agency in declaring a facility as essential; (iii) the objectives pursued by the TDLC in a market involving infrastructure that has essential-facility characteristics; and (iv) the means used to sanction or avoid anti-competitive conduct by operators that are vertically integrated with a monopoly that has essential-facility characteristics. It will then outline other cases in which the TDLC has referred to essential facilities, and it will list cases analyzed in the former commissions (which were replaced by the TDLC in 2004).

## **2. Sector regulations that embrace the essential-facility concept**

4. The Electrical Services Law stipulates that transmission and subtransmission firms may not deny access to transport or transmission services to any stakeholder, except in conditions of insufficient technical capacity. The regulation governing gas transport concessions establishes an open-access policy; and the Law on Port Services requires non-discriminatory access to port infrastructure. The essential-facility concept is thus applied directly in the legislation governing these three industries.

## **3. Three cases analyzed by the TDLC - Examples**

### **3.1 *Vertical integration in the distribution and supply of fuel to aircraft at national airport (Resolution 6)***

#### *3.1.1 Description of the problem*

5. Fuel is distributed and supplied to aircraft at Chile's various airports by holders of concessions granted by the competent authority, the General Civil Aviation Directorate (*Dirección General de Aeronáutica Civil* - DGAC).

6. Fuel can be distributed and supplied to aircraft using two different procedures:

- through *refueller trucks*: a mechanism that consists of using vehicles similar to the gasoline tankers that supply gasoline stations. The truck transports the fuel to the jet aircraft in a tank mounted on its chassis. It connects to the aircraft and pumps, monitors, and controls the fuel entering the aircraft.
- through hydrant networks: this system consists of supplying fuel through underground networks (pipelines) running from tanks situated outside the aircraft runway area to outlets or pits of tanks located within the area, to which the aircraft connect through a hydrant server vehicle.

7. In June 2002, DGAC issued a notice (N° 06/1/1/2725) establishing that, pursuant to aviation safety standards, the supply of aviation fuel through refueller trucks would henceforth only be authorized in airports and/or aerodromes that did not have a hydrant network, and only in exceptional cases, duly accredited by the head of the respective unit, in remote parking positions that did not have the corresponding pit.

8. When the notice was issued by the regulatory body, Santiago International Airport was using the hydrant network system, but airports in other regions of the country were using a combined system of hydrant networks and refueller trucks. The supply of these services was operated by a consortium consisting of Air BP Copec S.A. and Esso Chile, which was the owner of the hydrant networks, and Shell which supplied aircraft with fuel through refueller trucks.

9. After the DGAC had issued the notice in question, Shell asked the TDLC to rule on the legitimacy of the DGAC constituting a monopoly in the aviation fuel supply market, by abolishing the use of refueller trucks. Shell argued that Notice No. 2725 contravened Article 4 of DL 211, and that the administrative act in question was illegal and discriminatory. It adduced harmful effects on free competition in the aviation fuel supply market in Chilean airports, since the notice created a monopoly in favour of the owners of hydrant networks by eliminating refueller trucks — a monopoly that was not established by law, but merely by administrative act, which was a practice expressly prohibited by the legislature.

10. According to Shell, the monopoly also generated an entry barrier to the aviation fuel supply market, since it would only be possible to enter the hydrant network market by duplicating the existing infrastructure. This would be impractical as it would mean obtaining a permit from the authority to dig up the corresponding runway surface to install another supply network, which would not be justified.

### *3.1.2 Analysis of conduct*

11. The Tribunal considered that to participate in the market to supply fuel to commercial aircraft in airports, it was essential to have the technical means to deliver fuel to the aircraft, and that, prior to DGAC Notice 2725, there were two ways of doing this: hydrant networks and refueller trucks. The conditions for using the latter depended exclusively on the price, which was determined in a competitive market. Nonetheless, access to hydrant networks depended exclusively on the conditions imposed by their owners, since it was impossible to duplicate that type of infrastructure in an airport. Accordingly, the notice issued by the regulator had conferred essential-facility status on hydrant networks, since they would be the only viable means to participate in the relevant market, once the refueller truck concessions had expired.

12. The Tribunal considered that the existence of an essential facility for providing a service could easily become an entry barrier, particularly when the facility in question is controlled, directly or indirectly, by stakeholders that compete in the respective relevant market, as in this case, in which fuel distribution and supply are integrated.

13. If the essential facility had been granted to a third party that did not participate in the market to supply fuel to aircraft, the price of the final product might rise, but this would not in itself constitute an entry barrier, since all stakeholders would have an equal opportunity to participate in the aforementioned relevant market. In that case, the effects of creating an essential facility could have been eliminated or mitigated by ex ante competition, using a competitive bidding process based on the price of the service provided by the networks, or regulation of that price if the legislature had so decided. In this case, where the owners of the essential facility are participants in the relevant market, the conditions to be imposed on the concession holders should relate not only to price but also to the general conditions for accessing the network to guarantee service quality.

14. Accordingly, the TDLC decided that Notice 2725, the subject of the consultation made by Shell, tended to affect free competition by making one of the means of supply an essential facility for participation in the market, and could possibly also facilitate collusion between suppliers that are also network owners.

15. The Tribunal considered that the way this essential facility operated could have effects on free competition. It would therefore have been better if the DGAC had previously held consultations on the corresponding bidding conditions. Nonetheless, as the DGAC was not legally obliged to consult, the Tribunal could not reproach it for failing to do so.

### 3.1.3 Recommendations

16. The DGAC is recommended in future to consult the TDLC in advance on bidding conditions for granting concessions to operate hydrant networks in national airports, should this occur.

## 3.2 Vertical integration in the supply of port services and marketing of salt (Ruling 47)

### 3.2.1 Description of the problem

17. Chile's largest salt deposit is located at Gran Salar de Tarapacá, from which nearly 100% of national salt output is obtained. Of total national production in 2000-2003, roughly 9% was sold on the domestic market and about 91% internationally. The main export product is salt used for road de-icing on the east coast of the United States.

18. Domestic salt production is highly concentrated in a single firm, Sal Punta de Lobos (SPL), which accounted for 99.53% and 99.42% of total national salt production in 2003 and 2004 respectively. SPL salt production can be classified in three product groups: salt for de-icing roads, industrial salt (for human consumption and other uses) and chemical salt. Salt for de-icing roads is SPL's most important product in volume terms, accounting for 67% on average in 2000-2003.

19. SPL was vertically integrated, since it acted as a supplier in the salt commercialization market and also provided port services, as owner of the port of Patillos in the Tarapacá region, which was designed and used by the firm to transport salt in bulk.

20. In September 2001, Compañía Eléctrica de Tarapacá S.A. (CELTA), a firm linked to Empresa Nacional de Electricidad S.A. (ENDESA), convened a tender to sell the port of Patache — also in the Tarapacá region — and its respective maritime concession, involving Terminal Marítimo Minera Patache S.A. (TMMP), affiliated to Compañía Minera Cordillera S.A. (Cordillera) — an importer of salt for road de-icing — and Sociedad SPL S.A. (SPL), which submitted the best bid in the tender. The tender failed because CELTA rejected the bids submitted.

21. Following that rejection, ENDESA, as holder of the maritime concession in the port of Patache, and CELTA, as owner of the assets in that concession, embarked on direct negotiations with the stakeholders. These concluded in November 2001 with the signing of a promise to purchase the port, between ENDESA and CELTA on the one hand, and TMMP on the other. Among other conditions, this promise to purchase depended on the Patache port being authorized for salt shipment, by expanding the scope of the current concession.

22. In response, SPL filed various administrative petitions with the Undersecretariat for Maritime Affairs, the Directorate General of Maritime Territory, the National Merchant Marine and the Comptroller General of the Republic, requesting cancellation of the maritime concession for the port of Patache and a decree declaring concession to be illegal.

23. Following the rejection of its administrative petitions, SPL filed suits in various courts against the Chilean Treasury and ENDESA and CELTA, requesting that: (i) the maritime concession held by ENDESA on the Patache port be cancelled; (ii) SPL be awarded the tender and become owner of the Patache port and respective maritime concession; and (iii) Supreme Decree No. 139-2002 of the Ministry of Defence, Undersecretariat for Marine Affairs, which expanded the maritime concession held by ENDESA in the

Patache port to include the shipment of salt, be declared void. These actions delayed authorization to ship salt from the port by at least three years and eight months.<sup>2</sup>

24. The National Economic Regulator (*Fiscalía Nacional Económica* - FNE) took action against SPL for having violated free competition by implementing a set of legal and administrative actions aimed at avoiding, or at least delaying, the entry of new competitors into the salt and salt shipment port markets in the Tarapacá region and thus maintain its monopoly position those markets through illegitimate means.

25. The regulator considered that the discriminatory and abusive conducts SPL was accused of by its competitors in the salt commercialization market, such as Cordillera and Quimsal, consisted of: (i) an aggressive legal campaign by SPL aimed at monopolizing the salt transport market in the Tarapacá region; and that (ii) preventing Quimsal<sup>3</sup> access to the Patache port, in other words denying it sale of port services, was motivated by the vertical integration of SPL.

26. In view of the above, the FNE petitioned the Tribunal, among other things, to order the owners and/or concession holders of the Patillos and Patache ports, when conditions permitted, to allow salt produced by third parties to be shipped through these ports under competitive conditions, and under similar rules to those required of State port enterprises regarding equal and non-discriminatory access to port services, port charges, quality standards, allocation of capacity, and access to and publicity of information.

### 3.2.2 *Analysis of conduct*

27. The Tribunal considered that participation by a salt producer on large international markets would offer significant economies of scale and scope in the production and transport of salt, thereby generating lower unit operating costs which were currently beyond the reach of producers operating on a small scale, such as national producers that only participate in the Chilean market.

28. As the maritime route is the only economically viable means of transporting salt to international markets, competitive access to adequate port facilities plays a key role in achieving those economies of scale. Thanks to its production, port, and marketing infrastructure, SPL has succeeded in competing on international salt markets, and has thus achieved economies of scale and scope enabling it to consolidate a clearly dominant position in domestic markets for salt for industrial and chemical uses and for road de-icing.

29. Apart from being the leading producer and seller of salt on the national market, thanks to its control of the Patillos port and the scale achieved as a result of its participation in international markets, SPL has a cost advantage that cannot be matched by other local producers, thereby giving it a dominant position that is hard for a firm that only transports salt by road to contest.

30. Given the dominant firm's cost advantage in the salt commercialization market nationally, the possibility of restricting SPL's exercise of market power depends on the existence of a supply of potential competitors that is probable, timely, and sufficient to move towards a competitive solution.

31. The Tribunal considered that the chances of competition arising in the national salt commercialization market depended crucially on access to adequate port services. For that reason it analyzed port service access alternatives available to other salt producers than SPL, particularly Cordillera, which intended to acquire the Patache port, to determine whether the latter would be an essential facility in

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<sup>2</sup> The period for which the interim measures obtained by SPL were in force, in other words from the moment the first of them was decreed on 28 August 2002 until SPL withdrew from the respective actions on 25 April 2006.

<sup>3</sup> A family firm engaging in the extraction, crushing, and refining of salt obtained from its mining concessions in Salar Grande de Tarapacá.

the sense of not being replicable under technically and economically viable conditions, or whether there were other alternative ports that were economically viable for firms competing with SPL.

32. On this point, the Tribunal considered that, although Chile is a country with few sheltered bays suitable for port construction, and the construction of a port in unsheltered bays involves significant sunk costs in terms of protection infrastructure, Cordillera is a firm that acts as a consolidated intermediary on the international salt market, with knowledge of distribution channels as well as the infrastructure needed to market salt on a large scale. In a relatively short time, therefore, this firm could attain a scale of production that would make it economically viable to build or take over a port, and thus achieve a cost structure that was competitive with that of SPL. Accordingly, the Patache did not constitute an essential facility.

33. It also considered that, if a private port has the economic characteristics of essential facility, and in the absence of technical constraints or lack of capacity for shipping salt (conditions that do not exist in the case), it could have been considered contrary to free competition for the port operator to deny its services to third parties requesting them. Nonetheless, and considering that there was no proof that SPL had refused to provide port services to small-scale salt producers, because there were no minutes showing that any firm had requested them, the FNE's petition to require the owners of the Patillos and Patache ports to allow the shipment of salt produced by third parties was rejected.

34. On the other hand, the Tribunal concluded that the administrative and legal arguments put forward by SPL were intended to prevent the Patillo port from being authorized by another enterprise to ship salt, and thereby obstruct the entry of competitors into the national salt market, thus artificially and illegitimately maintaining its dominant position in that market, openly violating Article 3 of D.L. N° 211.

### 3.2.3 *Sanctions or recommendation*

35. Having considered the violation, the Tribunal ruled in favour of the FNE petitions and punished SPL for having violated Article 3 of DL NO. 211 by creating a strategic barrier to the entry of new competitors, artificially maintaining its dominant position in the market, by exercising a set of petitions and actions with the clear aim of impeding, restricting, or obstructing free competition in the domestic salt market. It sentenced SPL to a fine payable to the Treasury of 6,000 Monthly Tax Units (*Unidades Tributarias Mensuales - UTM*).

36. Thus, although the Patache port was not considered an essential-facility because it did not fulfil the necessary requirements, the Tribunal ordered SPL and Cordillera to consult the Tribunal in the future on any operation which, for itself or its branches, directly or indirectly represents an increase in concentration in the market for salt shipment port services, given the importance that access to port services has for the intensity of competition in the national salt market.

## 3.3 *Vertical integration between Transbank S.A and issuers of credit cards (Ruling 29)*

### 3.3.1 *Description of the problem*

37. In the market for transactions using bank credit and/or debit cards, it is possible to distinguish four links. The first is issuance, which corresponds to the provision of cards to credit-card holders. The second is affiliation, which corresponds to the incorporation of commercial establishments in the network of payments through credit and/or debit cards. The third is operation, which corresponds to management of the system as a whole; and the last one is licensing, which is the authorisation given by the brand owner (MasterCard, Visa, or other) for use by the card issuer.

38. In Chile, Transbank S.A. serves as operator, and is a banking auxiliary services company supervised by the Superintendency of Banks and Financial Institutions (SBIF). Nonetheless, it also plays the role of acquirer, as the agent of bank card issuers, who delegate to it the function of affiliating commercial establishments to the system.

39. Platforms such as Transbank, on which credit card services operate, may have the characteristics of an essential-facility both for acquirers and for issuers. As evidence of this, consideration was given to the gradual and sustained increase in concentration in the sector. The industry started operations with various platforms; Transbank, in particular, began with Visa; then it transferred to Diners Club; in 1991 it acquired the management of MasterCard and Magna; and since 2000 it has operated contracts for American Express. In other words, it is an industry that began with several platforms, but has ended up with just one.

40. In Ruling No. 1270 of 28 August 2003 resolving a complaint, the Central Preventive Commission decided that Transbank S.A had abused its dominant position in 2001 and 2002, by charging discriminatory and abusive prices to commercial entities that accept bank credit cards, and that it had operated a discriminatory fee structure towards card issuers. It therefore requested the National Economic Regulator (FNE) to indict Transbank S.A. and impose sanctions for the abuse of dominant position. It also requested, among other things, that: (i) no card issuer should control over 15% of the ownership of Transbank S.A. as long as it remained a dominant firm, owing to the problems generated by its vertical integration, since it belongs to banks and financial institutions that issue credit and/or debit cards; and (ii) to modify its pricing structure to make it public, objective and cost-related.

41. The FNE took action against Transbank S.A. and requested the TDLC to consider promoting legal, regulatory and normative amendments aimed at ensuring competitive market conditions and resolve the supposed problems of vertical integration among institutions authorized to issue and operate credit or debit cards.

### *3.3.2 Analysis of conduct*

42. In 2001 - 2002, Transbank S.A paid back to its bank card issuer partners between (0.00027 and 0.002 UF) for each transaction undertaken, but did not extend this refund to the single card issuer that not a Transbank partner (Coopeuch) to which it also provided the service. According to Transbank S.A., this rebate was a incentive mechanism for banks to promote the use of cards among their customers.

43. The Tribunal ruled that the rebate contained anti-competitive elements, because it discriminated in favour of the owners of Transbank, which is an essential input for competing in the market for transactions made using bank credit and/or debit cards as means of payment. The discrimination could therefore constitute an entry barrier to that market. Accordingly, current or potential financial institutions that were not Transbank partners faced different costs than those faced by its partners in the operation of its credit and debit cards. Although the Tribunal considered that the amount of the rebate paid to partners was not significant, so it would constitute a minor barrier, but acceptance of such conduct could develop into a substantial entry barrier in the future.

### *3.3.3 Sanctions and/or recommendations*

44. The TDLC considered that there was no economic or legal justification of any kind for discrimination against an issuer of bank cards that was not a Transbank partner. Accordingly, it concluded that the conduct was unlawful and restricted free competition, so it imposed a fine of 1000 UTM for discriminatory practices. In addition, and as requested by the FNE, the SBIF was recommended to apply the provisions of Circular No. 3209 of December 2002, to all existing banking auxiliary service companies



to ensure access under equal conditions for the different firms which, by nature of the services they provide, necessarily had to participate in it. Transbank S.A. was one of those firms. In other words, it aimed to ensure that Transbank S.A. charges were equitable for all user partners.

#### 4. Other cases analyzed by the TDLC

- *Merger between VTR and MI* (cable TV, broadband, fixed telephony) (Resolution 1): The conditions set by the TDLC for approving the merger between the two operators of cable television, broadband, and fixed telephony services existing at that time, included that “the merged enterprise should provide wholesale, public and non-discriminatory supply, in accordance with competitive market prices for access to broadband Internet, for any ISP.”
- *Merger between Telefónica and Bellsouth* (mobile telephony) (Resolution 2): The Undersecretariat for Telecommunications was recommended to force mobile phone companies to offer facilities for the resale of plans offered by commercial operators without networks, classifying the latter as essential facilities, and considering the potential entry of virtual mobile operators as beneficial for competition in the mobile phone market.
- *The CTC – Voissnet case* (virtual mobile phone operators) (Ruling 45): While not mentioning the “essential-facility” concept explicitly, Compañía de Telecomunicaciones de Chile is punished for having “engaged in a practice that restricts free competition, to obstruct the entry of the plaintiff, Voissnet S.A., and other potential competitors to the market for provision of telephony services”. This practice involved the defendant blocking ports in its modems that allowed IP voice traffic, which is the plaintiff’s main business.
- *Consultation over State-owned airport concessions* (Resolution 25): The TDLC considered that “airports have essential-facility characteristics for the operation of some air transport companies, and their control by a given market competitor could be used to raise entry barriers or obstruct expansion by other participants.”
- *Medicinal oxygen in public hospitals* (Ruling 43): During this case, it was argued that the medicine or oxygen tanks installed in hospitals constituted essential facilities. Nonetheless, the TDLC, in its ruling, disagreed, because “the fact that these tanks are the property of the firms cannot be considered an entry or exit barrier, but instead constitutes an entry cost or change that does not involve an insuperable obstacle for a potential market entrant.”

#### 5. Cases analyzed by the former commissions

45. The former commissions, although not directly applying the “essential-facility” concept in their resolutions, did apply its principles to at least three cases related to fixed telephony.

- In Resolution 389, of 1993, implementing the long-distance call multicarrier system, it ruled that “Firms providing local telephony services should give the same category of access to all long-distance telecommunications service carriers; they should introduce, at their cost, modifications in their local exchanges to give access to all carriers, without prejudice to recovering those investments through non-discriminatory charges to long-distance carriers for the use of their installations.”
- In Resolution 515, of 1998, which classified fixed telephony services subject to price-fixing, it ruled that “The pricing of signal switching and/or transmission services provided as private circuits should facilitate the disaggregated supply of local network facilities to allow for the introduction of greater competition in local telephony service”, thus implicitly classifying those signal switching and/or transmission services as an essential input.

- Resolution 611, of 2001, ruling on a request by CTC, the dominant fixed telephony firm in most of the country at that time, stated that *“As pointed out by CTC in its presentation, the local telephony networks owned by that company are in input for all Chilean telecommunications operators.(...) Steps should be taken to rapidly remove any artificial obstacle to free competition (...) in access by telecommunications operators to technological innovations incorporated into the public telephony network.”*

## **6. Conclusion**

46. Based on the jurisprudence described above, it can be concluded that the Free Competition Tribunal has been cautious in applying the essential-facility doctrine only in cases where the necessary requirements for this are satisfied. The key objective has been to sanction and prevent a situation whereby vertical integration between a monopoly with essential-facility characteristics, and a supplier participating in a related market, attempt to sabotage or exclude other competitors from that market, whether through the fees charged, the quality of the service provided, or denial of sale. Attempts have thus been made to prevent competition from being restricted and social welfare losses being generated that affect allocative efficiency in the market, where it is feasible for more than one supplier to exist.

47. The Tribunal has adopted various measures pursuant to the powers conferred on it by the Law, to reduce the possibility of sabotage or discrimination by integrated monopolies. This is being done through: (i) imposing fines; (ii) making recommendations to regulatory bodies in cases where they have generated essential facilities, such as holding consultations with the TDLC in markets where essential facilities have been granted; (iii) recommending regulatory bodies to ensure access under equal conditions for the different firms which, by nature of the services they provide, must necessarily make use of infrastructure considered as an essential facility.

48. It can also be seen that the TDLC in no case regulates the setting of fees or access charges when it considers an infrastructure to be an essential facility. It merely: (i) decides in which cases an infrastructure actually possesses this characteristic; (ii) identifies the risks this generates; and (iii) specifies general criteria to be fulfilled in giving access to the essential facility.