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LATIN AMERICAN COMPETITION FORUM

-- Session III: Strategies for Competition Advocacy --

Contribution from Chile (FNE)

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

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

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Session III: Strategies for Competition Advocacy

-- CONTRIBUTION FROM CHILE (FNE) --

Fiscalía Nacional Económica

1. Competition advocacy consists of all those non-enforcement activities and proceedings of the public specialised agency to foster a free-market culture and environment for economic activities in the country. It is the institution or offer of incentives and inducements for economic agents, private and public (the government), to internalise the concept of competition and its principles and to make it a frame of reference to guide their actions, operations and economic strategies.

2. Consequently, the advocacy function is exercised in, or targeted at, two areas: on one hand, private agents, and on the other hand, public agents or entities of government. With this latter group, the competition agency works to advise them on policies, legislation and regulations that relate to or have an impact on competition, activities that may collectively be called "intra-governmental advocacy." Naturally, this is a complex matter and involves a wider variety of instruments and methods than advocacy with private agents. This contribution, then, deals only with advocacy targeted at public agents. As will be seen, intra-governmental advocacy makes the technical expertise of the competition agency available to lawmakers and to sectoral regulators to avoid creating or maintaining legal or regulatory rules that impede competition.

1. Intra-governmental advocacy in Chile

3. Since the issuance of the first law whereby Chile introduced provisions to ensure free competition, in 1959, the country's competition authorities have accumulated years of experience in defending and promoting competition. Currently, the Chilean system of free competition consists of the Competition Tribunal (TDLC) and an independent investigative body, or competition agency, the National Economic Prosecutor's Office (FNE), which is a decentralised public service with its own legal personality and financial autonomy. Its head, the National Economic Prosecutor, enjoys independence vis-à-vis the authorities and the courts and cannot be removed by those who appointed him.

4. Article 1 of the Competition Law (DL No. 211) defines the objective of this legal body as being "to promote and defend free competition in markets", giving the corresponding entities the functions of fostering a culture of competition and prosecuting anticompetitive behaviour when it arises. In light of the foregoing, the Organisation and Operations Manual of the FNE indicates that "in relation to promotion the Office shall seek to have the concept of free competition and its benefits incorporated effectively and palpably into our legal institutions, our civic culture, and our public policies." Thus, advocacy is a positive and proactive function, i.e. deliberate and express, of the FNE.

5. Within the FNE, it is the Research Division, currently comprising three lawyers and three economists, that has been assigned responsibility for developing the agency's Annual Advocacy Plan and carrying out the measures and actions flowing from that plan, after approval by senior management. This does not of course exclude active participation by staff from other divisions of the FNE in carrying out those measures and actions.

6. To reinforce its competition advocacy function the FNE uses two principal tools:

- a) **Market studies:** these are reports based on economic research of moderate duration, and are prepared internally or contracted out to consultants, with a view to gathering information and background on a given sector or market. They are not necessarily intended to spark an investigation by the competition agency, but nothing prevents them from giving rise to or being used as evidence in proceedings before the TDLC. Of course, these studies can also be used as the basis for advocacy activities. The market studies of the Chilean FNE are included in its intranet and, as of quite recently, they are being posted at the agency's website: at the present time, two studies are available there, one on the forestry sector and the other on the construction industry.

Market studies can consume significant resources, but they are an indispensable resource for the competition agency, for the following reasons:

- They provide warning of provisions harmful to competition that sectoral regulations may contain.
 - They reveal potentially anticompetitive practices or structures in a given market.
 - They may suggest an approach or a solution to the problem.
 - When contracted out, they may provide technical or specialised input on sectors or situations where the competition agency itself has no basis for judgment.
- b) **Internal guides:** these are instructions that the FNE, in line with best international practice, issues to guide its own work. These instructions establish methods and procedures, standardise criteria, rank priorities, and inform and provide certainty to economic agencies and the community in general on the criteria and working procedures of the competition agency. In line with government policies for transparency and citizen participation, the FNE makes it a practice

to post at its website an initial version of every guide, for consultation and comment by interested parties and the general public, and a short time later it posts the final version of the document.

To date, the following PNE guides have been issued:

- Internal Guide for Analyzing Horizontal Concentrations ("Mergers Guide", 2006), for the analysis of mergers and acquisitions.
- Internal Guide for Judicial Investigations and Actions (2008), which instructs FNE officials in the fundamentals and procedures for conducting their investigations and their actions before the TDLC.
- Internal Guide on Fine Exemption and Reduction in Cases of Collusion, issued after Chile adopted legal provisions for immunity and clemency for participants in a cartel.

2. Interaction with the Legislature

7. Generally speaking, draft laws, i.e. laws in the process of debate and promulgation, may require the identification, analysis and rectification of shortcomings in the area of competition, and in these cases the agency may act to promote such action. In Chile there is no obligation for the FNE to be notified or consulted about draft laws or for it to provide advice on them, but the FNE and the Legislature maintain close relations: lawmakers will usually send drafts to the FNE for review. In fact, since its creation in 2007, the Research Division of the FNE has prepared 25 reports on competition aspects of draft laws, and its staff have accompanied the National Prosecutor on at least 17 occasions during the processing of those drafts, particularly during the legislative process which resulted in Law 20.361, granting new powers to the FNE over collusive agreements between competitors, among other matters.

8. In selecting proposals and draft laws for analysis, the FNE relies on one or more of the following tools or circumstances: (i) market studies; (ii) politically or socially significant cases; and (iii) a method for prioritising markets or sectors to indicate those deserving attention by the competition agency.

3. Intervention in public policies and sector regulations

9. By public policies we mean government programs or plans for social and economic development in concrete fields¹. Sectoral regulations, in turn, are issued by a government entity responsible for regulating and supervising a given sector of public or private economic activity, by reason of its specific technical, productive, informational or strategic features. Those sectors relate primarily to basic network services (electricity, drinking water, telecommunications, energy); public transport of all kinds and related essential facilities (roads, ports and airports); public health and education; financial services, and many others.

10. Public policies and sector regulations involve highly specific means, priorities and purposes that may not give priority to the principles and objectives of competition, nor incorporate them directly². It is a real challenge for the FNE, then, to ensure that such principles are recognised and included in those policies and regulations.

¹ In Chile, for example, successive governments in recent decades have proposed, among other policies, transparency in public management; citizen security and protection; modernisation of the education system; prevention of social diseases; financial modernisation; gender equality; sickness insurance, etc.

² In the Chilean case, moreover, sector regulators are under no legal obligation to submit their rules for consideration by the FNE.

11. Consequently, the FNE has strengthened its collaboration and communication with regulatory agencies in activities of mutual interest. This intra-governmental advocacy ranges from informal contacts (consultations, meetings, information sharing) to official forums and institutional agreements. Their purpose is to assess, with the help of the regulators themselves, any distortions in the rules or in the markets; to devise solutions, if necessary; and to guard against unlawful anticompetitive behaviour. An example is the understanding reached by the FNE with the Ministry of Public Works in which the two agencies have agreed to cooperate in matters of common interest.

12. In other cases, collaboration consists of training. With entry into force of Law 20.361, granting new powers to the FNE, there was a need to make the new rules known, especially within the public sector. In 2009 the FNE gave a commitment to the Office of the Presidency to train managers, professionals and technicians throughout the country in detecting bid-rigging in government procurement. That commitment was fulfilled with some 40 presentations on free competition and bid-rigging, held throughout the country during the course of 2009.

4. Activities with regional and municipal governments

13. Following centralisation in the national capital of the regional antitrust bodies in 2003, the FNE created a regional coordination office for the defence and promotion of free competition. In mid-2006, the FNE signed a cooperation agreement with the consumer protection agency, SERNAC, instituting mutual coordination and collaboration and delegating to the regional Directors of SERNAC the task of receiving competition-related complaints.

14. The regional activities of the FNE are included in an annual program that embraces discussion groups, seminars, workshops and surveys in which agency staff, including the National Prosecutor and Deputy Prosecutor, publicise and reinforce knowledge about competition institutions with public and private entities, academics and business groups in each region. In 2009 there were 43 such activities, and over the course of the years the FNE has visited every region in the country. During those encounters, it has explained and publicised the structure and functioning of the Chilean competition system, its component organs, procedures for filing complaints, and unlawful behaviour punished by law, analyzing some significant cases in order to familiarise the public with these topics.

5. Advocacy versus law enforcement

15. Ideally, in an efficient system of protection and advocacy the competition agency will turn to the courts only in extreme cases. An agency with recognised technical expertise, one that can reach prompt solutions such as out-of-court settlements, and one that in addition has advocacy and prevention functions, can contribute decisively to the competitive functioning of markets.

16. Competition advocacy also includes discouraging anticompetitive behaviour by alerting economic agents and public opinion to the existence of laws, rules and institutions that restrict and punish such behaviour; providing information on how to access those institutions; and reporting on the results (rulings, penalties) that all this implies. Consequently, advocacy has great preventive potential. Competition advocacy, rather than being a means of reinforcing or replacing law enforcement, should be seen then as a function complementary to enforcement, in the sense that certain advocacy activities may be just as or more effective, swifter and less costly than enforcement as a means of inducing competitive economic behaviour.

5.1 *Instances of advocacy with successful results*

17. The Chilean competition agency can point to at least two instances where advocacy produced effective results:

a) Prevention of bid rigging in government procurement

18. With support from the OECD and Canada's Competition Bureau, the FNE initiated in 2008 an institutional program to prevent and detect bid-rigging in procurement by public entities. Many public agencies have signed on to this initiative and have set up their own anti-bid-rigging committees. These include the Comptroller General's Office, various ministries and departments, the Government Procurement Directorate, the Auditor General's Office, and the State Supply Network (REDABA³). They have all incorporated measures and mechanisms into their internal processes designed to prevent or detect such conduct, becoming in this way strategic allies of the FNE in detecting a crime that affects not only markets but also the nation's fiscal health.

b) Reports on municipal bidding procedures

19. By law, Chile's 345 municipios must call for public tenders in their procurement of goods and services. To ensure that the technical and administrative documentation for those tenders guarantees competition provisions in the submission and award of bids, in June 2006 the TDLC issued a set of General Instructions (*Instrucciones de Carácter General N° 1*). They relate in particular to the contracting of services for the collection, transportation and disposal of household trash and provide that those documents shall be reviewed by the FNE. Since 2006 the FNE has issued 325 reports on such bidding documents.

20. In light of the General Instructions and the ongoing task of preparing reports, the FNE established in 2009 an internal procedure, in full effect since then, to speed the review of bidding documents and standardise its reports on them.

5.2 *Law enforcement in place of advocacy*

21. There have been a few cases in Chile where the communications and good offices of the FNE have been frustrated by misunderstanding, disregard, inefficiencies and legal or administrative discrepancies on the part of some government entity, and in those cases the Office has had to resort to law enforcement.

22. One such case gave rise to Ruling 77 of November 2008. After more than six months of fruitless application of its legal powers and obligations, in August 2007 the FNE filed suit before the TDLC against the Municipality of Curicó (Region VI) for breach of certain provisions in the General Instructions issued by that tribunal. After a thorough analysis of the defendant's failings with respect to the content and substance of the instructions, the TDLC upheld the FNE's suit and fined the municipality in the equivalent of \$3400, ordering it to abide by those rules in the future.

³ An association of more than 3000 public procurement officers.