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LATIN AMERICAN COMPETITION FORUM

Session IV: Competition Issues in the Air Transport Sector

Contribution from Chile (FNE)

13-14 Septembre 2011, Bogotá (Colombia)

The attached document from Chile (FNE) is circulated FOR DISCUSSION under Session IV of the Latin American Competition Forum at its forthcoming meeting to be held on 13-14 September 2011 (Colombia).

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Session IV: Competition Issues in the Air Transport Sector

-- CONTRIBUTION FROM CHILE (FNE) --

1. Industry characteristics and regulatory framework

1.1 Air transport industry

1. The structure of the air transport industry in Chile, particularly in national transport, is highly concentrated, with the Lan group having a majority market share.

Market share of the Lan Group
Domestic and International Passenger and Cargo Transport (2010)

Market	% Passengers and Cargo Transported
Domestic passenger	77.48%
Domestic cargo	89.18%
International passenger	62.06%
International cargo	59.42%

Source: Drawn up by FNE, from statistics available on the website of the Civil Aeronautics Board (*Junta de Aeronáutica Civil*)

2. The present-day structure of the aviation market with its origin and destination in Chile is influenced by the merger process between Lan Chile and Ladeco, which was completed at the end of 1997[1]. Prior to this operation, there was a duopoly at the national level. Subsequently, domestic passenger and cargo transport has been largely dominated by Lan, which has had a majority market share that has

[1] Resolution No. 445, 10.08.1995 of the Competition Committee (the *Comisión Resolutiva* which, at that time, was the resolution body for matters of competition), authorised the purchase of Ladeco shares by Lan, which meant that the domestic aviation market would no longer have an effective competitor, and Lan became the only Chilean airline offering important international routes.

remained largely unchanged over time. Aside from the presence of this company, other airlines that have entered and exited the market have accounted all together for less than 25% of the market. The industry is therefore very concentrated. In the case of both cargo and passenger international transport there is less concentration, and on some routes there are important competitors. Nevertheless, several airlines have stopped direct services to Chile, such as Lufthansa and Swiss[2].

3. The structure at the present time operates under a regulatory framework, the origins of which go back to 1979[3]. In order to ensure free entry to the markets, the Commercial Aviation Act (D.L. no. 2,564, 1979) repealed the granting of commercial air licences, whereby both Chilean and foreign companies could freely operate in the country, subject to compliance with the following requirements[4]:

- Technical specifications: Air Operator's Certificate from the Civil Aviation Authority;
- Insurance requirements: insurance for passengers and third parties on the surface as laid down by the Civil Aeronautics Board;

4. Since then, the legal framework for commercial aviation in Chile, and in particular restricted air frequency allocation, has supported a policy of open skies in commercial aviation, the principles of which are free entry to markets, free market pricing and minimal market intervention by the aviation authority. Nevertheless, it should be emphasised that, in the application of these general guidelines, the opening up of Chilean airspace to companies from other countries has been carried out on the basis of reciprocal rights[5]. This has led to a varying degree to which routes have been opened up, depending on the freedoms of the air that foreign countries have decided to implement.

5. There was a 92% rate of growth in the industry between 2001-2010 for national passenger transport, and 63% for international passenger transport; in the case of national cargo transport, there was a decline of 10% and international cargo dropped by 8%[6]. Growth in passenger transport was at least partially due to the increase in *per capita* income over the ten-year period. With regard to cargo transport, the reasons for the decrease over the period have not been examined in depth.

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2 All of the information on air traffic produced by national and international airlines over the last ten years can be found on the following link on the Civil Aeronautics Board website: http://www.jac-chile.cl/OpenSupport_EstadisticasFlight/asp/pagDefault.asp?arginstanciaID=48; The report, "Industrial Organisation in the Air Transport Sector in Chile", by Caludio Agostini (2005), analyses the phenomenon of the entry and exit of airlines in the domestic market. Available from the studies section at: http://www.juntadeaeronauticacivil.cl/

3 From 1929 until 1979, Lan Chile (a state-owned company) had a monopoly of the domestic market. Any company wanting to operate a route in this market had to consult the opinion of the company and then make a decision. If Lan Chile was of the view that the route was covered sufficiently, then authorisation would not be given. In 1958, Ladeco started operating as a company to transport mine workers, not to compete with Lan Chile. In the international market, only Lan Chile could operate, together with companies from other countries running reciprocal operations. If a foreign company wanted to operate on a route not operated by Lan Chile, the sole possibility for obtaining authorisation for such an operation was for it to make a prior pool agreement with Lan Chile. This meant paying Lan to operate (part of all sales). Moreover, fares were set for both the national and international markets.

4 Art. 1 DL 2564, 1979: *"Air transport services, whether cabotage or international, and all other classes of commercial airline services, may be undertaken by national and foreign companies, subject to compliance with all technical specifications and insurance requirements laid down by the national authorities"*.

5 The principle of reciprocity means that the Chilean authorities give airlines from other countries access to freedoms of the air that said countries give to Chilean airlines.

6 Based on statistics from the Civil Aeronautics Board website: http://www.jac-chile.cl/OpenSupport_EstadisticasFlight/asp/pagDefault.asp?arginstanciaID=48

6. In what was an interesting pro-competition initiative of a miscellaneous nature promoted by the Ministry of Economic Affairs in May 2011, called "Competitive Impulse", measures to increasingly liberalise the sector were developed to allow air cabotage by foreign companies and to provide for the unilateral opening-up of skies in internal passenger transport and cargo transport by eliminating all legal restrictions prohibiting the air cabotage of passengers and cargo by foreign aircraft, with due precautions being given to service security and tax treatment[7].

1.2 Airport infrastructures for the air transport sector

7. In the case of airport infrastructure, a policy was started in Chile in the mid-nineties to develop infrastructure through the granting of concessions (licencing procedures) to private parties responsible for the construction and management of the works. This policy took in all of the country's main airports. Public utility contractors of public works for government facilities and installations at airports, in addition to the general regulations on free competition in Decree Law 211, are currently regulated by the corresponding legislation governing the award of contracts, as well the subsequent amendments contained in supplementary agreements, together with the terms of the tender for the granting of a license together with any disclaimers, which are all an integral part of the aforementioned Decree Law.

8. The Ministry of Public Works' agency responsible for coordinating public works contracts (*Coordinación de Concessions de Obras Públicas*) has made various tenders for the award of licenses for the construction, maintenance and management of airports, with the administration of various regional airports and the airport in Santiago currently being run by the private sector. Santiago Airport is of particular importance in that almost all international flights are concentrated there. The competition authorities have been involved in the ex-ante evaluation of the competitive allocation of licence contracts and of making sure that the ownership structure of successful bidders does not lead to anti-competitive incentives in the transport services market[8].

9. The terms of tender to be complied with by companies awarded airport infrastructure concession licences take into account certain safeguards for free competition, such as the establishment of maximum rates to be charged for the provision of certain services. For example, there are defined maximum charges for a series of aviation services[9], such as embarkation and disembarkation systems. In the case of the terms of tender at the Arturo Merino Benítez Airport in Santiago, in July 1997, it specifically states in paragraph 1.8.5.3 that"(...) the charging of rates that are higher than authorised maximum charges constitutes an infringement of the concession contract for which the MOP imposes fines and can even terminate the concession in cases of serious infringement".

10. In the case of other services, the terms stipulate that they cannot be provided directly by the concession holder, and that it must instead be a number of independent companies that provide these services[10].

11. The person in charge of supervising compliance with the rules governing airport concessions and licences is the *Inspector Fiscal* (Head of Inspection) at the Ministry of Public Works.

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7 "Competitive Impulse" document and initiative, Ministry of the Economy, May 2011, http://www.economia.gob.cl/wp-content/uploads/2011/05/Impulso-Competitivo.pdf (Action No. 19)

8 For example, as a rule, the competition authorities have limited any direct or indirect holding in companies with airport infrastructure licenses for air transport and associated companies. V., *Comisión Preventiva Central*, Ruling No. 1004, 25.04.1997; as an exception, authorisation was given for a broader system to allow for vertical integration in Santiago Airport: Comisión Preventiva Central, Ruling No. 1014, 11.07.1997.

9 Defined by the terms of tender for Santiago Airport as "*those connected with support services for aircraft during stopover in the airport and other ground services*".

10 In the case of the terms of tender for Santiago Airport, it stipulates, for example, for platform services, that these must be provided by three unrelated companies.

12. The control and inspection of transport safety in the network of airports in Chile is carried out by the Chilean Civil Aviation Authority.

1.3 Enforceability of competition law in the air transport sector and infrastructure sector

13. Competition law (anti-trust law) is applicable to the sector of national and international cargo and passenger air transport services, as well as to the sector of supplies for these services. It is also applicable to the sector of airport infrastructure, even in cases where this is contracted out to a private company. Summaries of three cases illustrating the application of competition law in these sectors are given below.

The "Sky" Case – TDLC, Sentence no. 44/2006, 26.09.2006

Sky Service S.A. ("Sky"), a Chilean company and rival to Lan on several routes, sued the Ministry of Transport and Telecommunications and the Civil Aeronautics Board, stating that the "Regulations on Public Tenders for the Allocation of International Frequencies to National Companies" were contrary to the competition (anti-trust) regulations, because they establish a system of allocation based on the economic capacity of the proposers participating at the end of the process, which is favourable to the dominant airline. As a result of its application, Sky also criticised the concessions for international air frequencies on routes to Brazil in the tender that closed on 20.06.2005. Moreover, it sued Lan, which it claimed had been awarded all of the long distance routes between Chile and Brazil. The claimant requested that the tender and respective award of concessions be declared void, in breach of competition rules, where a monopoly was granted without express statutory authorisation, and that parameters for any such tender be established to prevent the concentration of frequencies held by one sole operator, by also determining the concentration limits for acceptable frequencies. It also requested that, in general, all appropriate measures are taken to ensure that competition laws are upheld.

The *Tribunal de Defensa de la Libre Competencia* (TDLC, the Chilean Competition Tribunal) rejected all parts of the action brought by Sky, except for the fact that, in the court's declaration, it was recognised that there were features of the Regulations in question that restrict free competition in the allocation of restricted international frequencies; it accordingly proposed their amendment on the basis of the principles of free competition, transparency, non-discrimination, and allocative efficiency in the award, use, withdrawal from and re-award of frequencies.

The "Lan Cargo/Punta Arenas" Case – TDLC, Sentence no. 55/2007, 21.06.2007

The FNE accused Lan of abusing its dominant position by attempting to transfer its dominant position in one market (international air transport to Punta Arenas) to another associated market (the warehousing of import cargo). In actual fact, when the warehouse at the airport (Fast Air) that was connected with the dominant airline started operating, Lan (i) totally took out of service an approximately 21 km-long section of road that, up until that time, it had provided for transport at no cost for users between the airport and the import warehouse in the city; (ii) began to charge a new additional fee for the inland freight service for clients wishing to maintain their operations with the pre-existing import warehouse.

Furthermore, for the services provided in the warehouse, Lan had set an additional fee for import cargo, related to use of the fork-lift truck, a fee that would likewise be unfair and discriminatory, as this charge would not be applied on national cargo.

The TDLC authorised the FNE injunction and stated that Lan had abused its dominant position in the international cargo air transport market to Punta Arenas, with anti-competitive effects on the market associated with the customs warehousing of air cargo in said city. It fined Lan and its freight subsidiary US $150,000, and it also ordered it to restructure its charges. In addition, the TDLC recommended changes be made to the regulations and Lan and its subsidiary were ordered to change their procedures as long as said changes were not implemented, all of which was aimed at promoting competition in customs warehousing.

The TDLC's ruling was upheld by the Supreme Court.

The Case of "Transportes Delfos and FNE v. SCL" – TDLC, Sentence no. 61/2007, 27.12.07

The FNE accused SCL, a company with a concession licence at Santiago Airport, of having sublicenced the taxi service in a way that was not compliant with the regulations of the former anti-monopoly body (*Comisiones Antimonopolio*, Ruling no. 961-96), which would constitute an abuse of its dominant position and have restricted and/or inhibited free competition between the operators of public transport services at the Airport. In actual fact, SCL had granted the present sublicences without prior tender and allocated them in a discretionary way, at a cost that did not conform to a single, fixed general amount and that was lacking objective and reasonable parameters, with mutually independent operators. They were also allocated according to compulsory maximum rates that were publicly advertised. The FNE also declared that the maximum rates set by SCL for this service were not an effective ceiling, nor were they in line with objective criteria, according to which, in its opinion, it was not possible to ensure competitive rates.

There was also an individual complainant (Transportes Delfos) in the case, who was affected by the sub-licence allocation system for the ground transport service.

The TDLC authorised the FNE injunction against SCL and ordered it, on termination of the current contracts for the sub-licencing of the tourist taxi service, to sub-licence by way of an open public tender, the terms of which were to be referred to the FNE. In addition, the TDLC made recommendations to the Government, through the Ministry of Public Works, that the relevant legal and regulatory rules should be amended.

14. According to the Supreme Court's finding in the Appeal against TDLC Sentence no. 81[11], the application of competition law to the air transport and airport infrastructure sectors does not mean however that, through the application of said competition law, other legislation and regulations, or application of the same, are void or repealed, not even if they have anti-competition effects.

2. Market definition

15. The principles governing the relevant market definition in passenger transport, cargo transport and services associated with transport infrastructure and supplies are set out separately below.

2.1 Passenger transport

16. For the relevant market definition in the case of passenger transport, the FNE considers substitutability on the demand side as being the most suitable.

17. Definition of the relevant market is done case by case. So far, the FNE has made no distinction in its definition of relevant market according to type of conduct, so it will therefore continue to use a similar methodology, whether for agreements between competitors, the analysis of mergers and other operations leading to concentration or the abuse of a dominant position.

[11] TDLC, Sentence No. 81/2009, 16.01.09: *Judges are obliged to honour their function of applying the prevailing legislation, irrespective of the satisfaction that they may have with its merits. Following the TDLC's ruling that the regulations implementing commercial aviation law, to which express reference is made regarding the tender of international air frequencies, contravene the rules governing free competition, in this case Decree Law 211, it can merely propose that these are amended, but it cannot order the JAC to formulate the rules irrespective of the provisions of the law, as has mistakenly been done in this case, for which reason the appeals are accepted.* (Cons. 8)

18. In the case of passenger transport, the relevant market has been best defined by the combination of city pairs (origin and destination), a view shared by the TDLC[12].

19. In addition to air transport by way of non-stop direct flights on each route, the FNE analyses the feasibility of the substitutability of flights with stop-overs and/or journeys using other means of transportation. The degree of substitutability is determined by the specific characteristics of each option, such as journey time, cost, level of comfort, level of flexibility, etc. In general, on short-haul routes, and in relation to passenger transport, flights with stop-overs or intermediate stops are not considered as being part of the relevant market, mainly because the time taken on short routes to make an intermediate stop represents an important percentage of the overall time of the flight. The foregoing was ratified by the TDLC in Sentence no. 81, in its ruling that indirect flights were not part of the relevant market on the Santiago-Lima route[13].

20. In regard to what it says about the existence of substitution through other means of transportation for passenger transport, the FNE has ruled out these alternatives in various opportunities given that, due to the length of the journey, it is not viable for consumers to choose any equivalent or alternative means of ground transport in terms of cost and quality due, fundamentally, to service availability and journey time[14].

21. In its definition of the relevant market, the FNE considered the different aspects of demand among time-sensitive and non-time-sensitive passengers, in order to analyse, for example substitutability between flights with and without stop-overs due to the more inelastic demand of time-sensitive passengers for direct flights, i.e. for flights that depart and arrive at required times. Flights with a stop-over are therefore generally not considered to be a good substitute for time-sensitive passengers. Another factor to be taken into account is the ability to effectively compete on a route where there is no possibility of attracting a percentage of business passengers.

22. A further aspect taken into consideration when analysing substitutability between flights with and without a stop-over is the journey distance, given that on short routes the time taken to make an intermediate stop represents an important percentage of the overall time of a flight, as a result of which the FNE ruled that, for this type of route, flights with a stop-over should not be considered as a substitute for flights without stop-overs[15].

23. In the analysis of the degree of competition that low-cost airlines can exert in order to attract passengers, both the FNE and the TDLC concurred that any dispute would only be with regard to passengers with a more elastic demand as far as cost is concerned, with the TDLC pointing out that part of the tourist passengers do fall into this bracket[16].

24. In practice, given the limited information that the FNE has had before it regarding this type of passenger, and in view of the fact that the analysis of competition has mostly shown no great variation on the

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12 As confirmed by the TDLC, for example, in Sentences No. 44/2006, 26.09.2006, and No.81/2009, 16.01.2009.

13 The TDLC also held that flights with intermediate stop-overs have higher costs, which adds to the lower demand for them.

14 See for example the FNE's report to the TDLC within the context of the inquiry into the merger operation between Lan and Tam. NC Case No. 388-11. See: http://www.tdlc.cl/DocumentosMultiples/Aporta%20Antecedentes%20FNE%20-%20NC%20388-11.pdf

15 *Ibidem*.

16 See recital 52, Sentence No.81/2009, 16.01.09.

routes analysed, there have not been any cases defined as distinct relevant markets according to passenger type[17].

25. With regard to regular and charter flights, the FNE has, in certain circumstances, concluded that the market consists of regular flights, with charter flights not being considered a substitute on the demand side[18].

26. The national sectoral regulators do not generally give any definitions for relevant market. Nevertheless, in the case of the FNE's injunction against JAC, the sectoral body and counterpart to the FNE in the case ruled that, in the definition for the Santiago-Lima route, the relevant market should be extended to include flights with a stop-over[19].

2.2 Cargo transport

27. With regard to cargo (freight) transport, the relevant market has been defined on a unidirectional basis, given that import cargo is totally different to export cargo, in terms of demand characteristics. In this type of product, an analysis is also made of the feasibility of substitution with other means of transport, including different factors connected with the particular characteristics of products that are transported (such as the degree of urgency required for transport) and each means of transport (such as risks associated with the means of transport, cost and time). In general, on long-haul routes, other means of transport are not considered to be a substitute for air transport due to non-feasibility and journey length[20].

28. Unlike the passenger transport market, direct and indirect flights have been considered part of the same relevant market, given that, generally speaking, freight can be transported with one or more intermediate stops, without this being considered to be a lower quality service by the consumer.

29. In addition, given the possibilities of intermodal transport, in particular overland transport, it is possible to define the geographical market more broadly by taking countries and/or continents, and not just city pairs, providing that the particular characteristics of each case are taken into consideration. In view of the foregoing, in the case NC Roll no. 388-11, the FNE dealt with cargo transport to and from Chile on a country-by-country basis, from and to countries in Latin America. In the case of Europe and North America, a continent-based approach was used to define the geographical markets, as to any specific country of origin or destination in these continents.

2.3 Market definition in cases of infrastructure and inputs for air transport

30. In order to determine the relevant market in reference to air transport-related infrastructure, the FNE and the TDLC analysed substitutability on the side of supply and demand, although not necessarily limiting the relevant geographical market to the infrastructure and supplies at airports. Nevertheless, the definition is usually limited to a particular airport infrastructure, which, generally speaking, rules out any other alternatives, such as completion of the economic analysis[21].

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17 *Ibidem*, supra, n. 14.

18 See for example the point made by the FNE in the observations regarding the proof in Case C No. 148-07.

19 See paragraph 5.29 of "Having regard to" in Sentence No.81/2009, 16.01.09.

20 See for example, TDLC, Sentence No. 55/2007, 21.06.2007 (Cons. 16 and 17).

21 In Sentence No. 75/2008 by the TDLC, 30.09.2008, the idea that land outside of the concession area at the airport could be considered as a substitute for land inside the concession area for courier companies was rejected due to the higher cost involved in this option (see recitals 35 and 36).

3. Alliances and mergers

31. In 2010, the FNE carried out an analysis of airlines operations involving code sharing and its effects on competition, on the Santiago-Madrid, Santiago-Miami, Santiago-Mexico City and Santiago-Sao Paulo routes.

32. Among the conclusions of the report, the FNE stated that, in general, code sharing agreements provide a series of benefits, such as better coordination of connections and an increase in network economies, among others. On the other hand, however, these agreements make it easier for airlines to coordinate with each other regarding fares, routes, etc. This is particularly so on parallel routes. According to the recommendations in the report, airlines using code sharing should offer these sections of a flight as a single flight so as to not take over the flight information display boards, the sectoral authorities should implement measures to implement the unilateral opening of the skies and in future the FNE should refer all future code share agreements by the dominant airline concerning parallel routes to the TDLC, including the renewal of prevailing agreements, in particular when concentration thresholds laid down in the guidelines for horizontal concentration operation are exceeded. However, the report did not call for any specific action to be referred by the FNE to the TDLC, although it did serve as the background for other cases being analysed in the aviation market.

33. The report mentioned in the previous paragraph also includes a ruling by the TDLC in a Sentence dealing with the carrier frequency allocation sector, regarding alliances between airlines: "*In general, airline alliances tend to enhance consumer well-being when they involve routes where the companies were not originally in direct competition. In other cases, however, the benefits for consumer well-being are less evident.*"[22]

34. The Chilean competition authorities have had the opportunity to become familiar with and analyse two important mergers in the air transport industry, which are summarised below.

The "Lan-Ladeco Merger" Case – TDLC, Resolution no. 445, 10.08.1995

Lan requested a ruling by the Anti-Monopoly Commission (*Comision Preventiva Central*, CPC) stating that the purchase of Ladeco shares was not an infringement of the rules of free competition. The FNE pointed out that the purchase would have a restrictive effect on competition as the reduction in the number of competitors from three to two and the increased degree of concentration would imply the risk of an increase in costs and fares. The Competition Committee (*Comision Resolutiva*) endorsed the operation, in what was a divided ruling, on the grounds that it considered, amongst other things, that the merger would allow for economies of scale and that the reduction in costs might eventually benefit the consumers.

In parallel with the endorsement, the merged airlines were also required however to comply with a Self-Regulation Plan whereby the average charge per kilometre in markets defined as being non-competitive was no higher than the rate charged in competitive markets.

NB: The Self-Regulation Plan was finally endorsed by the Competition Committee with Resolution no. 496, 28.10.1997. The companies that were subsequently reviewed under the Plan were fined for non-compliance (Resolution no. 723, 30.01.2004).

[22] Sentence No. 44/2006, 26.09.2006, Cons. 30.

The "Lan-Tam Merger" Case – TDLC (pending)

The TDLC is currently analysing the merger between the national airline, Lan, and the Brazilian airline, Tam (NC Case no. 388-11).

The FNE submitted a report to the TDLC setting out its analysis regarding the merger. In this proposed merger, potential risks to competition were analysed and whether there were means to mitigate them, together with the efficiencies and the probability of these being transferred to consumers. Risks for competition were detected, mainly in passenger transport on certain routes where concentration would increase considerably, in addition to the fact of existing barriers to entry. From the analysis of the antecedents, there may be the risk of higher charges and a decrease in supply, mainly on the Santiago-Sao Paulo route, but also on others, such as routes between Santiago and Europe (such as London, Milan and Frankfurt). Regarding the risks in terms of coordination, the FNE considered the antecedent of the cartel detected in the international cargo transport market, in which Lan participated, to be significant.

In the analysis of the efficiencies, it was noted that details of the factual basis for each efficiency as claimed by the parties were not available, and it was not possible to check whether these would in fact be achieved. Nevertheless, it was noted that there were no antecedents according to which it can be concluded that the synergies would be transferred to the consumer with lower fare on different routes, or in any other way.

Nevertheless, a series of mitigation measures were proposed, as, according to the FNE, the aforementioned risks were contingencies that can be mitigated. Most of the proposed measures deal mainly with reducing the barriers to entry into the routes affected by the merger. Other measures aim at reducing the possibility of fares being raised. Both structural and behavioural measures are proposed. Amongst others, the proposal is made for the merged airline to exchange slots in favour of third party airlines that so request and/or enter Guarulhos airport in Sao Paulo, given the existing congestion at that airport. Measures such as extending the merged airline's frequent passenger programme to passengers of an airline entering certain routes and the signing of interline agreements are also considered. In order to directly prevent the abuse of a dominant position, measures to reduce fares and increase the supply on affected routes are proposed.

The TDLC must issue a resolution on this operation within a short time.

4. Airport services

35. The Chilean authorities have had the opportunity to analyse problems with competition in airport infrastructure services separate from air transport services. Problems have occurred in spite of the existence of sector-specific regulations for infrastructure that, in the majority of cases, refer to pro-competition provisions and regulatory bodies responsible for their enforcement. Consideration also needs to be given to the role of the competition authorities linked to the operating of the respective infrastructure in the process of the ex-ante review of the risks involved[23].

36. Services analysed in investigations by the FNE and/or proceedings brought before the TDLC in recent years include the following: the passenger ground transport service to and from the airport; the leasing of passenger information counters linked to the arrangements for leasing software used by these computer work stations; areas for the installation of infrastructure and operations (express transport) for courier service companies; aspects connected with the use of passenger boarding bridges linked to the contracting of other services; conditions of use for hydrant systems for aircraft refuelling; the structure of charges for airport parking.

37. In certain instances, the practices of concession holders at airports have been expressly criticised by the TDLC, and they have even received fines, as in the following case.

23 The ex-ante actions referred to have included, for example, reports and comments on the conditions of competition in the terms of tender during the period of tender validity.

The “ATREX v. SCL” Case – TDLC, Sentence no. 75/2008, 30.09.2008

The trade association ATREX (*Asociación Gremial de Transporte Expreso Internacional*) and various courier and postal service companies sued SCL, a company holding a concession at Santiago Airport, for the abusive exploitation of its dominant position and arbitrary discrimination consisting of: (i) imposing a form of payment according to ‘per kilogram of transported cargo’ that was not authorised according to the terms of tender; (ii) arbitrary discrimination in the application of different prices for courier companies in equivalent conditions, and different prices for courier companies and the Chilean Post (*Correos de Chile*); (iii) negation and unfair restriction regarding requests by the claimants to extend infrastructure.

Upholding the claim, the court stated that SCL was guilty of the conduct of discrimination and the abuse of a dominant position, as a result of which it was imposed a fine of approximately US$ 1.8 million. The court ruled that SCL could only charge courier companies as permitted under the terms of tender. It also declared that SCL must lease the claimants, together with other courier companies that so require, an area inside Arturo Merino Benítez Airport that is appropriate for operating Cargo Terminal services so that, either jointly or separately, they can build the necessary installations and facilities in order to operate correctly.

The TDLC’s ruling was upheld by the Supreme Court.