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Session I: Competition Issues in Trade Associations

Contribution from Chile (FNE)

13-14 Septembre 2011, Bogotá (Colombia)

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

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Session I: Competition Issues in Trade Associations

-- CONTRIBUTION FROM CHILE (FNE) --

1. Trade associations in Chile

1. Trade/business associations in Chile are regulated under Decree Law 2757, 1979, with professional associations also figuring under this same category. Pursuant to article 1, *trade associations are organisations established in accordance with this law that bring together natural and/or legal persons to promote the rationalisation, development and protection of their common activities, on the grounds of their profession, work or branch of production or services, and professions associated with these common activities.*

2. Decree Law 211:1973, together with its amendments, lays down the antitrust regulations in Chile although no specific reference is made in the provisions of this law to trade associations, nor to any other potential infringer of competition law in particular; however, extensive reference is made to contributory infringement with anti-competitive effect. Jurisprudence of the Antitrust Commissions (*Comisiones Antimonopolio*) and, in recent years, that of the Chilean Competition Tribunal (*Tribunal de Defensa de la Libre Competencia*, TDLC), has constantly upheld that Decree Law 211 is applicable to trade associations[1]. The prevailing regulations on trade associations also support the same principle of

[1] The TDLC took up this matter in Sentence 82/2009, 22.01.09 *(the Interbus case)* which, in view of the allegation by a trade association of bus operators that it had not engaged in unlawful anti-competitive behaviour, stated: *"[T]his Tribunal has repeatedly expressed in its rulings that, irrespective of whatever the nature and purpose of an entity may be, whether public or private, what is important in terms of antitrust legislation is to analyse whether its actions as a supplying and/or demanding agent of goods and services has an effect on what should prevail in a competitive market, as the intention of protecting the legal interest of the free market is to prevent conduct that obstructs or eliminates this and which leads to the loss of social welfare or, in other words, that it negatively affects economic efficiency in the use of scarce resources;"* (recital 2) */"[I]t should be borne in mind that trade associations, business associations*

applicability[2]. This was recently recognised in a survey carried out by the Faculty of Law at the University of Chile, entitled "Trade and Business Associations and Competition Law in Chile" (December 2010), on experience in Chile with the enforcement of competition law as applied to trade associations[3].

3. From the point of view of competition law, trade associations are generally dealt with in the same way as any natural or legal person who breaches antitrust regulations, with no special exemptions applying to any of their frequent activities[4], nor do any regulations exist that establish a regime that distinguishes between the responsibility of the members of a trade association and the responsibility of the association itself [5].

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*and any other type of industrial self-regulating body, either as participants in the economic activity or as organisers, coordinators or as a cohesive element for the competitive behaviour of their members, cannot circumvent compliance with rules that precisely serve to ensure effective competition in the markets in which they are involved. This has been recognised in comparative law, where said regulations also apply to this type of behaviour by trade and business associations. This is the case, for example, with Article 1 of the Spanish Anti-Trust Law 15/2007, 3 July (*Ley de Defensa de la Competencia*), and Section 1, article 81 of the Treaty on European Union."* (recital 5) / *"In addition, and as is explained below, pursuant to article 26 of the aforementioned Decree Law 2757, it was an aggravating circumstance of the then criminal responsibility for antitrust offences for a trade association to commit such a violation, which shows that the applicability of antitrust regulations to trade associations is a recognised circumstance and one that has been established in our legal system for some time;"* (recital 6). Sentence upheld by the Supreme Court, 25.06.09, Case 1856, 2009, which elaborates on this point in recital 3.

2 Pursuant to article 26 of the law on trade associations (DL 2757, 1979): *"The carrying out by a trade association of, or agreement regarding, the facts, acts or behaviour sanctioned under article 1 of Decree Law 211, 1973, shall constitute an aggravating circumstance of the criminal responsibility of those who participate in such conduct."* Although the criminal responsibility for antitrust infringements in Chile was repealed under legal reform in 2003, the TDLC, on the basis of this provision, has held that, *according to the legal system in Chile, the hindrance to free market competition committed by a trade association should be liable to more severe sanction*, an issue which it considered in Sentence 82/2009, 22.01.09 *(Interbus)*, (recital 42) as a basis for setting fines. Nevertheless, in a review of the sentence the Supreme Court held that, given the revocation of criminal responsibility, this aggravating circumstance was no longer applicable. Supreme Court, 25.06.09, Case 1856-2009, (recital 11).

3 Centre for Regulation and Competition (*Centro de Regulación y Competencia*), Faculty of Law, University of Chile, "*Asociaciones Gremiales y Empresariales ante el Derecho de la Competencia Chileno*", December 2010. Available from: http://www.fne.gob.cl/wp-content/uploads/2011/05/FNE_Associaciones_Gremiales_RegCom.pdf

4 For example, there are no known cases of any trade association having been sanctioned, pursuant to antitrust laws, for being involved in lobbying in order to obtain regulations that, in addition to being beneficial for the trade association, had an effect on free market competition or that were an artificial barrier to entry into the market. Something close to this occurred in the Kinesiologists case, referred to in the text (see further below), in which a professional association advocated regulatory changes that made it more difficult for a competitor to enter the market. The TDLC held that *the actions undertaken by the respondent professional association, which fall within the legitimate purpose of seeking to accredit studies in kinesiology as a university-level degree, cannot be considered contrary to free competition, as they fall within the legally mandated aims of this association.*

5 According to TDLC case law, in cases where the accused have been both the organisation and its members, the members will be sanctioned according to the degree of their individual involvement, with the leaders receiving stiffer sanctions. It should also be noted that in the case where there is collaboration in some form between a trade association and a public authority to organise a cartel between its members, the public authority would risk being held responsible for collaborating in an anti-competition infringement. In this regard, and although there was no trade association involved, see TDLC, Sentence 94/2010, 07.01.10 *(Transportes Central y otros – Buses Osorno)*, (recital 92).

2. Trade associations and antitrust laws

4. Antitrust agencies in Chile have for a long time recognised that the activities of trade associations can play a positive role in the functioning of the market, at the same time that they may also serve as a vehicle for unlawful activities by trade associations[6]. Section IV of this contribution presents various cases of Chilean jurisprudence.

5. In order to clarify the main concepts and applications of antitrust policy and legislation with regard to trade associations, the *Fiscalía Nacional Económica* (FNE, the Competition Agency in Chile) began a thorough process that considered, first, the presentation of this issue in the national community at the annual Free Market Competition Day seminar in November 2010. Then, in December 2010, the FNE commissioned the preparation of a study, Trade and Business Associations and Competition in Chile (*Asociaciones Gremiales y Empresariales ante el Derecho Chileno*), referred to above. Subsequently, in January 2010 the FNE presented for public discussion over a period of two months a first draft of what would later become the so-called Promotional Material No. 2 for the FNE's "Trade Associations and Free Competition" study. Following the period of public discussion, the FNE processed and analysed the remarks and comments received. Finally, in August 2011, the FNE published the definitive version of the study (hereinafter, this definitive version is referred to as PM2)[7]. The FNE had previously presented draft versions of other guidelines and guides for public consultation, although the scope of the process to produce the PM2 was unprecedented.

6. The positive role trade associations can play in free markets is recognised in different passages of PM2[8]. However, the potential use of trade associations as a vehicle to disseminate competition principles within a specific industrial sector is also recognised in PM2[9]. In the process of preparing this publicity material, a series of activities was planned for its presentation and discussion, with an intense series of working meetings with the main trade associations at the national level and in the main regions, several of

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6 For example, the TDLC, in Sentence 102/2010, 11.08.10 (Agmital), (recital 12), held that: *"[W]ithout prejudice to the freedom of the members of an association – in this case, Agmital – to carry out lawful activities of common interest through the association, it must be borne in mind that situations such as that described – in which a trade or business association may serve as the instrument for anti-competitive coordination among its members – have been dealt with by comparative law as a particular type of collusive conduct, which is attributable to the collective entity and not its members in particular"* (recital 21). The position of the FNE is made clear in Resolution 219 of the Competition Committee (*Comisión Resolutiva*), 29.04.1986:*"[T]he legally recognised aims of trade associations, which are those of promoting the rationalisation, development and protection of the activities that are common to the members, do not empower them, nor their managerial staff, to direct the commercial conduct of their members"* (recital 3).

7 To download both PM2 (*Material de Promoción*, or *MP no. 2*, in Spanish) and the earlier draft documents on this subject: http://www.fne.gob.cl/comunicaciones/agenda-fiscal/historico-agenda-fiscal/consulta-associaciones-gremiales

8 For example, on p. 4 of the Introduction to PM2, it says: *"In spite of their diversity in terms of size, structure and aims, all of them [trade associations] play an important and legitimate role in the market system. In general terms, they are conducive to the development and protection of their members' activities and common interests […] [T]rade associations offer numerous opportunities for economic agents that directly compete with each other to meet. In principle, such meetings are lawful and they relate to matters that are of lawful interest to the members."*

9 For example, on p. 2 of the Foreword to PM2 by the FNE, it says: *"[W]ithout prejudice to the FNE's role of ensuring free market competition, it is hoped that trade associations themselves play an important role in educating their members regarding the matters dealt with here"*.

which have already taken place[10]. One result of this that has already become apparent in industry is the publishing by the trade associations of guides that are geared towards compliance with antitrust legislation[11]. Even though this process is at any early stage and there are only a few isolated cases of results, they are very important because they provide the evidence that antitrust agencies can successfully encourage enterprises, professionals and the associations that bring them together to take it upon themselves to promote competition and prevent antitrust infringement.

7. It is also widely recognised in the literature and through experience in comparative law, however, that trade associations may stray from their legitimate objectives and end up restricting competition in the markets. In particular, with regard to the activities of groups of companies – or of the trade association that represents them – which use lobbying strategies with public entities to promote regulations that may have anti-competitive effects, such behaviour by trade associations or their members through their collective action is subject to sanction by the FNE, especially when it is obvious that their sole or primary purpose is contrary to antitrust laws, irrespective of other justifications.

3. The contents of the FNE's Promotional Material No. 2 for "Trade Associations and Free Competition in Chile"

8. The FNE's document contains interesting developments as regards the exchange of information between competitors and other issues shown below. While the main focus of the material is on collusion, there are also other types of possible conduct that are covered in a proactive way. The material is neither binding on the TDLC, the Supreme Court nor the FNE itself.

3.1 Information exchange between competitors through trade associations

9. According to the FNE's PM2 for Trade Associations and Free Competition, one of the most important functions of trade associations is to collect information of common interest on the respective industry or sector and to disseminate it among their members, who thereby obtain this information in a faster and more efficient way than they would individually. Information collected and disseminated includes data on activities in the sector or economic activity that they are involved in. This involves a constant exchange of information between the members and between the members and the trade association[12].

10. It is stated in the PM2 that, in principle, information exchange within the framework of a trade association does not necessarily imply problems for competition, as, in general, the more information that is available to the participants, the more the markets operate more efficiently. Nevertheless, depending on the nature of the information and the way and opportuneness with which the exchange takes place, this practice may have negative consequences for competition. This will occur in cases where **a member passes "relevant" information to a competitor**, on the expectation that equivalent information will be

10 For example, remarks and comments were received from approximately thirty trade associations during the public consultation period, and these included business associations and professional bodies. For the purposes of the publicising and dissemination of PM2, the FNE has already held, amongst others, a meeting with the largest trade association in Chile, which brings together approximately 2,500 enterprises, 39 sectoral associations and 8 regional business associations. All together, its members account for 100% of the industrial activity in Chile and 30% of GNP.

11 For example, the *Manual sobre Libre Competencia* (Free Market Competition Handbook), published by the Chilean Building Construction Association (*Cámara Chilena de la Construcción*), August 2011. Available online at: http://www.cchc.cl/publicacion/manual-sobre-libre-competencia/

12 In the PM2, a broad interpretation is given to the concept of **information exchange** between competitors, i.e. no special considerations are given to whether it takes place verbally, in written form, or by way of electronic or other means.

received in exchange, and to which a particular value is or may be allocated. Under other circumstances this information would probably not be revealed.

11. It is stated in PM2 that the exchange of relevant information between competing companies through a trade association can lead to **two types of problem** for competition in the markets. (i) By facilitating agreement or the arrangement of practices between competitors that form part of the trade association, mainly by offering a reciprocal monitoring system to those participating in the agreement. (ii) By increasing transparency in the market to the degree that, even though there is no coordination between the competitors, uncertainty diminishes and the process of independent decision-making by the economic agents is affected, thereby leading to a deterioration in the level of competition.

12. To this end, the FNE understands ***relevant information*** to be all of a company's strategic information that, if it was known to a competitor, would have an influence on its decisions regarding its behaviour in the market. In general terms, relevant information also permits decisions to be adopted in the market on a non-individual basis, meaning that this will not normally be shared with other companies that participate in the market. The PM2 recommends that both trade associations and their members ***avoid the exchange of relevant information among competitors***, as this practice may be considered to be incompatible pursuant to prevailing competition law (Decree Law 211).

13. The following **examples of relevant information** are given in PM2: information on pricing policies (current and future), cost structures, production volumes (current and projected), plans for expansion and investments, import policies, market shares of the members in an industry or sector, customer listings, discount policies, terms and conditions of payment, business strategies, and techniques for the design and content of bids or proposals for future tenders, amongst others.

14. The actual meaning of relevant information will depend on the **market characteristics** and the **nature of the information**. On the one hand, particularly in markets where few agents participate (oligopolistic markets), which are highly concentrated and where the barriers to entry are high, the exchange of a certain type of information can reduce the uncertainty of the competitive response of rivals and therefore the degree of competition in the market. When products are relatively homogenous and companies compete through other variables, the risks associated with such exchanges of information increase. On the other hand, the concept of relevant information also depends on the nature of the information. Put in general terms, the exchange of private, non-aggregated information excludes the possibility of gains in efficiency for consumers, particularly when it is current or future information on prices or quantities.

15. Evaluation of the effects that information exchange has or may have for competition among the associates of a trade association, either within the context of the association itself or outside of it, will take into consideration these and any other circumstances in which this information exchange has taken place. Consideration is also given to those who are involved in the exchange, how many are involved, the frequency of exchange, the way in which the information is provided, the effects of the exchange, etc. The same will occur when establishing if this exchange involves illicit anti-competitive conduct: all relevant circumstances are taken into consideration.

16. While acknowledging the positive aspect of the information services normally provided by trade associations, **it is recommendable for organisations to take full precautions during the stages of data collection, production and dissemination.** As a general recommendation for reducing the risks that the production and collection of this type of information entails for competition, the FNE suggests the following measures, details of which are given below, which nevertheless merely reduce the risks implied in information exchange for competition, but do not eliminate them: collect and/or keep only historical, but not future, information; disseminate information on the members only in aggregate form and for general

issues; make the collection of information voluntary for associates and members; and lastly, outsource information collection and processing.

17. To sum up, when dealing with information exchange between competitors, particularly within a trade association, the FNE will focus its analysis mainly, although not exclusively, on the following aspects: (i) the characteristics of the relevant market; (ii) the nature of the information that is exchanged; (iii) the intervening parties in the exchange; (iv) the frequency and temporary nature of the exchanges; (v) the exchange mechanism used (including the way in which the information is provided); and (vi) the effects that it has or may have in the corresponding market.

3.2 Summary of the main recommendations in PM2 on other issues

18. In addition to the recommendations related to information exchange between competitors that are referred to in the corresponding section of the PM2, the main recommendations of the FNE are given below, grouped according to each subject.

19. With regard to *collaboration between competitors*, in broad terms, what the PM2 suggests is that trade associations and participants in any collaboration take into account the aims that are pursued, and the actual and potential effects that such collaboration may have on the market. In cases where collaboration is aimed at improving production, it is recommended that any possible repercussions of the collaboration be documented. Lastly, it recommends that collaboration be limited to what is strictly necessary within the lawful scope of the same, in order to avoid coordination mechanisms that may be anti-competitive. (PM2, p. 12)

20. With regard to the *recommendations by trade associations to their members*, the PM2 suggests that these recommendations or instructions by trade association do not refer to prices, production quantities or commercial policies, that adherence to or compliance with any such recommendations or instructions is voluntary for the members and that members should not be sanctioned for deviating from these recommendations. (PM2, pp. 18-19)

21. With regard to the *meetings held by trade associations*, the PM2 recommends that control be maintained over the issues to be dealt with, the meeting agenda and schedule and, as far as possible, that there is a specialist adviser on free market competition present at these meetings. It is suggested that the material to be circulated and distributed for these meetings is also reviewed by a specialist in order to avoid the exchange of relevant information and thereby an infringement of free market competition. In cases where meetings are conducted over the Internet, the PM2 recommends that the same principles that are applicable to face-to-face meetings should apply. It is recommended that the arrangements for participating in the meetings do not include any vetting mechanisms and that there be no arbitrary discrimination against any participants in the meetings. Lastly, the PM2 advises that the principles of record keeping and documentation on these meetings be followed. (PM2, pp. 20-21)

22. The PM2 also refers to boycotting, which can be promoted or facilitated by trade associations, with specific mention to its illicit nature under Chilean legislation[13], with the distinction being made between a boycott against competitors of the trade association and its members, and a boycott against customers or suppliers. For the purposes of PM2, a boycott is coordinated pressure exerted by a group of economic agents with the aim of having a direct detrimental effect on another existing or potential economic agent. A boycott can take different forms, the most common being exclusion, which not only affects the participation of a player in the market, but also sends a negative signal to other players and potential agents of similar characteristics. (PM2, p. 23)

[13] According to Chilean legislation, this is dealt with no differently to other hard core agreements between competitors (V., art. 3a), Decree Law 211).

23. The PM2 also deals with the *criteria and conditions for membership to trade associations*, and it suggests that these are established in accordance with the legitimate aims of the trade association and that they therefore conform to criteria that are general, objective and transparent and do not arbitrarily discriminate. In the case where there are subjective criteria for membership (e.g. recommendations by members), it is recommended that arbitrary discrimination or threats to competition be avoided. It suggests that criteria for membership should also be sustainable over time and that they should not be unreasonably restrictive. In the case where consideration is given to criteria for expulsion, these should not be arbitrary. It lastly suggests that procedures for admission and expulsion should be clear, permanent and transparent. (PM2, pp. 24-25)

24. With regard to *products and/or services provided by a trade association* for its members as well as non-members, the PM2 advises that, in the case where such products or services are essential for the development of an economic activity, they should also be made available to undertakings not affiliated with the trade association that request them, with the avoidance of arbitrary discrimination and excessive charges for these services or products. (PM2, pp. 26-27)

25. Remarks are also made in the PM2 regarding the *role of self-regulation by trade associations*. It recommends that self-regulating measures be transparent and objective; that they do not involve the imposition of pricing policies, the supply of services or commercial conditions; and that they do not give rise to any disciplinary measures that are of an unfounded or arbitrary nature. Measures that are implemented to evaluate regulation should be transparent and impartial. It also suggests that attention is paid to ensure that the aim of self-regulating measures is not to exclude any undertaking from the market and, in general, that they do not create any unfounded or arbitrary restrictions to entry in the market, such as barriers to accreditation. (PM2, p. 28)

26. With regard to the *setting of technical standards by trade associations*, which is another of the issues dealt with in the PM2, the recommendations are that the definition of these standards be based on objective factors, that standards not be used to restrict the supply of products or services, that certification of compliance with technical standards be voluntary and that certification programmes do not arbitrarily discriminate between affiliated and non-affiliated enterprises. (PM2, p. 30)

27. With regard to *the rules of advertising by trade associations*, it recommends, first, that direct advertising by the trade association which is in the interest of all of its members does not include any references to, or recommendations on, prices, commercial conditions or other competitive variables. As far as guidelines on advertising by the members is concerned, the recommendation is made for the association to not limit advertising by members, in either its form or content. (PM2, pp. 31-32)

28. The PM2 also deals with the problems connected with *standard contracts and the general terms and conditions of business* promoted by a trade association. The suggestion made regarding this point is that trade associations abstain from participating in the design of standard contracts for industry as this may limit the freedom and competitive independence of its members. In cases where they do participate in these activities, trade associations should ensure that activities aimed at harmonising general contract conditions do not invalidate variables that are important for competition between its members. (PM2, pp. 32-33)

29. Lastly, the PM2 includes a series of *general recommendations* on record keeping and documentation from the meetings of trade associations and documentation produced within the context of its activities, in relation to the procurement of specialist advisory services and, in terms of practical application on a daily basis, all the criteria referred to in the PM2.

30. Some of the more illustrative and recent cases in which a trade association has been investigated by the competition authorities in Chile are given below.

4. Case studies of Chilean jurisprudence

4.1 Trade associations and hard core cartels

31. In relation to the use of trade associations as mechanisms for organising hard core cartels, various recent cases are worthy of mention, although the majority of them take the form of a collective boycott as to a hard core cartel as such.

The case of "Interbus"– TDLC, Sentence 82/2009, 22.01.09

The FNE brought a case against the Interbus trade association of bus operators on the grounds that, through the association, different intercity transport operators had discontinued independent competitive action in the relevant market of share taxis (urban and intercity transport) and entrusted the trade association with the task of dividing up the market and of deciding who could compete and the terms on which they would compete, all with the specific aim of displacing and excluding a new competitor, the bus company, *Buses Costa Cordillera*.

The TDLC admitted the case presented by the FNE and ruled that the trade association had superseded the natural conditions of competition that would have existed had its members acted independently and established coordination and control mechanisms that distorted competition in the relevant market. It also held that the trade association, as the entity coordinating the collusive agreement among its members, had carried out exclusionary practices and engaged in acts of harassment that were prejudicial to Buses Costa Cordillera.

The TDLC imposed a fine of US$ 50,000 on the trade association. For having entered into a collusive agreement aimed at excluding a competitor, it was ordered to immediately stop any kind of exclusionary conduct and to abstain from any similar acts in the future.

The Sentence was appealed before the Supreme Court, which had to rule on various different lines of defence formulated by the trade association.

Amongst other issues, with regard to the allegation that it had been condemned for being an illicit group despite being only an individual entity, the Supreme Court held that the trade association, in the way that it had operated, had become the means and the centre through which its members individually and voluntarily took part in influencing competition through the adoption of various agreements evidenced in the respective minutes and which led subsequently to the injunction and sanction. It was consequently penalised because it was the trade association which brought together its members to jointly act against a third party, and while legally speaking the said entity was a sole entity, it brought together the collective intention of its members to achieve its objective. On these grounds, the Supreme Court overruled the defence's allegation and ruled that it was sufficiently clear and proven that there had been collusion.

The Supreme Court upheld the sentence of the TDLC, but reduced the fine to US$ 25,000 (approx.) on the grounds that the aggravating circumstance of responsibility, which the TDLC had applied, was not applicable and also because of the small number of members and the market volume of operations on the bus route being covered.

The Agmital Case – TDLC, Sentence 102/2010, 18.08.10

The FNE brought a case against the Agmital trade association of minibus owners, alleging that it had arbitrarily fixed prices in order to exclude a competitor, whilst recognising that the exclusionary price structure followed an agreement between the members of the trade association.

The TDLC admitted the action brought by the FNE and held that the trade association had engaged in antitrust practices aimed at excluding a competitor from the market. It was established that prices for the transport service had been fixed through the trade association, exclusively at the time when a new competitor began to operate, and that this decision was adopted as a reaction to the entry of the same into the market. It was also proved that the members of Agmital had engaged in acts of harassment against the new entrant, with the obvious aim of implementing the exclusionary decision adopted in Agmital. In addition, it was also proved that price fixing took place between Agmital and two other market participants, which was facilitated by the sectoral association.

The TDLC held that, without prejudice to the freedom of the members of a trade association to carry out licit activities of common interest through the association, in situations where a trade association serves as an instrument for the anti-competitive coordination of its members, a particular type of collusion was facilitated that was attributable to the collective entity (the association).

The TDLC imposed fines of US$ 50,000 (approx.) on the trade association. The sentence was upheld by the Supreme Court.

The "*Kinesiologists*" case – TDLC, Sentence 35/2005, 27.12.05

The *Instituto Profesional de Chile* (IPCH) accused the *Colegio de Kinesiólogos*, a professional association, of anti-competitive acts and conduct to hamper the development of its educational activities in kinesiology. These included activities aimed at amending legislation on education (the Education Act); activities aimed at dissuading the IPCH from offering a course leading to professional recognition in kinesiology; the issuance of public statements with extensive coverage in the press and its participation in a rally against said course; other smear tactics (on its website, press releases, correspondence and in distributed pamphlets); acts of harassment against IPCH teachers, such as requests for teachers to stand down and threats of legal proceedings for professional misconduct; and boycotts of, and promoting the rejection of, IPCH students in health care institutions.

The TDLC established the existence of the alleged practices and that several of them were contrary to antitrust regulations. In its ruling, the trade association was ordered to immediately put an end to the acts of harassment and boycott against the IPCH's course and teaching staff, and to abstain from any such actions in the future. It also fined the trade association US$ 2,000 (approx.).

4.2 The concurrence of licit and anti-competitive objectives within a trade association

32. One of the cases in which something similar to the situation in which the members of a trade association use the legitimate activities of a trade association to conceal anti-competitive activities is the case of *AM Patagonia*. In this case, a professional association that brought together most of the doctors in an isolated region of the country combined both conduct of an anti-competitive nature and legitimate aims, which the TDLC took into consideration when determining the fines to be imposed. Although legally speaking there was no trade association involved in the case, as the doctors had formed a limited company (*sociedad anónima*), the case illustrates that, irrespective of the legal form chosen (trade association or limited company), the effects of the conduct and the resulting sanction are the same.

The *AM Patagonia* case – TDLC, Sentence 74/2008, 02.09.08

The FNE brought a case against eighty-four doctors in the city of Punta Arenas for allegedly having engaged in anti-competitive practices consisting of price fixing in the provision of various different medical specialties. To this end they had formed a limited company, *AM Patagonia S.A.* (i.e., not a trade or professional association), with an established fee scale.

The TDLC held that the agreement was capable of undermining free competition, at least in the short term, for certain specialities – those which the seventy-four (74) doctors who were sanctioned belonged to – as the effect of the alleged fee scale was to increase the cost of medical services provided by the doctors for users of the private health system. In the case of ten (10) doctors who were acquitted, the agreement could not be penalised in terms of anti-competitive conduct, as it was not a suitable means for preventing, restricting or hindering competition given the market characteristics.

Each of the doctors found guilty were fined US$ 1,000 (approx.), apart from the negotiator of the agreement, who was fined US$ 2,000. In setting the fines, the TDLC took into consideration, on the one hand, the economic gain resulting from the infringement (higher charges as a result of the agreement); on the other hand, the fine was reduced for (i) those doctors who took action to reduce or limit the effects of the infringement, (ii) the association, which had other objectives that were licit from the free market competition point of view, and (iii) those doctors who took steps to defend the licit nature of their conduct.

The Supreme Court upheld the sentence although it reduced the fine to 10% of what the TDLC had imposed.

4.3 Exchanges of information between competitors

33. The way that exchanges of information among competitors through a trade association have been dealt with has also been examined in TDLC case law. For example, in a ruling regarding a legal action brought in relation to the private health insurance market[14], the TDLC pointed out that there is a flow of information exchange among competitors both within and outside of the trade association that brings together private health insurance companies, which are known as *Isapres*. Although the acquittal in the case was according to a majority opinion, with collusion between the main members of the trade association having been ruled out, the statements made during the proceedings regarding the exchange of information were used by the dissenting votes to defend the existence of collusion and pronounce in favour of the companies' conviction: "*16) That, in this context, it has also been demonstrated (recital 71) that there were frequent and formal exchanges of information between the accused through the trade association that brings them together and in which decisions are regularly adopted regarding components of what Isapres offer that, in a context of competition, should be made by each one individually; 17) That, also with regard to information, those who make this minority dissenting vote are of the opinion that the fact demonstrated in recitals 71 and 72 of this sentence, namely, the existence of information that is easily accessible for the group of private health insurance companies on trial here, acquired through the mutual and frequent monitoring of new marketing strategies and healthcare plans introduced by other private health insurance companies, especially through information exchange between the sale representatives of different private health insurance companies – also constitutes an enabling condition for collusion, given that it allows private health insurance companies to monitor the effective implementation of agreements entered into regarding the introduction, withdrawal or modification of their products;*"[15]. The Supreme Court upheld the acquittal, also according to a majority opinion[16].

4.4 Other trade associations activities which can raise antitrust concerns

34. Historically speaking, trade associations have come under scrutiny by the antitrust authorities in Chile for different matters, such as the precautionary review of clauses in their statutes, their practices

14 TDLC, Sentence 57/2007, 12.07.06: "*That in terms of the frequency of interaction between the companies, it has been shown that, in addition to the sessions of the* Asociación de Isapres, *said Association has a Technical Committee and various bodies in charge of establishing joint financial policies, such as a cost control committee, whose work included precisely that of "Establishing limits on cash reimbursements" …. In addition, there were other instances of coordination between the accused, such as the "meeting of heads and managers"* (recital 71) / *"That it has also been demonstrated that the sales representatives of each Isapre have free access to information on the healthcare plans marketed by competitor private health insurance companies (Isapres) … and that, in addition, the* Superintendencia de Isapres (a public supervisory institution for the sector) *periodically publishes information on the companies that participate in the health insurance market …, all of which forms a free channel of information"* (recital 72);

15 Dissenting votes by ministers A. Butelmann and R. Depolo.

16 Supreme Court, 28.01.2008, Case 4052-07.

concerning the recommendation or setting of uniform fees or charges; business activities by trade associations; exchanges of information; self-regulating mechanisms and conditions of membership, among others.

35. One of the activities that has repeatedly raised concern has been the advanced notification of price rises by the heads of trade associations. In this regard, the former anti-trust bodies (*Comisiones*) instructed the heads of these associations to abstain from developing such activities. For example, the *Comisión Resolutiva* held that such statements, while not amounting to a wrong against free market competition, are entirely inappropriate. *"[O]n no grounds is it justifiable for prognoses or forecasts to be expressed, in quantitative terms, regarding these variations because these predictions may have had significant effects on the market and thereby implied an illicit inference of fluctuations in the aforementioned price of bread"*, (Resolution 80, 16.09.1980, recital 12). In a similar way, as regards the transport sector, the *Comisión Resolutiva* affirmed: *"[A]lthough the statements by the management […] were clarified or denied subsequent to their being made, they do imply future rises in the cost of public transport and are not in reference to price rises that have already taken place, with the values of such charges ($50) even being stated, which was subsequently confirmed in practice as all buses and share taxis began to charge this rate, an attitude that can only be condemned as a suggestive insinuation of price rises, which is contrary to anti-trust regulations"* (Resolution 267, 15.12.1987, recital 10.)

NB: For more information, see the document "Trade Associations and Free Market Competition" (*Material de Promoción* No. 2, August 2011), available from the OECD website (www.oecd.org/competition/latinamerica) and the website of the SIC: (http://www.sic.gov.co/recursos_user/documentos/promocion_competencia/Foro/web/index.html)