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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Chile

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. The Competition Authorities

1. The Competition law has an institutional framework composed by two bodies – an enforcement agency (the Prosecutor’s Office) and an independent Competition Tribunal.

2. The National Economic Prosecutor heads the agency that investigates and brings enforcement cases. The Prosecutor, who must be a lawyer, is appointed by President of Chile and may be removed by him at any time. For budget purpose, The Prosecutor’s Office (“Office”) is part of the Ministry of the Economy, but the Prosecutor is independent of the Ministry. By law, he is subject to the supervision of the President through the Ministry of Economy, and is directed by law to “discharge its duties independently,” to “defend the interests entrusted to him...based on his own discretion”, and to represent “the general economic interests of the community”. In Chile, there have been a tradition of independence by the Prosecutors.

3. The Prosecutor’s Office must investigate all legally valid complaints and may open investigations *ex officio*. Upon notice to the Chair of the Competition Tribunal, the Prosecutor may declare investigations confidential and may obtain police assistance. The Prosecutor must ordinarily provide notice to the target of an investigation, but the Competition Tribunal may waive this requirement when notice would interfere the investigation. The Prosecutor has the power to compel the production of documents and the co-operation of public agencies, state-owned entities, private firms, and individuals. Public officials must keep confidential all information they obtain by reason of their duties, except that such information may be used in enforcement activities and in proceedings before the Competition Tribunal or courts. Interference with an investigation by the Prosecutor’s Office is punishable by imprisonment for up to 15 days, independent if the person belongs to a private or state-owned company or if he is a public servant.

4. The result’s of investigations by the Prosecutor’s Office are usually set forth in a “report”- essentially an administrative decision – that is delivered to the Competition Tribunal. If the Office decides that an official proceeding should be begun, the report is accompanied by a “*requerimiento*”- a formal charge seeking a fine or other remedy. The report is a matter of public record.

5. The rulings in competition cases are performed by the Competition Tribunal. This Tribunal is an independent entity that has judicial powers but is not formally part of the judiciary. It has five members. The President of the Tribunal, who must be a lawyer, is appointed by the President of the Republic from a list of five nominees established by the Supreme Court through a public competition. The other members (two lawyers and two economists) are chosen as follows. One lawyer and one economist are chosen by the President from a list of three nominees established by the Central Bank (Council of Governors), also through a public competition. The other lawyer and economist will be appointed directly by the Central Bank from candidates selected by this same public contest. The Tribunal will also have four subrogate members, selected by the President of the Republic and the Central Bank from the same lists of nominees. All candidates are requested to have expertise in competition issues.

6. The members of the Tribunal have terms of six years, and may serve more than one term. During their terms, they can only be removed for cause. Neither public servants nor officers or employees of publicly held corporations (or their affiliates) are eligible. Members of the Tribunal will receive fixed remuneration. The Tribunal also has its own staff.

7. The decisions of the Competition Tribunal are solved by majority. The parties affected by the decisions of the Competition Tribunal usually file with the Supreme Court a special appeal, known as a “petition in error,” which relates to the procedural, rather than meritorious, aspects of the original Tribunal proceedings. If the appeal is accepted, the Court requires the Tribunal to amend the “mistake or abuse” made when the Tribunal issued the decision being challenged. Thus, using petition in error, the substance of a decision can be modified.

2. Competition law and policy in regulated sectors

8. For many competition authorities, activity relating to regulated sectors of the economy is largely a matter of competition advocacy because the sectoral regulator has the exclusive power to make many of the key decisions relating to competition. In Chile, the balance of power is different because the competition law can sometimes be applied even to a sectoral regulator of other part of the government.

9. In fact, Article 1’s of the Competition Law applies to all individuals, to all enterprises (regardless of state ownership), and in some circumstances to government ministries or other agencies. An unusual feature of Chile’s law, is that it applies to some extent to decisions by government ministries or agencies even when they are acting in a regulatory capacity, and not just when they are acting in a proprietary capacity. It has been applied to discriminatory government action that creates an “unlevel playing field”. The law is not interpreted as covering governmental “output restrictions” in the form of non-discriminatory quality standards or other limitations on who may enter a market. On the national level, the law has been applied to the Ministry of Transportation, the Telecommunication Office, the Electricity and Fuels Superintendence, the General Waters Directorate, and the State Procurement Directorate. It also applies to municipalities.

10. Virtually all competition laws have an express or implied exclusion for conduct that is required by law, including private action that is authorised by government regulations of official decisions. In general, the basis for this exclusion is a concern that applying competition law could or would interfere too much with other government regulation. In Chile, there are no express exclusions in the competition law. As in other countries, statutory monopolies do exist and there are instances when laws grant exclusive rights. Since possession of a monopoly is not a violation, these laws do not actually create exclusions, as long as abuse of the monopoly or exclusive right is subject to the law.

11. With respect to competition actions against government entities acting in their regulatory capacity, the Competition Authorities has attempted to avoid interfering with legitimate government regulation by limiting the law’s coverage to discriminatory regulations or conduct.

12. In any case, a usual practice has been that when a government entity will decide something that can have competition problems it asks for a consultation of the Competition Authorities – Prosecutor’s Office or Competition Tribunal - to inquire whether go ahead or not.

3. An example

13. As an example of the application of the competition law to sectoral regulators, let us study a case of the telecommunication market. Two firms operating at 800 megahertz petitioned for additional spectrum at 1900 megahertz in order to compete more effectively against two firms that already had some spectrum at that band. The telecoms regulator agreed. One of the incumbents complained, and the Prosecutor’s Office initiated a proceeding. Eventually, the Tribunal – former Antitrust Commission - order that the regulator use an auction to decide which firms should obtain rights to the spectrum. Another order in this proceeding directed the regulator not to give the first two firms preference because they had applied first for the megahertz. The entire process took about two years, and the two firms initially approved by the

telecoms regulators were the successful bidders at the auction, but the process had to be competitive and transparent and finally the decision was taken by who paid more for the spectrum. Relying in part on this fact, some telecoms officials regard the case as one in which the competition institutions were used to delay the allocation of new spectrum. Some telecoms officials also believe that in some occasions the competition institutions become too involved in technical matters, but the final result of the competition process is the important one and in most part the competition and the telecoms agencies work well together.