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Global Forum on Competition

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

Contribution from Chile

-- Session III --

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QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Chile--

Despite the fact the FNE was created more than 30 years ago, we will answer this questionnaire as a young agency, due to the fact that deep organisational and legislative changes started taking place only last decade. These changes have amounted to the transformation of the FNE's substance and image: formerly perceived as a relatively low profile institution with a rather unimportant mission, it now stands as a nascent, effective and well respected competition agency, both locally and abroad.

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

As a young agency the FNE has faced several organisational challenges. Starting from its location, the FNE is placed in two different floors in the same building: floors 12° and 2. This can look as a very pedestrian detail but it does in fact have an impact in terms of the way people communicate and work together. Difficulties can also be observed when it comes to the filling of senior positions. This is due to the relative low income assigned to their posts, in comparison to what the private sector may offer for someone of the same experience. The same is true with respect to retaining senior professionals.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

The FNE has organised the Competition Day since 2003. This yearly event gathers government agencies, academia, business, professionals, and general public which work relate to competition.

Also, the FNE is working closely with the academia. In this regard, in August 2008, the FNE and the School of law's Competition Centre of the *Pontificia Universidad Catolica de Chile* signed a Cooperation Agreement for the Development and Implementation of Research Projects.

Furthermore, the FNE is participating in the ICN Competition Advocacy working group in order to get acquainted with the best to increase public awareness of the benefits of competition.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

Regarding prosecution of abuse of dominance and non-cartel restrictive agreements, the main problem was the confrontation with traditional arguments such as constitutional and subjective rights (property rights and freedom of enterprise).

As regards to both prosecution and investigation, the FNE has encountered problems when dealing with regulators. Here, the main source of conflict has been the definition of each agency's authority. Moreover, the FNE has had to deal with policies aiming at the promotion of SMEs and an environment customarily biased towards their protection.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The most difficult part of implementing an anti-cartel programme has been the lack of legal tools to support the development and implementation of investigative strategies. The implementation of an anti-cartel programme is still a work in progress, pending the passing of an amendment to the Chilean Competition legislation that grants more investigative powers to the FNE, and the creation of a specialised FNE Cartel group.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

The main concern that arises from the lack of pre-merger control is that, in principle, any issue that comes up in the context of a merger has to be dealt with as a controversy. Chilean legislation does not provide for compulsory pre merger notification, and therefore the FNE may either deal with it in a controversial manner before the tribunal, to prevent the merger from taking place; or in a non adversarial procedure, also before the Tribunal, to establish conditions for the operation of the merger once it has occurred

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was

it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

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1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

In order to answer this question it must first be stated that the Chilean Competition System is made up of two bodies, namely:

1. The *Fiscalía Nacional Económica (FNE* or National Bureau of Economic Prosecution), an agency with investigative power, in charge of the prevention and investigation of the offences against the competition statute (DL 211). As the FNE decisions are whether to initiate an investigation, and whether to prosecute the perpetrator of an anticompetitive conduct before the Competition Tribunal, they cannot be appealed before the Courts.
2. The *Tribunal de Defensa de la Libre Competencia (TDLC)*, a competition court which is part of the judiciary system, and as such empowered to sanction anticompetitive conducts.

As follows from the paragraph above, what can be appealed are the final decisions of the Competition Tribunal before the Supreme Court of Justice. Ever since the creation of the Competition Tribunal in 2004, 27 of a total of 77 TDLC's Decisions (roughly one third) have been complained to the Supreme Court. Of these 27 decisions, 55.6% have been upheld by the Supreme Court, 22.2 % were overturned and 22.2 % were settled with relief. These figures amount to a very gratifying outcome indeed and point at the fact that both the agency and the TDLC have been gaining experience and expertise in the investigation, construction and analysis of competition cases.

It is also worth mentioning the fact that in 2008 the usual period of time taken for a Supreme Court's opinion on a TDLC's Decision decreased from an average of 5 months to 4 months.

This system allows for very knowledgeable decisions by the Tribunal. The main drawback of the system is that, as the appellate body for the Competition Tribunal's final decisions is the Supreme Court of Justice, this latter court is not very acquainted with competition issues, or with the economic analysis that may entail the examination of any given case. This in turn has resulted in several Competition Tribunal rulings being revoked by the Supreme Court of Justice. Moreover, the Supreme

Court of Justice has not always agreed on the amount of the fines imposed by the TDLC. Actually, out of 11 TDLC's decisions imposing fines, the High Court has overturned two of the fines, and reduced three others in approximately 29%.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Currently, the FNE does not have a formal programme for interacting with judges. However, the FNE is holding preliminary meetings aimed at developing such programme.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

As stated above, the FNE has had difficulties when filling and maintaining senior officers. This is due to the relative low income assigned to their post, in comparison to what the private sector may offer to someone of the same experience.

Also, the load of cases exceeds the capacity of personnel assigned to handle them.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Yes. Despite the fact the head of the National Economic Prosecutor's Bureau is directly appointed by the President of the Republic, the members of the Competition Tribunal are not. Given that it is the Tribunal and not the FNE the decisional body, the decisions may not be biased by the Executive. Bearing in mind that in other systems the competition agency can even impose fines, it is important to underline this feature of our structure. What has happened in practice is that there has never been any kind of influence of the executive over the way the National Economic Prosecutor's Bureau's Head conducts his job.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

The FNE considers that the most important actions to ensure a successful start are getting enough resources for the agency operation, hiring highly specialised human resources, providing capacity building, establishing a prioritisation of the agency goals and carrying out advocacy activities to create public awareness.