

**INSTITUTIONAL CHALLENGES IN PROMOTING
COMPETITION**

NATIONAL ECONOMIC PROSECUTOR'S OFFICE

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INTRODUCTION

It is known that the main functions of competition authorities are enforcement and advocacy. However, it is not clear which is the limit between them. It is said that advocacy is almost everything except enforcement, but is not always obvious what exactly enforcement can mean and this can be different from one jurisdiction to another. For example, studying some decisions given by the Chilean Competition authorities, it was not clear when they enforced the law and when they promoted free competition.

Anyway, for the purpose of this presentation, enforcement involves both powers to investigate anticompetitive conducts and powers to impose sanctions for those conducts. The investigative powers include faculties related with:

- Confidentiality;
- Enforcement of the rulings, decisions and instructions issued by courts or tribunals;
- Mandatory collaboration of government entities;
- Compelling for oral and written statements from any entity or person;
- Etc.

In the subject of sanctions, generally, the competition laws authorize the Courts or the agencies to impose fines, imprisonment, corrective measures and injunctions.

According to the International Competition Network, advocacy means the promotion of a competitive environment for economic activities by means of non/enforcement mechanisms.

This possible definition involves, on the one hand, relationships with other governmental entities, that is, all of those initiatives undertaken by the competition authorities towards other public entities in order to influence the regulatory framework and its implementation in a competition friendly way, through, basically reports to the legislature, ministries, courts, sectorial regulators or municipalities.

On the other hand, promoting a competitive environment implies the strengthening of the public awareness about the benefits of competition. It covers all activities undertaken by competition authorities aimed at raising the awareness of economic agents, public authorities, the judiciary and the public in general of the benefits that competition can bring to society. It involves activities such as:

- Interaction with trade associations and academic institutions.
- Publications.
- Media strategy towards the explanation of the importance of competition.

THE CHILEAN COMPETITION SYSTEM

The first laws

The focus of the Chilean competition system has been enforcement, but since the first law, which was enacted in 1959, establishing an Antitrust Commission, we can find some rules of advocacy. Even the title of the law suggested the idea of advocacy: "*Rules to foment industrial and commercial free competition*".

Four years later, in 1963, the position of the National Economic Prosecutor was created by Law N° 15.142, with the mission to prosecute and investigate anticompetitive conducts, acting on behalf of the general interest.

These entities didn't have much work because a central planned economy was established in those years.

Decree Law N° 211

In 1973 the Military Government gave a new economic orientation to the country, based on free market. The features of this new orientation were the privatization process, the liberalization of prices, a unilateral tariff reduction and the opening of the Economy to foreign trade.

Together with these new orientations, the Military Government improved the system of competition enforcement by Decree Law N° 211, which was enacted in December of 1973, that is, just two months after the coup. So, it was pretty clear that competition was going to play a central role in the economic system of that government.

Decree Law N° 211 established a tripartite competition system:

1. The **Preventive Commissions** which were administrative bodies which accomplished a very important task in the transitional period from a planned economy to a market economy, educating firms and entrepreneurs on competition affairs. So, these Commissions fulfilled an advocacy role. In fact, they did not have powers to enforce the law because their main function was to respond to consultations from legal entities or individuals on competition issues. They were composed of government officials, members of the civil society and the academic world, who served without payment with the technical support of the National Economic Prosecutor's Office.
2. The **Antitrust Commission** was a judicial body which resolved competition conflicts and had broad powers of enforcement and sanctions. It could impose fines (up to US\$ 500,000), modify and nullify contracts, or order the dissolution and termination of corporations. It was composed of 2 government officials, 2 members of the academic world, and one Supreme Court Judge. They also served without payment and with the technical support of the National Economic Prosecutor's Office.

3. The **National Economic Prosecutor's Office** is the competition agency with ample powers to investigate and prosecute anticompetitive conducts. Its head is appointed by the President of the Republic, but has statutory independence from any authority. In 1999 Law N° 19.610 was enacted and its investigative powers and budget were substantially improved. Its main faculties are:
- To investigate and order confidential proceedings.
 - To request the Commissions to order injunctions.
 - To act in any case before the Courts and Tribunals.
 - To request the support of the Police.

The last reform

After almost thirty years of application of this framework, the globalization process, the new technologies and the concentration of markets, created the need for a new enforcement system, because competition issues became more complex. The improvement of the Competition Enforcement System, jointly with other micro-economic initiatives such as labor law reform, electricity reform, fishery reform, and others, was part, in 2001, of the so-called Pro-Growth Agenda, which consisted of a political agreement between the government and the private sector.

The focus of the reform of the Competition Law was the creation of a Competition Tribunal, which replaces the Preventive and Antitrust Commissions. This legal reform was officially published on November 14th 2003 and was in full effect on May 13th 2004.

The Competition Tribunal is a judicial body pertaining to the Judiciary, composed by three lawyers and two economists. Its chairman is a lawyer and is appointed by the President of the Republic from a list of five nominees established by the Supreme Court. One lawyer and one economist are appointed by the President of the Republic from a list of three nominees established by the Central Bank. The other lawyer and economist are designated by the Central Bank directly. In all cases there is a previous public contest where all candidates could apply.

The members will stand for a period of 6 years, which is renewable. They are remunerated. The law establishes a minimum payment of US\$ 3,700 per month and a maximum payment of US \$ 5,500 per month, depending on the number of sessions held.

Another important reform is the creation of the staff of the Tribunal. Remember that its predecessors - the Preventive and Antitrust Commissions - didn't have their own staff and received support from the National Economic Prosecutor's Office. Now the Tribunal will have a professional staff composed of two economists and three lawyers. This aspect of the reform increases the independence of the Tribunal in relation to the National Economic Prosecutor's Office.

The Competition Tribunal maintains the faculties of the Preventive and Antitrust Commissions. Consequently, its main function is to resolve conflicts and enforce the law.

Nevertheless, exceptionally, the Tribunal also fulfills an advocacy function when it responds to consultations about future contracts, or when it proposes to the President of the Republic the modification, approval or expiration of laws. Furthermore, it can promote competition principles when issuing general rules.

Regarding the sanctions, the reform abolished criminal imprisonment, because it had little application. As a counterpart, the reform substantially increases the maximum amount of fines: from a limit of US\$ 500,000 to US\$ 12,000,000.

The framework currently considers both the Competition Tribunal and the National Economic Prosecutor's Office for enforcing the competition law.

ADVOCACY

1. Rules of promotion of competition

Article 1° of law N° 19.911, establishes that *“the objective of the law is to promote and to defend free competition in markets”*. So, the law, expressly, confers to the Tribunal and the Agency the faculty and the duty of promoting competition. As I mentioned before, this new system came in full effect a few days ago, so we have a lot of expectations of the outcomes of this new framework.

With respect to the powers of the Tribunal, as I said before, the Tribunal has, in our opinion, some faculties related to competition advocacy. In fact, in the past, when the Preventive Commissions responded to consultations from firms or parties, they were, through their decisions, educating entrepreneurs and the public on competition affairs.

In relation to the faculty of issuing general rules, article 17 C N° 3 of the law establishes that the Competition Tribunal is empowered to issue general rules, according with the law, which individuals or firms should take into account in the acts or contracts they plan to sign or fulfill. As it can be observed, when the Tribunal issues general rules, generally, it is not enforcing any law or decision but rather it is promoting competition by establishing certain conditions in markets.

Regarding the faculty of proposing to the President of the Republic the modification, approval or expiration of laws, this doesn't need too much explanation about its relation with advocacy, due to the fact that one of the best ways to promote competition is, precisely, through the public policy of the government which is contained in laws and regulations.

With respect to the powers of the National Economic Prosecutor's Office, I have to emphasize the one related with the elaboration of technical reports for the Competition Tribunal. Indeed, the law authorizes the Agency to present technical reports to the Tribunal. Therefore, when it exercises this power, it fulfills an advocacy role rather than an enforcement one.

In utility sectors, such as telecom, electricity and water industries, prices should be free unless there are no competitive conditions. The laws that regulate these sectors empower the Competition Tribunal to authorize government intervention in prices. In fact, the Competition Tribunal must determine the competition conditions of those markets. The exercise of this legal duty is, in part, a competition advocacy task of the Tribunal.

2. Competition advocacy through the decisions of the Preventive Commissions.

I will explain briefly some decisions issued by the Preventive Commissions, in which we can find the way how those authorities have promoted competition principles in different markets. All of the following decisions were originated on consultations from firms or entrepreneurs.

1. *Dictamen* N° 995/96. This order was originated because of the level of concentration in the waste management market. The firm which controlled the garbage disposal market also controlled the waste transportation market. The Central Preventive Commission suggested that the bidding processes organized by the Municipalities for granting the waste management concession, should be consulted to the Commission before assigning the bid. Analyzing the bidding rules, the Commissions have recommended several rules which promote competition in the bidding processes.
2. *Dictamen* N° 1045/99: In 1998, three state-owned port companies consulted the Central Preventive Commission's opinion about the competition rules that they should consider in the bidding processes for the auction of harbor concessions in the dockage fronts. In the decision, the Central Preventive Commission laid down rules of horizontal and vertical integration in order to promote competition in both *intra* port operations and *inter* port services. For example, "important users" of a port may not have more than a 40 percent interest in the port operation business; or that which established that the concessionaire of a port terminal or its related companies can't have more than 15% of the share holds of another terminal in the same area or region.
3. *Dictámenes n°s. 202, 277, 979, 1133, 1211*. There have been many rules of parallel imports, the majority of them originated as consultations from private parties. Generally, importers have asked the Preventive Commissions about the legality of importing original products which are already commercialized in the country by virtue of a previous distribution agreement. The Preventive Commission established the criteria that the parallel imports of original products promote competition in markets, authorizing them.

3. Competition advocacy through the decisions of the Antitrust Commission.

The Antitrust Commission has promoted competition principles through its decisions, especially in regulated sectors.

Telecommunication Market

- Resolution N° 389. In 1993, the Antitrust Commission concluded that local and long distance telephone services could be operated by the same holding but through separate corporate subsidiaries, and it laid out various other principles to be incorporated into new provisions of the telecom law, especially the so-called *multicarrier system*, established for the consumer choice of the long distance service provider.
- Resolutions N°s. 394, 515, 611 and 686. The telecom law provides that in the local exchange telephone market, prices can be fixed by the telecom regulator if the Antitrust Commission finds that competitive conditions do not exist. Periodically, the dominant firm has consulted the Antitrust Commission in order to obtain a statement which allows it to set freely the price of its services. The

Commission has done far more than making these periodic determinations on the existence of competitive conditions, and has set some rules to promote more competition in this market. For example, it established principles to ensure open access to networks.

- Resolution N° 584 of September 27th 2000. It is a very interesting decision under the advocacy approach. Indeed, by this decision, the Antitrust Commission determined how the telecom regulator allocates spectrum in the mobile telephone market. The Commission ordered that the regulator has to use a bidding process to decide which firms should obtain rights to spectrum. Initially, the telecom regulator was going to give preference to some firms because they had applied first.

Electricity market

- Resolution N° 488 of 1997. The Antitrust Commission, assessing a case of vertical integration in the electricity market, issued general rules and ordered distribution companies to call for bids and buy their supplies on objective and non-discriminatory terms. In Chile, the generation market is potentially competitive, but the distribution one is not competitive. So, through this Resolution, the Antitrust Commission attempted to promote competition in the generation sector, not allowing the distribution companies to buy their supplies directly and not openly.
- By Resolution N° 592 of 2001, the Antitrust Commission decided that the prices of some complementary services offered by electricity distribution companies, had to be fixed by the authority because they were not provided in competitive conditions.

The Antitrust Commission has issued other general rules which have promoted competition in different markets.

For instance, in the pharmaceutical market, the Commission has issued general rules (Resolutions N^os. 634 and 729) about transparency in the commercialization conditions of pharmaceutical products between laboratories and pharmacies, and the conditions that the sellers of pharmaceutical products must fulfill to communicate or publish prices, rebates, forms of payment, etc.

Also, the Commission has attempted to introduce more competition and transparency in the credit market, particularly in relation to the financial services given by the Retail Stores. Through Resolutions N^os 656 and 666, the Commission concluded that the credits given by commercial stores to the public didn't have all the information which can allow the customers to compare the conditions and interest rates in order to choose the better for them.

4. The advocacy approach of the National Economic Prosecutor's Office: creating a culture of competition.

Publication of the decisions and rules in the Agency web page

One of the first measures taken by the current National Economic Prosecutor was to publish the decisions of the Commissions in the web page of the Agency. The idea was been to open and make available for the general public the work of the Commissions. The web page has a complete data index of jurisprudence ordered by date, matter and conduct, which allow the public in general to understand how the Competition System has addressed competition issues throughout the last thirty years.

Press conferences

The National Economic Prosecutor's Office has made a great effort explaining the importance of cases and the latest legal reform. Almost once a week, the National Economic Prosecutor holds press conferences where he explains the importance of the investigations of the Agency and the decisions taken by the Commissions to consumers and competitors. In this sense, last year, there were very important cases ruled where the consumer welfare was clearly protected by the Antitrust System. In this way, the Agency tries to create awareness of the importance of competition in the daily life of people.

One example of this practice, was the so-called Credit Card Christmas Promotion. It was a promotion given by credit card operators allowing the consumers to buy and pay in 3 payments without an interest rate. The 3 biggest departments stores refused to sell under this modality, because they have their own credit cards. The National Economic Prosecutor's Office filled a suit before the Antitrust Commission and the Commission finally impose fines to those department stores, because it considered that this parallel conduct was an exclusionary conduct. The Supreme Court confirmed this decision.

Another important case consisted in the modification of covenants contained in contracts celebrated between a mall and the stores which operated in it. These covenants imposed the prohibition for the stores to establish in another mall in a radius of 5 kilometers (territorial restraint). The National Economic Prosecutor's Office presented a suit before the Antitrust Commission which decided only in part in favor of the National Economic Prosecutor's Office. The Office appealed to the Supreme Court which overturned the decision and ordered the elimination of those covenants.

Also, in press conferences and in special media publications, the National Economic Prosecutor has described the importance of the new law, which created the Competition Tribunal. This strategy has made competition issues closer to consumers.

Competition day

In October 30th of 2003, the National Economic Prosecutor's Office organized, for the first time, a Competition Day, a seminar in which different experts could discuss competition affairs. The idea of the National Economic Prosecutor's Office is to celebrate this event every year, in order to create, precisely, a culture of competition. This year we expect to organize the Second Competition Day and the Iberoamerican Forum on the same day.

Speeches and publications

Every year, the National Economic Prosecutor's Office sets out some goals for its fulfillment. One of the main areas of interest is, indeed, the diffusion of competition policy. Last year, we made speeches to many academic institutions, explaining the system and the new reform. This year we have made speeches to trade associations and we expect to make more presentations of these kind to other organizations, and publish the Office's opinions in specialized journals.

Technical reports

Regarding the reports that the competition institutions can issue to different authorities promoting competition principles, I have mentioned how the Commissions, through their decisions, have issued some rules to regulators and municipalities in order to incorporate some competition principles in their public policies.

In relation to the National Economic Prosecutor's Office action in this field, the Agency has issued many reports on request by other State authorities. However, during this last period, the Agency has become more aware of its role in competition advocacy and has taken measures to fulfill this task in a better way. One example of this new orientation is the creation of a special unit within the Agency in charge of studying all those bills which are related with economic effects, with the objective of giving an opinion to the authority who heads the bill.