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**Working Party No. 2 on Competition and Regulation**

**COMPETITION ISSUES IN LINER SHIPPING**

-- Note by Chile --

**19 June 2015**

*This document reproduces a written contribution from Chile (FNE) submitted for Item IV of the 59th meeting of the Working Party No. 2 on Competition and Regulation on 19 June 2015.*

*More documents related to this discussion can be found at:  
<http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm>*

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-- Chile (FNE) --

1. The West Coast of South America (“WCSA”) is among the smallest trades in the world. With 3.5 million TEUS of overall trading volumes, the WCSA represents a mere 1% of the global containerized trade<sup>1</sup>. Chile is the largest trading partner among the WCSA countries (including also Peru, Colombia, Ecuador and Bolivia) with 1.2 million TEUS<sup>2</sup>, representing around 36% of the total trading volumes. Its main trading partners both in terms of imports and in terms of exports are China, Northern Europe and the East Coast of the USA. Overall, Chile is a net exporter of goods, with the main products being raw material such as cellulose, wood and copper as well as food products, mainly fruits.

2. All in all, there are 26 companies operating in the WCSA. This number has been relatively stable over the past five years, since the entry of five Asian shipping companies that operate in the Far East services and with the only recent changes being the acquisitions of local companies CSAV and CCNI by Hapag Lloyd and Hamburg Süd respectively, which will be reviewed in more detail below. Nonetheless, a closer look at the sector shows that four companies hold more than 70% of the overall capacity and are the only ones present in all trades. In addition, most of the shipping companies operate in WCSA using cooperation agreements that mainly consist of Vessel Sharing Agreements (“VSA”) and on occasion slot charter and pool agreements.

3. These agreements, which in some cases date back to more than 10 years, represent at least a third of the imported volumes and between 15% and 60% of the exported volumes in each relevant trade. The concentration is most notorious in the trades of Northern Europe and the Far East and subsides slightly in the trades of North America and the Mediterranean.

4. Further, for two of the main trade routes calling in WCSA, namely the Far East and North America, the main shipping companies are grouped under Conferences that explicitly express their purpose to be to promote rate stability, reduce destructive competition, facilitate efficiencies and cooperate in providing services in the trade. As a result, and taking into account the high market shares of the main shipping companies in all trades as well as the intensity of cooperation among them, one could conclude that the liner shipping sector is highly concentrated and presents increased risks of coordination.

5. These coordination risks are partly offset, at least temporarily, by excess capacity that characterizes the sector. This phenomenon is particularly present in the Pacific trade routes that represent higher trading volumes and thus larger vessels, but most importantly, that are not constrained by the vessel capacity limits of the Panama canal. The new vessel order-book of shipping companies could imply that excess capacity could deteriorate over the next few years.

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<sup>1</sup> [http://unctad.org/en/PublicationsLibrary/rmt2012\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2012_en.pdf)

<sup>2</sup> Source: CTS, 2012

6. In Chile, the sector's regulatory framework encompasses: i) the Merchant Navy's Promotion Act<sup>3</sup> ("**Merchant Navy Act**") which provides several rules in support of local shipping companies, such as tax benefits and a competition law exemption for Chilean shipping companies which participate in liner shipping agreements<sup>4</sup>; ii) the Merchant Navy Regulation<sup>5</sup>, which mandates the due registration of the agreements between shipping companies and the tariffs they may agree in that regard; and iii) the Shipping Act<sup>6</sup> and its specific regulations<sup>7</sup> which establishes the requirements for registering as a Chilean shipping company, among other matters.

7. There is no sector-specific regulatory agency that thoroughly intervenes in the application and enforcement of competition law to liner shipping in Chile. However, two bodies regulate certain aspects of the sector's operation. The Directorate General of Maritime Territory and Merchant Navy ("**Directemar**"), an agency subject to the supervision of the Chilean Navy Force, is entrusted to keep the registry of Chilean ships which operate in the liner sector<sup>8</sup>. Further, the Maritime, Fluvial and Lake Transport Department, within the Ministry of Transport and Telecommunication ("**Transport Department**"), keeps records of the liner shipping conferences, consortia and other strategic alliances that have Chilean shipping companies as members.

8. In Chile, liner shipping, just as any other sector, is subject to the legal framework established by the Competition Act<sup>9</sup>. Hence, local competition authorities -namely the National Economic Prosecutor Office ("**FNE**") and the Competition Tribunal ("**TDLC**")- are entitled to, respectively, investigate and adjudicate on antitrust matters and to engage in merger control<sup>10</sup>.

9. However, the Merchant Navy Act<sup>11</sup> contains an antitrust exemption in regard to conferences, pool agreements and consortia, which regulate and rationalize transport services and according to which Chilean shipping companies are free to participate in the abovementioned agreements without being subject to the Competition Act provisions (the "**Antitrust Exemption**"). The scope of the Antitrust Exemption was extensively discussed before the Competition Tribunal and will be presented in more detail in what follows; for now it is worth noting that unlike most Antitrust Exemptions put in force in foreign jurisdictions, that attempt to address specific, timely issues and thus have specific life span, the Chilean Antitrust Exemption does not have an established time-horizon.

10. The rationale behind the Antitrust Exemption was related to the fact that the largest trading partner for Chile in terms of transported volumes, the Asia-Pacific, is also covered by a similar antitrust exemption. Therefore, as stated by the Competition Tribunal, if Chilean shipping companies were not exempted from Competition rules in order to enter and take part in conferences, consortia and/or pool agreements, they would suffer from a 'regulatory asymmetry' that could eventually impair their performance in international trade.

<sup>3</sup> Law Decree No. 3.059 (*Ley de Fomento a la Marina Mercante*), dated December 22, 1979.

<sup>4</sup> The competition law exemption will be assessed in detail throughout this contribution.

<sup>5</sup> Supreme Decree No. 237 (*Reglamento de la Ley de Fomento a la Marina Mercante*), dated December 22, 2000.

<sup>6</sup> Law Decree No. 2.222 (*Ley de Navegación*), dated May 31, 1978.

<sup>7</sup> Supreme Decree N° 163 (*Reglamento del Registro de Naves y Artefactos Navales*), dated February 2, 1981.

<sup>8</sup> As well as ships which provide bulk or any other shipping services.

<sup>9</sup> Law Decree No. 211 (*Ley de Fomento a la Libre Competencia*), dated December 22, 1973.

<sup>10</sup> Please note that Chile has a semi-voluntary regime of merger control. For further information, please revise the 2014 in-depth report of the OECD: <http://www.oecd.org/chile/chile-merger-control-2014.htm>

<sup>11</sup> Article 5.

11. In addition to the Antitrust Exemption and particularly regarding liner shipping conferences, in 1975 Chile subscribed the Convention on a Code of Conduct for Liner Conferences, of the United Nations Conference on Trade and Development (“**Code**”) and has been a member of the Code ever since. This Code provides standards on liner conferences governance, relations between member lines, criteria for freight rate determination and dispute resolution, amongst other matters.

12. In 2012, in line with the OECD recommendations<sup>12</sup>, the FNE requested the Competition Tribunal to remove the Antitrust Exemption as well as the country’s membership to the Code. It was argued that the liner shipping sector was no different from other like network industries; that competition law in Chile had a general application across markets; and that the sector did not require special treatment under competition law. Furthermore, the FNE highlighted that Chilean companies participated in several liner shipping conferences, which were not duly registered by the Transport Department, as required by the regulatory framework. This lack of registry caused a relevant asymmetry of information among shipping companies and competition authorities. As it was claimed, the Antitrust Exemption, the Code and the lack of conferences’ due registry prevented proper competition law enforcement by the FNE in the liner shipping sector.

13. Thus the FNE initiated a consultation proceeding before the Competition Tribunal in which the main operators of the shipping sector intervened. In its ruling<sup>13</sup>, the Competition Tribunal stated that there was no need to remove the Antitrust Exemption since it only allowed Chilean shipping companies - whether liner or not- to enter and take part in conferences, pool agreements and consortia with international trading partners, which does not imply that companies may engage in anticompetitive practices that lessen competition. Local competition authorities are still able to investigate and eventually sanction conducts that impair competition in the liner shipping market in Chile. In the same vein, the Competition Tribunal highlighted there were several unregistered liner shipping agreements that the relevant regulatory authorities were unaware of, in violation to the sector-specific regulation in that regard.

14. The Tribunal also highlighted that, due to the combination of otherwise independent networks, cooperation agreements present significant network economies that allow coordinating schedules, routes and frequencies, which could otherwise only be possible through mergers or long term contracts. Thus, the Tribunal stated that these agreements can contribute to resolve issues arising from excess capacity or scheduling and are particularly beneficial for smaller lines.

15. In addition, relevant case law related to liner shipping has been issued by the TDLC’s predecessors -the ‘*Comisión Preventiva*’ and the ‘*Comisión Resolutiva*’ (the ‘**Commissions**’)-, which is in line with the aforementioned recent ruling. In several decisions regarding the liner shipping sector<sup>14</sup>, the Commissions interpreted the Antitrust Exemption and held it did not impede the competition authorities to review and adjudicate on matters regarding liner shipping. Accordingly, while the aforementioned rule allowed firms to enter into and participate in conferences –and thus into at least partial price fixing practices- and consortia, it did not imply an immunity of liner shipping from domestic competition law.

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<sup>12</sup> In the 2002 OECD report ‘*Competition Policy in Liner Shipping*’.

<sup>13</sup> Ruling ERN 14/2012, para. 192, 193, 200 – 203.

<sup>14</sup> *Comisión Preventiva*: Decision No. 737/1990; and *Comisión Resolutiva*: Decisions No. 100/1981, 225/1986, 251/1987 and 354/1991

16. Regarding merger control, the FNE has recently cleared two international mergers in the liner shipping sector. In 2014, the FNE was notified of the acquisition of *Compañía Sudamericana de Vapores S.A.* (“CSAV”) by Hapag-Lloyd AG, in which competition concerns were raised regarding the West Coast South America – Northern Europe trade. The agency found significant loss of rivalry between the two consortia that participated in the trade due to the fact that each of the merging firms was a member of a different consortium.

17. In these types of agreements participants jointly decide on some commercial variables of the services such as overall capacity, frequency or port calls. In addition, after the merger, the resulting company would have access to commercial information from a significant part of its competitors in the trade that was previously not available. Thus, the FNE was concerned that the resulting undertaking could influence commercial decisions and could therefore unilaterally restrict or alter competitive conditions in the market. It is worth noting that the two consortia represented more than half of the transported volumes in the trade and there were few remaining non-allied members in the route that could apply a competitive constraint.

18. The FNE did not raise any competition concerns in the rest of the overlapping relevant trades, due to the marginal participation of Hapag Lloyd. In addition, and whilst CSAV operated in all trades using VSAs, Hapag Lloyd operated these trades using combinations of its own services or through swap agreements and slot chartering agreements, which are forms of cooperation with much less potential to influence the competitive variables of the service; this due to the fact that these type of agreements do not imply a joint administration of the service but rather an exchange or renting of slots.

19. The merger was also notified to the European Commission who, after expressing similar concerns, received commitments by the merging parties<sup>15</sup> regarding the trade of West Coast South America – Northern Europe. As a result, the FNE cleared the acquisition, considering that commitments presented before the European Commission remedied FNE’s competition concerns in the relevant trades and were binding for the parties.

20. Finally, during the same year, the FNE reviewed the acquisition by Hamburg Süd of the liner business of *Compañía Chilena de Navegación Interoceánica S.A.* The analysis was focused on the participation of the companies in liner shipping agreements, namely consortia and conferences. The main factors considered in the analysis were the marginal participation of CCNI in most relevant trades as well as the membership of both companies in the same shipping agreements in all relevant trades.

21. One trade that merited more analysis was that of West Coast South America – Far East, in which there was a significant interconnection that could cause coordination among players. This was due to the membership in various consortia and pool agreements and in the Conference of Asia-West Coast South America Agreement of the most significant shipping companies of the trade<sup>16</sup>. Nonetheless, the FNE found that the coordination risks did not significantly increase by the acquisition and that the significant excess capacity in the trade that was expected to deteriorate in the years to come, could, at least to an extent, destabilize potential attempts to coordinate.

<sup>15</sup> Case No. Comp/M.7268 (CSAV/HGV/KHÜNE MARITIME/HAPAG-LLOYD AG). Available at: [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7268](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7268).

<sup>16</sup> [www.scaga.net](http://www.scaga.net)