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**INVESTIGATIVE POWER IN PRACTICE – Breakout session 2: Requests for
Information – Limits and Effectiveness**

Contribution from Chile

- Session IV -

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This contribution is submitted by Chile (FNE) under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

Breakout session 2 - Requests for Information Limits and Effectiveness -

- Contribution from Chile (FNE)* -

1. Chilean competition law, contained in Law Decree No. 211 of 1973 (“**DL 211**”), seeks to promote and defend competition in the market place. The National Economic Prosecutor’s Office (“**FNE**”) and the Tribunal for the Defense of Free Competition (“**Competition Court**” or “**TDLC**”) are the agencies responsible for enforcing DL 211. The FNE is responsible for the investigation and prosecution of anticompetitive conducts. The TDLC is an independent Court that decides cases brought by the FNE or private parties. TDLC’s final decisions are subject to appeal before the Supreme Court.
2. In its investigations, the FNE has broad powers to request information. The targets of the investigation and third parties, public and private entities, companies and individuals are all legally required to give the information or documents requested by the FNE, even if they are confidential. However, up until recently, the FNE faced significant delays and challenges to get parties to comply fully with requests for information. A new regulatory framework, introduced in 2016 by Law No 20.945, has established sanctions for whoever does not promptly respond to the request of information from the FNE or does it untruthfully.
3. In our presentation, we explain the powers granted to the FNE to request information, and describe the limits set to this power by the Competition Court. We try to explain how our investigative power and its limit work “in action”, referencing actual cases we have faced whenever possible.

1. Power to request information: Content and limits

4. The National Economic Prosecutor’s office has broad power to request information deemed necessary during its investigations.¹ Under these powers, the FNE can request data, documents and information from: 1) Private parties, meaning individuals or legal entities; 2) Public entities, including officials, public agencies and service, municipalities or companies in which the State, or any other companies related to the State, have representation or participation. Information can be requested from entities in two different capacities: as targets of the investigation or as third parties. The FNE also has the power to collect and examine documentation, accounting information and any other material that it deems necessary. The FNE can request reports from any technical agency and hire the services of experts and technicians. Furthermore, the FNE can call any individual,

* This written contribution is submitted by the National Economic Prosecutor’s Office – Chile.

¹ Power laid down in Article 39 letters f), g) and h) of Law Decree No. 211 of 1973.

representative, administrator, advisor, etc., from any entity that may have knowledge of relevant facts under investigation, as well as any other person who has executed and celebrated agreements of any nature that may be relevant to the case for interrogation through either oral or written deposition.²

5. In exercising its power to request information, the Prosecutor's office must indicate the scope and subject of the investigation, as well as in what capacity the information is requested (whether as a target of the investigation or as a third party).³ The request for information ("RFI") must be accurate regarding the need to gather information in the framework of the investigation, specifying all documents, databases, facts and information requested. The foregoing with the purpose of facilitating the prompt and complete compliance with the request.

6. In order to determine the scope of the RFI, the FNE must evaluate -based on the evidence gathered in the investigation at the time of the RFI- what facts and information are relevant to the development of the case. These facts will be determined on a case-by-case basis. However, in most investigations it is essential to gather basic documents and information such as the organizational and corporate structure of the company, legal representatives, information on incomes, sales and / or production, economic reports, information on price variations, etc. The required information must be strictly confined to the scope of the investigation, avoiding abstract and general requests (*fishing expeditions*). It should be noted that the FNE shall not request information that already possess and has the obligation to return -without leaving copy-all information that is not strictly related to the specific object of the investigation⁴.

7. In addition to the duty to substantiate its RFIs, the Competition Court has established that requests for information should not be excessive, unnecessary or a burden to fulfil⁵. Nonetheless, the Court has established that in cases in which the RFI requires a complex task, or when parties need more time than that granted by the Prosecutor's office, the requested party may always ask for an extension of this period in order to comply with the request⁶.

8. To balance this broad power to request information, our legal framework has established a specific procedure to oppose RFI. This procedure allows requested parties that deem the RFI as harmful to their interests or those of third parties, the possibility to request the TDLC declare the RFI totally or partially null and voided. The Competition Court may decide on the pertinence, necessity or opportunity of the RFI. Since the TDLC

² In cartel investigations, with a judicial warrant, the FNE also has the power to search premises, seize evidence and wiretap.

³ TDLC Decision 28/2009 and 29/2010 Copesa.

⁴ TDLC Decision 6/2006 Yamaimport, 43/2013 Copesa and, specially, 21/2008 Socofar regarding the delivery of communications maintained by 10 workers, the Court ordered to return the information to the company "without leaving any copy or endorsement of all information that does not strictly relate to the specific object of the investigation that's being carried out ..."

⁵ TDLC Decision 14/2007 La Polar, 21/2008 Socofar, 23/2008 Pharma Investi,

⁶ TDLC Decision 44/2013 Walmart Chile.

became operative, in 2003, nearly 60 oppositions have been filed; of which only nine have been wholly or partially accepted.

9. The Competition Court has consistently held that RFI are binding⁷ and that delivering the information is a burden established by law.⁸ Moreover, the TDLC has established that parties may not oppose RFI based on the confidential nature of the information requested,⁹ nor in the fact that the information is protected by confidentiality clauses or contractual liability agreed with customers or suppliers.¹⁰ Thus, the TDLC has frequently rejected oppositions based on arguments such as the sensitivity of the information, the potential damages caused by its disclosure, the contractual liability of the company or its protection by confidentiality clauses, and reaffirmed the authority of the FNE to request information related to income, costs, commercial information, etc. The Competition Court rejected those arguments stating that the information handed to the FNE it is not disclosed. The FNE has the power and duty to declare and keep confidential all commercial secrets or competitively sensitive information handed to it by the parties, and FNE's officials are required to keep confidential any information and knowledge they have received in the exercise of their duties, under criminal penalties. This prevents third parties from having access to information that is handed over with such character.¹¹ Therefore, the confidentiality or the eventual breach of contract with suppliers and/or customers does not prevent them from handing over the information.¹²

10. In addition, the Competition Court has indicated that the FNE has the power to request information with a broad temporal extension, even from periods covered by the statute of limitations. The TDLC has held that information from a period covered by the statute of limitations could be requested as long as it could provide a context or may be relevant in some other way to prove an infringement. Furthermore, the Court has argued, defenses base grounded on statute of limitations are to be discussed at trial and not during the investigation.¹³

11. We now present four limits the Competition Court has established to the power granted to the FNE to request information. Each limit is explained by briefly describing cases were the TDLC has accepted, either totally or partially, an opposition to a RFI from the FNE.

⁷ With the exception of voluntary information, which occurs in the admissibility phase of the complaint prior to the formal opening of the investigation enshrined in article 41 of DL 211.

⁸ TDLC Decision 49/2015 Sanderson/Fresenius.

⁹ TDLC Decision 14/2007 La Polar, 21/2008 Socofar, 23/2008 Pharma Investi, 30/2010 Dascher, among other.

¹⁰ TDLC Decision 35/2011 Bechtel Chile, 47/2014 Compañía Minera Zaldivar, among other.

¹¹ The regulation goes further and contemplates that the breach of duty of confidentiality will be punish with penalties ranging from disciplinary sanctions, suspension of employment, a fine of 20 UTA to deprivation of liberty (Articles 246, 247 and 247 bis of the Criminal Code) and Auto Acordado 16/2017 on reservation or confidentiality of information.

¹² Nor the existence of specific clauses that oblige one of the parties to give notice in case of a RFI.

¹³ TDLC Decision 44/2013 Walmart Chile and 49/2015 Sanderson/Fresenius.

1.1. The COPESA case: Request of information from related parties over which there is no control.¹⁴

12. The FNE was conducting an investigation on the advertisement industry. In that context, the FNE directed a RFI to COPESA group – a media holding that owns several newspapers and radio stations. The FNE requested COPESA to give information of different subsidiaries. COPESA opposed the RFI stating that the FNE was requiring information of some companies to which they were related, but over which they had no direct control or decisive influence. COPESA argued that they were not legally allowed to give information on behalf of companies they did not control, that the request was overly burdensome, and that the FNE could get that information from those companies directly. The TDLC ruled in their favor, striking from the RFI all information related to parties that were not wholly owned subsidiaries of COPESA.

1.2. The Coca Cola Embonor case: Request of equipment and associated software¹⁵

13. The FNE was investigating certain discounts applied by a company that bottled and distributed products of The Coca Cola Company (EMBONOR). According to the investigation, there was a specific equipment used by EMBONOR's sales force to place purchasing orders. The equipment was furnished with a software that applied discounts automatically. The FNE requested EMBONOR a specimen of the said equipment. EMBONOR opposed the RFI arguing that the FNE had legal powers to request information or documents, but not equipment. The TDLC partially accepted the opposition, noting that the FNE had exceeded the scope of its powers and that these did not include the delivery of machinery and equipment, enabling the required company not to comply with that point of the request. The Court also noted that this was notwithstanding the powers of the FNE to request information on how the discounts were applied.

1.3. The Nielsen case: Request of information from third parties when the information can be supplied directly by investigated party¹⁶

14. The FNE was conducting an investigation in the supermarkets industry. In that context, the FNE requested AC Nielsen Chile S.A. ("Nielsen"), a company that compiles and processes sales data from supermarkets, to supply information of different products marketed by the investigated companies. Nielsen opposed the RFI, stating its business consisted in processing information handed to them by supermarkets and suppliers; if that information could be reached by the authorities, supermarkets and suppliers would not have incentives to continue supplying the information to Nielsen, thus harming their business; and that the FNE could reach that same information directly from the investigated parties. The TDLC ruled on Nielsen's favor, arguing that the information could be obtained directly from the investigated parties, without putting Nielsen's business into jeopardy.

¹⁴ TDLC Decision 43/2013 Copesa.

¹⁵ TDLC Decision 33/2010 Coca Cola Embonor.

¹⁶ TDLC Decision 11/2007 AC Nielsen.

1.4. The Corpbanca case: If information or facts are not available, there is no obligation to deliver them¹⁷

15. The FNE was investigating a merger that could affect, among others, the market for bank loans. The FNE requested information of the last decade from Corpbanca, a commercial bank. The bank opposed the RFI arguing that the Chilean banking laws only required financial institutions to keep such records for a period of 6 years. The Court ruled that the Bank was obliged to give the information they had, even if it was older than the information that they were required to keep by law on their records.¹⁸ However, the bank was not required to produce that information if they did not have it available. After this case, all RFI from FNE requires parties to state and justify if they do not have the information requested.¹⁹

2. Non- Compliance to a Request of Information

16. Until the amendments to the DL 211 came into effect on August 30 of 2016, the only applicable regulation against non-compliance with a RFI was a general provision contemplated in article 42 of DL 211 that establishes compulsory measures against whoever ‘obstructs’ an investigation. Obstruction can result on an arrest warrant against the infringer that can extend to up to 15 days or until the obligation is fulfilled. The arrest warrant shall be issued by a judge with criminal jurisdiction at the request of the National Economic Prosecutor, prior authorization of the TDLC.

17. Having an undertakings’ manager or legal representative arrested by a criminal court implies only very clear or serious cases of noncompliance are amount to ‘obstruction’. On the other hand, even if such case arises, the need to seek double judicial authorization makes the execution of this measure cumbersome and difficult. For this reason article 42 has rarely been used in practice. The absence of a more workable provision to guarantee compliance with a RFI conveyed incentives for strategic behavior can negatively affect investigations for infringements to competition law. For this reason, the legislature foresaw the need to incorporate a new regulatory framework including specific sanctions for non-compliance to a RFI. As it was conceived, under the new regulation financial penalties can be imposed within a special summary procedure.²⁰

18. The new procedure applies specifically to cases in which: i) unjustifiably, a request for information made by the FNE is not answered or is partially answered or delayed,²¹ ii) A person duly summoned to be deposed before the FNE does not attend without valid

¹⁷ TDLC Decision 15/2007 Corpbanca.

¹⁸ TDLC Decision 15/2007 Corpbanca y 38 /2011 Banco de Crédito e Inversiones (BCI).

¹⁹ As an example, in an investigation where minutes from different board meetings were requested and the respondent replied that they had been stolen, he was required to present report from the police.

²⁰ Law No. 20.945, added two paragraphs to article 39 h) and introduced a new procedure in 39 ter.

²¹ Article 39 h) point 5.

justification.²²⁻²³ In these cases, the imposition can amount up to 2 Annual Tax Units (“UTA”)²⁴ for tax benefit for each day the answer is delayed.²⁵

19. The Prosecutor's Office has recently used this tool for the first time in an investigation regarding the Association of Surgeons of the V Region (“AG”), after this entity failed to deliver information requested several times during an investigation for price fixing in the medical services market. The information requested was not considered to be particularly complex to produce (identification of current members, dates of entry and other similar). However, the Associations’ answer was incomplete and omitted information already in the case file (for example the identification of physicians who had acknowledged being part of the Association). This led the Prosecutor's Office to reiterate the request on several occasions without the AG delivering the information or requesting an extension of the deadline. The Competition Tribunal agreed with the FNE that the Association had no justification to breach its obligation to give a full and timely response to the request for information thereby obstructing course of the investigation. The amount of the fine was set at 0.5 UTA per day the answer was unduly delayed, totaling 8.5 UTA, equivalent to 4.8 million Chilean pesos (7,175 USD).²⁶

20. The new regulation has also has introduced a new criminal felony punished with a maximum of 3 years prison sentence in case the addressee of a RFI provides false information, manipulates or conceals evidence with a deliberate intention to hinder or obstruct an investigation.²⁷ In these cases, the FNE can refer the case to the Criminal Prosecution Office.²⁸ Until this date, no such cases have arisen.

21. All in all the recently passed amendments have reinforced our regulatory framework with the existence of a specific measures and sanctions that constitute a more effective enforcement mechanism. It is important to note that the possibility of arrest for ‘obstruction’ of an investigation is still available, if such a case where the arrest of the addressee of a RFI is necessary and/or proportionate for an adequate compliance.

²² Article 39 j) point 2.

²³ It is important to bear in mind that in these cases there is no need to prove fraud or negligence in the failure to deliver information or facts, the breach without reason or relevant reason (unjustified) is sufficient.

²⁴ Annual Tax Unit is a measure of special value. The approximate value of 1 UTA is around 577,000 Chilean pesos which is equivalent to 862 dollars per day of delay

²⁵ Fine that will be determined by the TDLC at the request of the FNE.

²⁶ Regarding its execution, Article 28 provides that the payment must be made within 10 days from the issuing of the Decision, and in case of non-payment the TDLC may exercise the measures of constraint contained in Article 543 of the CPC (arrest up to 15 days or proportional fine, repeatable until the fulfillment of the obligation).

²⁷ Article 39 h) point 4.

²⁸ The National Economic Prosecutor will be responsible for sending the information to the Public Prosecutor's Office, agency in charge of the investigation so that it may continue with the criminal proceedings. The FNE will have the power, not the obligation, to become a complainant if it deems it appropriate. As of today, the FNE has not used this legal tool.

3. Practical aspects of Request for information/Use of Information from previous investigations

22. With respect to the limitations of the use of information from previous and separate investigations, the law established that any evidence gathered by intrusive means of investigation (such as in search warrants in an undertakings' premises or private communications tapings) can't be used by the Prosecutor's Office in any other investigation unless a new judicial authorization is obtained.

23. An allegation on this issue appeared in a cartel case in the regional passenger transport market that involved several bus companies operating the route between Santiago and Valparaíso among other very important routes. One of the undertakings, "Transportes Cometa S.A" requested the exclusion of evidence obtained by the FNE as a result of the interception of communications arguing originally the investigation was aimed to price fixing, whereas the final FNE's accusation was a joint conspiracy to foreclose the market by hoarding the offices in bus terminals located in different regions of Chile. Transportes Cometa argued that the alleged collusive agreement to exclude competitors constituted "incidental findings of new facts" that were independent to those originally covered by the FNE's investigation. Even if the investigation of both conduct (price fixing and the exclusion of competitors) was handled within the same case file, they amounted to different 'investigations' from which it follows, according to the undertaking, that the FNE should have sought a new judicial authorization to use the wiretaps.²⁹

24. The Court of Appeals did not accept this argument reasoning that the FNEs' investigation covered several and different hypothesis of concerted behavior, within the same market and among the same undertakings, prior to the judicial authorization granting the interception of communications. Therefore, the evidence thus obtained could be adduced in Court without need of a new judicial decree.³⁰

²⁹ The opponent went further and pointed out that the FNE had "incidental" access to this information, and that these new facts would account for a collusive agreement "of different nature, between different parties and in a completely different geographical market".

³⁰ Judgment of the I. Court of Appeals of Santiago, Case No. 886-2012, of May 31, 2012.