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**- Contribution from Chile -**

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## Session III: Ex officio Investigations

### - Contribution from Chile -

#### 1. Introduction

1. This contribution describes the policy and practice of the *Fiscalía Nacional Económica* (“FNE”) when detecting cartels, focusing on the interplay between different cartel detection tools and recent efforts to enhance the quality and number of proactive tools.
2. Anti-cartel enforcement continues to be the highest priority for the FNE. This is evidenced in several recent developments, such as the fact that the FNE has started prosecuting individuals involved in cartel conduct, including managers without residence in Chile<sup>1</sup>; the fact that in the last 15 years, the FNE has brought actions against four of the five largest economic conglomerates in Chile; and the recent creation of an Intelligence Unit that has been designing and implementing new tools to detect cartels.
3. In its fight against cartels, the FNE adopts a mixed cartel detection policy whereby it uses a wide range of both reactive and proactive tools to ensure an effective cartel enforcement. To achieve this objective, these tools are used together and in support of each other.
4. In recent years, the FNE has successfully sought to expand the use of proactive tools. In fact, half of the cartel cases that the FNE has brought to court in the last decade have been based on ex-officio investigations.
5. As part of these continuous efforts, in September 2020<sup>2</sup>, the FNE launched the Intelligence Unit (“IU”, in Spanish, *Unidad de Inteligencia*), which is a multidisciplinary team of the Anti-Cartel Division, composed of a lawyer, a data scientist/economist and a software developer, that develops digital investigative tools to support and optimize cartel investigations. The IU has designed several computational tools based on data analysis and market screening, denoting a pivotal step in the FNE's ongoing efforts to actively combat cartels and align its investigative techniques with global standards.

#### 2. Background to cartel enforcement in Chile

6. Chilean competition law, contained in Law Decree No. 211 of 1973 (“DL 211”)<sup>3</sup>, seeks to promote and defend competition in all the markets of the Chilean economy. Article 3 letter a) of DL 211 prohibits cartel conduct for individuals, companies, organisations and other entities.

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<sup>1</sup> Just a few months ago the Chilean Competition Court, Tribunal de Defensa de la Libre Competencia, issued its first decision sanctioning individuals involved in cartel conduct and finding one of them as jointly and severally liable.

<sup>2</sup> See press release at <https://www.fne.gob.cl/fne-crea-unidad-de-inteligencia-dependiente-de-la-division-anticarteles/>.

<sup>3</sup> Available in Spanish at <https://www.bcn.cl/leychile/navegar?idNorma=236106>.

7. Article 3 letter a) of the DL 211 forbids agreements or concerted practices involving competitors that consist of fixing prices, limiting output, allocating areas or market shares or affecting the outcome of bidding processes, as well as those agreements or concerted practices that, conferring market power to competitors, consist of determining commercial conditions or excluding actual or potential competitors.

8. In the 2016 amendment to the DL 211, cartel enforcement was strengthened through (i) criminalizing hardcore cartels, (ii) introducing a per se rule in the law to judge hardcore cartels, (iii) establishing additional penalties for cartels, such as the prohibition to act as director or manager in certain types of companies or the prohibition to participate in public bids for a certain period of time; (iv) introducing a criminal liability exemption for the first beneficiary of a leniency program from a penalty, that ranges between 3 and 10 years of imprisonment, and introducing a reduction of this penalty for the second beneficiary.

9. The FNE and the Chilean Competition Court, Tribunal de Defensa de la Libre Competencia (“TDLC”) are the main agencies responsible for enforcing DL 211. The FNE is an independent government competition agency in charge of investigating and prosecuting cartel cases, however, it does not have adjudicative powers in this matter. Fines and other sanctions for cartel conduct are imposed by the TDLC, a specialized court that has exclusive jurisdiction to decide on these cases<sup>4</sup>. The Supreme Court of Justice reviews the TDLC’s rulings and decisions.

10. As of 2016, criminal sanctions can be sought for certain hardcore cartels before the Criminal Court. Since the Chilean system requires full administrative prosecution before the case can be referred by the FNE for criminal prosecution<sup>5</sup>, the FNE has not yet referred such a case<sup>6</sup>. However, the FNE is currently litigating cases that could later be prosecuted criminally. The FNE envisages that making the threat of criminal prosecution real is a very important deterrence tool.

11. Investigations carried out by the FNE can be opened by a complaint, a leniency application or by the FNE on its own initiative (ex officio)<sup>7</sup>. In the first two cases, the FNE receives information from third parties regarding cartel conduct, while in the latter case, the FNE decides to open an investigation based on the information that it has gained through the full exercise of its investigative powers.

12. The FNE actively exercises the general powers conferred upon it by law - applicable to all antitrust investigations-, which are established in Article 39 of the DL 211

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<sup>4</sup> Private parties may also file a complaint before the TDLC for a cartel infringement or other anticompetitive conducts prohibited by the DL 211.

<sup>5</sup> In 2018 the FNE published the Internal Guidelines for Filing Criminal Claims for Cartels, available at <https://www.fne.gob.cl/wp-content/uploads/2018/08/Guidelines-for-criminal-claims-on-cartel-offences.pdf>. Article 64 of the DL 211 establishes the submission of a criminal claim by FNE as a precondition for criminal prosecution of the cartel offence, thereby excluding the possibility of criminal claims by third-party claimants or an ex-officio initiative by the Criminal Prosecutor (Ministerio Público). The submission of a criminal claim is, as a general rule, not compulsory for the FNE.

<sup>6</sup> In December 2023, the FNE applied article 64 of DL 211 for the first time, justifying the decision not to file a criminal claim regarding a local case of an agreement among passenger transport companies. More information available at <https://www.fne.gob.cl/fne-descarta-que-acuerdo-entre-microbuseros-de-la-araucania-comprometiera-gravemente-la-libre-competencia-y-decide-no-presentar-querella/>.

<sup>7</sup> See FNE Internal Guidelines on Conducting Investigations, dated May 2013, and available in Spanish at [https://www.fne.gob.cl/wp-content/uploads/2017/10/Instr.\\_investigaciones\\_2013-1.pdf](https://www.fne.gob.cl/wp-content/uploads/2017/10/Instr._investigaciones_2013-1.pdf)

and include the following: the power to request information and records from public or private parties (Article 39 f), g) and h)) and the power to summon any person involved in or who may have knowledge of the facts, acts or agreements that are subject to investigation to an interview or to present a written declaration (Article 39 j)).

13. In serious and qualified cases of investigations aiming to prove cartel conduct described in Article 3 a) of the DL 211, the FNE is given special investigatory powers, which include the authority to: enter public or private premises and, if necessary, to force said entry; register and seize all types of objects and documents; intercept communications; and order any company that offers communications services to provide copies and records of communications that have been transmitted or received by the investigated parties.

14. The measures described in the paragraph above must be authorized by the Judge of the Appeal Court of Santiago that is on call -with prior approval of the TDLC- and they must be executed by the Police (*Carabineros de Chile*) or Investigative Police (*Policía de Investigaciones*) under the orders of an employee of the FNE<sup>8</sup>.

15. To grant the authorization, the Judge shall verify the existence of precise and serious information regarding the existence of collusive practices, compiled by the FNE prior to the request for authorization to conduct the dawn raid. This information is obtained using reactive tools, i.e. complaints or leniency applications and/or proactive tools, such as the general investigatory powers, industry monitoring, cartel screening, etc.

16. Since 2009, 70% of a total of 23 cartel cases that the FNE has brought to court have been based on investigations in which the FNE has conducted investigative measures and all cartel cases -except for one which is being reviewed by the Supreme Court- have had a successful outcome.

### 3. Cartel detection tools used by the FNE

17. In the battle against cartels, the FNE draws on both reactive and proactive cartel detection tools. Reactive tools are those which enable the FNE to receive information regarding cartel conduct from a third party without actively seeking it, whereas proactive tools are those with which the FNE intentionally seeks out suspicious firms and markets and investigates cartel conduct<sup>9</sup>.

18. Examples of reactive tools used by the FNE are complaints of cartel conduct received by the FNE from external entities or individuals and leniency applications. Complaints are a good example of the complementarity that occurs between reactive and proactive tools, since their admissibility examination requires a preliminary analysis of the market to determine whether it is necessary to open an investigation (or not).

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<sup>8</sup> The authorization shall precisely specify the measures the Police or Investigative Police is allowed to execute, the hours during which they may be executed and the individuals that shall be affected by said measures.

If the requirements for the use of investigative measures are not met or if their exercise occurs outside the conditions established by law, those affected by these measures may appeal to the Judge of the Appeal Court of Santiago that is on call, and the results of such actions cannot be presented as evidence before the tribunal. Additionally, information from previous and separate investigations cannot be used in another investigation by the FNE unless a new judicial authorization is obtained.

<sup>9</sup> See Background note by the OECD Secretariat, Roundtable on ex officio cartel investigations and the use of screens to detect cartels, dated November 4, 2013, available at DAF/COMP(2013)14.

19. Proactive cartel detection tools used by the FNE include all kinds of investigative powers conferred upon it by law, industry monitoring, use of public economic data, computational tools, case analyses and agency cooperation. As it was previously mentioned, in recent years, the FNE has sought to enhance its cartel detection tools through the creation of an Intelligence Unit which has been devoted to designing investigative tools that incorporate the use of data science, improving investigative techniques and developing intelligence based on open, public and private sources.

20. In most cases, the FNE uses both reactive and proactive tools in a complementary manner to open or conduct cartel investigations. In the following paragraphs we will describe each of these tools and provide examples of the interplay between them.

### 3.1. Complaints

21. As part of the FNE's responsibilities, the FNE must receive and investigate complaints submitted by individuals regarding anticompetitive conduct, as established in Article 41 of DL 211. Complaints are subject to an admissibility review to determine whether the investigation should proceed or be dismissed.

22. The FNE may decide not to initiate an investigation if the complaint does not refer to facts, acts, or agreements that constitute violations of DL 211; if other competent bodies are responsible for the complaint due to its nature; if the liability for the violation of DL 211 is time-barred; if there is insufficient evidence to conduct actions that would gather pertinent evidence to clarify the complaint; and if initiating an investigation does not seem justified according to Article 39, paragraph 1 of DL 211, considering the general interest of the community in the economic order, the efficiency and effectiveness in fulfilling the FNE's role, and the proportionality of intervention to protect market competition.

23. Thus, although a complaint is a reactive tool, the FNE actively engages to determine whether or not to open an investigation, not only using the tools specified in Article 41 of DL 211, such as requesting information from individuals and/or summoning individuals who might have knowledge of the facts to an interview, but also by analyzing market behavior through information provided by public institutions; analyzing prices published in various sources like Customs, public tenders, the Agricultural Studies and Policies Office (ODEPA); analyzing variations in the Consumer Price Index (CPI) from the National Institute of Statistics (INE); among others.

### 3.2. Leniency

24. Another reactive tool is leniency, regulated under Article 39 bis and 63 of DL 211. This is an essential and necessary tool for destabilizing collective illegal activities. It involves granting certain benefits to cartel participants who provide information about the cartel and other members involved and cooperate with the authority to facilitate the investigation.

25. Article 39 bis of DL 211 states that individuals involved in cartel activity may be exempt from fines or company dissolution if they provide the FNE with evidence that establishes the existence of such conduct and identify the responsible parties<sup>10</sup>.

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<sup>10</sup> To obtain a leniency benefit it is required that the leniency applicant: provides precise, truthful, and verifiable information that establishes sufficient evidence to justify filing a complaint before the Court; maintains the confidentiality of the request for this benefit until the FNE has filed the complaint or closed the case; and immediately ceases participation in the conduct.

The article further specifies that, in addition to meeting the initial requirements, to qualify for exemption

26. Additionally, Article 63 of DL 211 exempts the first leniency applicant from criminal liability for cartel offenses<sup>11</sup>. The FNE will identify these beneficiaries in its complaint before the TDLC, and their status will be declared by the mentioned tribunal<sup>12</sup>. Subsequent applicants might receive a reduction in the determined penalty, and their identification will also be specified in the FNE's complaint and declared by the TDLC.

27. The operation and implementation of leniency programs in Chile, contrary to what seems to happen in some other jurisdictions, is going through its best moment. According to the details provided by the National Economic Prosecutor, Jorge Grunberg, in the 2023 Participatory Accountability Report, since the FNE was granted investigatory powers and the leniency program was established in the 2009 amendment, the FNE has won all of its cases except for one which is being reviewed by the Supreme Court, with nearly 40% of cartel accusations being preceded by leniency applications<sup>13</sup>.

28. The FNE believes that the success of its leniency program can be explained because the following three pillars have been well-established in the investigative practice of the FNE, serving as crucial incentives for its objective: a high probability of prosecution, the threat of severe sanctions and transparent procedures<sup>14</sup>.

29. On one hand, there is a high probability of effective prosecution by the FNE. Market players see that the FNE does not rely solely on reactive tools like complaints or leniency to detect cartel conduct, but it is constantly seeking out cartels through market behavior analysis using various public information tools and other tools. This generates a deterrent effect on those involved in illicit activities, leading them to opt for leniency.

30. The exercise of investigatory powers has played a key role in strengthening leniency in Chile. In effect, as it we will explain below, several leniency applications have been preceded by dawn raids, such as the recent cartel accusation in the medicinal and specialty gas market<sup>15</sup>.

31. On the other hand, the FNE's powers to request the application of severe sanctions also contribute to promoting leniency. Cartel participants face not only the threat of being

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from dissolution or fines, the individual must be the first to provide information to the FNE among the responsible parties. To qualify for a fine reduction, the individual must provide additional information beyond what was provided by the first applicant. Moreover, the fine reduction proposed by the Prosecutor cannot exceed 50% of the fine that would normally be requested.

In the complaint, it is the Prosecutor who will identify those who meet the requirements for benefits. Thus, if the Court finds that the conduct is proven, it cannot impose sanctions on those who received leniency or impose a higher fine than proposed, unless it is demonstrated that one of the beneficiaries was the organizer of the cartel and coerced the other members of the cartel to participate. To ensure that this benefit maintains its essence of destabilizing collective illegal activities, anyone requesting benefits based on false information may face criminal penalties. Finally, this system of exemptions or reductions does not apply to compensation for damages incurred.

<sup>11</sup> Criminal liability is established in Article 62 of DL 211.

<sup>12</sup> These individuals must present the same evidence to the Public Prosecutor's Office and the competent court and testify in the corresponding trial. If a summoned witness fails to appear without justification or refuses to confirm their statement, they will forfeit their criminal liability exemption.

<sup>13</sup> 2023 Participatory Accountability Report available at <https://www.fne.gob.cl/advocacy/cuenta-publica/>.

<sup>14</sup> Hammond, S. D. (2009). Cornerstones of an effective leniency program. Presented on the occasion of Chilean Competition Day. Available at [https://www.fne.gob.cl/wp-content/uploads/2011/03/2009\\_ddcc\\_0004.pdf](https://www.fne.gob.cl/wp-content/uploads/2011/03/2009_ddcc_0004.pdf).

<sup>15</sup> <https://www.fne.gob.cl/wp-content/uploads/2024/05/Requerimiento-FNE-Indura-y-otros-1.pdf>.

actively pursued but also significant sanctions associated with the offense. Economic sanctions can include fines up to twice the economic benefit gained by the offender, thirty percent of the sales of the offender in the concerned line of product or service, or up to sixty thousand *unidades tributarias anuales* (“UTA”)<sup>16</sup>, while criminal sanctions range from 3 to 10 years of imprisonment and temporary absolute disqualification from holding managerial positions. These penalties can be significantly reduced if leniency is chosen.

32. Lastly, transparency in our leniency procedures is achieved by ensuring that the leniency policies are clear, comprehensive, well publicized, regularly updated and coherently applied. In March 2017, the FNE published the Internal Guidelines on Leniency in Cartel Cases<sup>17</sup>, which replaced the Internal Guidelines on Benefits of Exemption and Reduction of Fines in collusion cases of October 2009.

### 3.3. Market screening

One of the major contributions of the IU consists of the use of information technologies to develop general investigative tools that facilitate market screening. To date, three tools have been released, the first being an automated web-based data tool that assembles and stores market information, which has allowed the FNE professionals to answer consumer complaints and expand their information sources in ongoing cases. Since its implementation in 2019, this tool has collected, processed and stored daily price information for more than 80 thousand products.

33. The second tool is also an automated web-based data collector, but focused on news from digital media platforms, allowing investigators to stay up to date on specific news regarding ongoing investigations. This tool has been especially useful for monitoring cases that occur at a regional level, given that it covers news from local media all over the country. Since its implementation in 2023, this tool has collected, processed and stored approximately 360 thousand news from more than 15 digital media platforms. Although until now this tool has been used as a historical news repository, improvements are being worked on so that, in the future, it can serve as a daily antitrust news broadcast medium for all FNE’s professionals.

34. The third tool provides a systematization of data published by the Customs National Service (in Spanish, *Servicio Nacional de Aduanas*) from 2007 to date, which has served to identify the main importers or exporters of certain products, as well as to estimate concentration levels in their respective markets and price variations. This tool has been broadly used through the FNE’s Divisions, making it unnecessary, in some cases, to send requests for information to every market participant to obtain the information mentioned above.

### 3.4. Computational tools designed for cartel investigations

35. In addition to the investigative tools described in the previous section, the IU has developed several computational tools to make cartel investigations more efficient. One of them analyses past public tenders based on screening techniques, using information to which the FNE has access through a cooperation agreement that it entered into with the public procurement agency *Chilecompra*. The use of this platform has provided significant time reductions in the collection and revision of large quantities of data,

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<sup>16</sup> To date, is equivalent to an approximate amount of USD\$ 50 million.

<sup>17</sup> Available at <https://www.fne.gob.cl/en/leniency-program/leniency-guideline/>.

optimizing the detection of anticompetitive behaviours regarding procurement mechanisms.

### 3.5. Economic analysis in cartel investigations

36. The FNE uses different economic tools in cartel detection analysis and market screening<sup>18</sup>. Regarding the application of screens, the FNE analyses structural market characteristics to detect those that may be prone to cartel conduct<sup>19</sup> and it also performs behavioural screenings. Examples of behavioral screenings performed by the Anti-Cartel Division are: analysis of potential market division and/or stability in market shares<sup>20</sup>, evolution over time of average prices offered (and average margins, if such information is available)<sup>21</sup>, average prices vs. dispersion indicator (standard deviation or variance coefficient)<sup>22</sup>, ratio of cost changes vs. price changes<sup>23</sup>, among others.

37. The use of these techniques has served to detect suspicious collusive patterns which, in some cases, after further investigation and together with the use of other tools, have led to open cartel investigations or to obtain authorization from the Court to use investigatory powers.

### 3.6. Agency cooperation

38. The FNE has entered into cooperation agreements with other Chilean public agencies such as the General Register Office (“Servicio de Registro Civil e Identificación”), the Central Bank of Chile (“Banco Central de Chile”), the National Customs Service (“Servicio Nacional de Aduanas”), the General Direction of Civil Aviation (“Dirección General de Aeronáutica Civil”), the Chilean Economic Development Agency

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<sup>18</sup> OCDE (2013). Ex officio Cartel Investigations and the Use of Screens to Detect Cartels. Available at <https://www.oecd.org/daf/competition/exofficio-cartel-investigations.htm>.

<sup>19</sup> The FNE has mainly focused its attention on markets with a small number of players, homogeneous products, barriers to entry, transparency, and frequent interaction among competitors

<sup>20</sup> The likelihood of market division (allocation of tender entities, allocation of territories, allocation of products, etc.) is evaluated on the value of contracts awarded to each bidder and the evolution of those values over time relative to the same evolution regarding other competitors. In addition, particularly for cases in which there is not a complete market division (100% vs. 0%), evolution of market shares over time must be examined as well, since stability on market shares is an indicator of weak competition.

<sup>21</sup> This screening seeks to identify a pattern change in prices to identify any structural breaks (e.g., change in average price levels or in the variance of individual prices offered in each tender). These pattern changes allow the identification of potential competitive and collusive periods. This kind of screening can be complemented with an econometric analysis based on a test for structural breaks (e.g. Chow test).

<sup>22</sup> This screening involves the analysis of average prices of contract awards and the variation over time. This orientation assumes that in collusive markets average prices of awards should be higher and show a lower dispersion.

<sup>23</sup> When information on companies’ costs is available or public information on major productive inputs is reliable, behavioral screenings can be performed which are aimed at identifying whether variations in costs have translated into variations in prices submitted (assuming that in a competitive market the ratio should be close to 1:1).



(“Corporación de Fomento de la Producción”), the Central Purchasing Body *Chilecompra* (“*Dirección de Compras y Contratación Pública*”), among others<sup>24</sup>.

39. These agreements have been actively used by the FNE to obtain information or evidence in an expedite manner. By way of example, the cooperation agreement reached between the FNE and the public procurement agency *Chilecompra* allows the FNE to monitor the tenders through the database available in *Chilecompra*'s technology sources.

40. The FNE has also entered into several cooperation agreements and memorandums of understanding with foreign competition authorities, within the structure of its powers established in Article 39, 1) of DL 211<sup>25</sup>. The scope of cooperation varies from one agreement to another, however, the FNE has sought to strengthen its relationship with foreign competition authorities and deepen the cooperation mechanisms.

41. International cooperation has been of utmost importance for our investigations. Some examples that illustrate this are the following: the FNE obtained evidence that had been seized in Spain in the cases concerning the aerial firefighting market; the FNE used wiretaps which had taken place in The Netherlands in the salmon cartel case; and the FNE -with the help of the FBI- managed to decrypt a device that had been seized in the cartel case against cash and valuables transportation companies.

42. The FNE participates actively in international seminars, conferences, working groups and meetings. By way of example, in 2021 the FNE was chosen among its peers to become one of the Co-chairs of the Cartel Working Group at the International Competition Network (ICN).

#### 4. Concluding remarks

43. The FNE uses both reactive and proactive tools to ensure effective cartel enforcement. The increasing use of proactive tools has enabled the FNE to enhance cartel enforcement.

44. Efforts undertaken by the FNE to improve the quality and increase the number of proactive tools have proven to be effective. Computational tools designed by the Intelligence Unit have been very useful not only in terms of cartel detection, but also by helping lawyers and economists to work with large volumes of data in a more friendly manner. As there is still a lot of work to be done in this field, the FNE is further developing its investigative and computational tools, especially regarding the use of artificial intelligence.

45. International cooperation has also been of utmost importance to enhance cartel enforcement, especially in gathering evidence of cartel conduct and the shared use of data analytics tools. It is a priority of the FNE to strengthen its relationship with foreign competition agencies in the future.

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<sup>24</sup> These agreements are available in Spanish at <https://www.fne.gob.cl/advocacy/acuerdos-nacionales-de-cooperacion/acuerdos-nacionales-de-cooperacion-2/>.

<sup>25</sup> Available in Spanish at <https://www.fne.gob.cl/advocacy/acuerdos-nacionales-de-cooperacion/acuerdos-de-cooperacion/>.