

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT**

-- Chile --

**15 June 2010**

*The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.*

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## 1. Introduction

1. The Fiscalía Nacional Económica (hereinafter, the “FNE” or the “Agency”) is an independent government competition agency in charge of detection, investigation and prosecution of competition law infringements, issuing also technical reports and performing competition advocacy activities.

2. The Competition Tribunal (“Tribunal de Defensa de la Libre Competencia”, hereinafter, the “TDLC” or “Competition Tribunal”) is the decisional body having exclusive jurisdiction over competition law and adjudicating in both adversarial procedures (such as cartels or dominance abuses) and non-adversarial ones (such as mergers).

3. The TDLC’s rulings are subject to appeal before the Supreme Court which reviews the factual basis of the cases and the applicable law. The Competition Act is Decree Law N° 211, enacted in 1973 and its amendments<sup>1</sup>.

4. The following insights represent the joint opinion of both the FNE and the TDLC unless otherwise stated. Each body complies with procedural fairness duties within its corresponding field or stage of the case.

## 2. Q&A

### 2.1 *Decision making process*<sup>2</sup>

2.1.1 *What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation?*

5. The TDLC is legally bound to consider all the evidence gathered in the case to be decided, and must take care that a due process of law is carried on in every occasion. All parties involved have equal right to present their evidence and their arguments. Counterfactual evidence and alternative scenarios to the alleged anticompetitive practice are always considered by the TDLC in its decisions.

2.1.2 *Are independent teams used internally?*

6. Being a judiciary body, the TDLC acts independently from the FNE –the body in charge of the investigation- and from any other authority. Thus, its decisions are based exclusively on the work of its judges and staff. Hence, independence is guaranteed by a functional division of tasks between the two institutions.

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<sup>1</sup> The main amendments of the Competition Act in recent years have been Law N° 19.911/2003 which established the TDLC and Law N° 20.361/2009 which reinforced the law against cartels.

<sup>2</sup> The FNE does not have a direct involvement in the “Decision Making Process”, if it is understood as the outcome of an adversarial judicial process. However, the FNE intervenes in the investigation phase, conducting the investigations and collecting evidence subject to the administrative law. Once an investigation is finished, the FNE may submit charges against the defendants or close the case and file the records. If it submits charges, the FNE prosecutes the case in the adversarial procedure before the Competition Tribunal, representing the public interest, but in equivalent terms as any other party, with no particular procedural privileges. The TDLC does not have the power to initiate a procedure *ex – officio*.

2.1.3 *Is there an independent review of the case by specialized economists?*

7. Two out of the five judges of the TDLC are economists who participate actively –and jointly with the other three judges, which are lawyers- in the discussion and drafting of the Tribunal’s decisions. The *amicus curiae* institution is not used in Chile. Nevertheless, (a) in non-adversarial procedures any person interested in filing with the TDLC an opinion/comment on the matters being discussed in a specific case can do so, and (b) All non-confidential economic opinions/reports/data issued by economists or expert witnesses acting on behalf of the parties involved in a case are published in the TDLC’s website for public scrutiny and academic discussion<sup>3</sup>.

2.1.4 *Are there other channels of input directly to the decision-makers?*

8. All decision making carried on by the TDLC is based exclusively on the evidence gathered, filed and produced in a due process of law.

2.1.5 *Are outside analysts or experts used to help decision-makers?*

9. The parties may file with the TDLC the opinion of experts or analysts as documentary evidence, and the TDLC may appoint an expert in case it deems it necessary.

2.1.6 *What other techniques or practices has your agency adopted to promote sound decision-making?*

10. The TDLC and its members are permanently involved in training programs both in Chile and abroad. OECD and ICN guidelines, along with up-to-date legal and economic literature are also studied and analyzed when discussing and drafting a decision.

**2.2 Confidentiality**

2.2.1 *How does your agency balance a defendant’s right to review and respond to evidence that will be used against it with the need to protect confidentiality?*

11. The FNE during the investigation and the TDLC during the trial try to balance the defendant’s rights of defense with the need to protect confidentiality by making available public versions of sensitive confidential information.

2.2.2 *Are there special procedures available for disclosure necessary to protect rights of defense, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses?*

12. Yes. Public versions must be made of all confidential/reserved documents. These public versions must have enough information available so that an adequate legal defense is possible. The TDLC decides whether the public version is sufficient. If it’s not, the Tribunal will declare that the information be made available to the parties.

2.2.3 *How is confidential information defined?*

13. The law uses two different concepts. When it states that the information is reserved, it means that only the parties of the investigation or trial can have access to it. When the law states that the

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<sup>3</sup> See, in general, <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?GUID=&ID=341> and, i.e., <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=1829&GUID=>.

information is confidential, only the party that submitted it, can access it, along with the FNE and the TDLC. The issuing and submission of a public version can be order with respect to both confidential and reserved information.

2.2.4 *What rules apply to the protection of confidential information obtained from parties by your agency?*

14. Confidential information obtained by the FNE can be declared reserved or confidential *ex-officio* or by request of the affected party. The rule regarding confidentiality of the information when this is obtained by the agency can be found in letter a) of article 39 of DL 211. When the information is presented to the Competition Tribunal, it can also be declared reserved. The rule can be found in Tribunal's Internal Regulation N° 11/2008 and general applicable civil procedural rules<sup>4</sup>.

2.2.5 *Is such information automatically considered to be confidential, or does the party have to identify it as such?*

15. When the information is submitted to the FNE, it can be declared confidential/reserved *ex-officio* or at the request of the party. When submitted to the Competition Tribunal, the affected party must request that the information be declared confidential/reserved. The Tribunal will decide if it declares the information to be confidential/reserved if it finds that it may be detrimental for the party that submits the information.

2.2.6 *If such information is to be disclosed to other parties or made public, does the party have a prior right to object the disclosure?*

16. If the information is presented voluntarily, such party has the right to request the information to be declared confidential/reserved. If the Tribunal denies such request, then the affected party can withdraw the information. When the information is not submitted voluntarily to the Tribunal, the party can also request it to be declared confidential/reserved, request that will be decided by the Tribunal. If the Tribunal denies the request, the information is deemed to be public.

17. When the information is requested by the FNE, it can be declared reserved/confidential *ex-officio* or at the request of the party. If such motion is denied, then the affected party can challenge the decision before the same authority. This is not expressly established in DL 211, but it's a general rule that applies to all public entities.

18. According to the Transparency Act<sup>5</sup>, which applies to the acts and activities of administrative bodies such as the FNE, as a general rule, administrative acts, records and documents should be public. However, this Act considers exceptions that can be argued against a requirement of publicity, such as the protection of the efficiency of the investigation. Private parties who may be harmed by publicity requirements may also object such a requirement if this publicity affects their commercial interest.

2.2.7 *How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on reputation?*

19. The agency is very conscious of the risks and possible effects of public disclosure of information for private parties. Its policy is to protect as much as possible the confidentiality and reputation of the

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<sup>4</sup> See <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?GUID=&ID=328>.

<sup>5</sup> Law N° 20.285/2008 (Transparency Act).

investigated parties, as long as it doesn't interfere with the agency's duty to prosecute illicit activities. According to section 39 a) the whole investigation period may be kept secret.

2.2.8 *What are the penalties for negligent/intentional violation of confidentiality rules?*

20. Officers of the Competition Agency are obliged to keep strict confidentiality of all information in accordance to article 42 of DL 211. The infringement of said obligation may be harshly punished with criminal sanctions.

### **2.3 Requests for information to targets of investigations**

2.3.1 *Does your agency have procedures to review information requests with the party?*

21. At the FNE, a group of professionals composed by economists and lawyers analyze which information will be requested to the parties. This decision is later analyzed and approved by a senior officer, who authorizes the junior investigators to request the information to the private parties.

2.3.2 *Is the party informed of the theory of the case and reasons for requesting the information?*

22. As a general rule, subjects of enforcement proceedings are notified that an investigation by the FNE is being conducted, but at that moment only a general overview of factual basis of the case is exposed to them. Exceptionally, some investigations may be restricted, and not notified to the investigated party, prior authorization by the Competition Tribunal.

23. A full description of the factual basis, the economic theories and legal doctrines relevant to the allegations against subjects of enforcement proceedings are informed at the time the FNE submits charges before the Tribunal, which opens the trial or litigation stage.

2.3.3 *Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency?*

24. The party can request reconsideration to the Head of the Competition Agency. This is not expressly established in DL 211, but it's a general rule that applies to all public entities. In addition, according to section 39 h), the party can request to the TDLC to limit, condition or invalidate the FNE's request of information if it successfully argues that harm can be derived if the request is satisfied in its terms.

2.3.4 *Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?*

25. The procedure is the same.

### **2.4 Agreed resolutions of enforcement proceeding**

2.4.1 *At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency?*

26. Leaving aside immunity/leniency provisions for cartels, during the investigation, any party, according to article 39 ñ) can reach an agreement with the agency, which must be submitted to the approval of the Competition Tribunal. This is a new rule, introduced in 2009.

27. During litigation before the TDLC a party may also reach an agreement with the FNE. This opportunity will only arise if the Tribunal decides that the case can be settled. According to article 22 of DL 211, the TDLC shall approve the settlement if it is not against free competition.

*2.4.2 Are there restrictions on the types of cases that can be settled in this manner?*

28. In relation to article 39 ñ), there are currently no legal restrictions on the type of cases that may be settled. The Tribunal has only 15 days to approve the settlement.

29. The only restriction for settlements during the litigation phase before the TDLC is that they should not have an anticompetitive character, a requirement analyzed by the TDLC and even by the Supreme Court reviewing the settlement approval decision, if challenged. This provision has allowed the FNE to settle cases with all or only with some of the defendants in collective infringements and with the defendant in unilateral cases with or without the consent of private plaintiffs.

*2.4.3 Does your agency actively seek to settle cases?*

30. The agency does not have an explicit policy regarding this matter, although the FNE has settled some cases. Settlements has to be approved by the TDLC.

31. In a few cases, the TDLC has sought actively that parties settle. Even the Supreme Court has done it at least once.

## **2.5 Judicial review and interim relief**

32. Considering that in the Chilean system decisions are made not by an administrative agency but by a judicial body with specific competence on competition law and whose decisions may be reviewed by the Supreme Court, in the following questions we assume *judicial review* as the role played by the Supreme Court reviewing TDLC's decisions.

*2.5.1 At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred?*

33. After a decision has been notified by the Competition Tribunal, any party or the agency can challenge said decision before the Supreme Court according to the rules established in article 27 of DL 211. The Supreme Court reviews TDLC's decisions in broad terms such as whether due process was respected or not; whether the TDLC issued a decision within its field of competence; it analyses the factual basis of the ruling and the reasonableness of the sanctions or remedies imposed.

*2.5.2 What level of deference does the judicial body grant to the agency's decision?*

34. The Supreme Court generally has a high level of deference for the Competition Tribunal's decisions. It is uncommon that decisions are totally overturned by the Supreme Court. However, in some adversarial cases, generally related to regulated markets, it may be stated that this deference diminishes, as the Supreme Court has overruled some decisions invading the field of competence of the regulators. In addition, the amount of the fines imposed is frequently reduced.

2.5.3 *If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy?*

35. The pending judicial review on the sanction delays the execution of the sanction or the remedy until the Supreme Court issues its decision.

2.5.4 *Can the judicial body grant interim relief?*

36. Yes, according to the general civil procedural rules, the judicial body can grant interim relief.

2.5.5 *What is the timing of the review by the judicial body, and are there procedures for expedited reviews of time-sensitive business transactions or conduct?*

37. The timing of the review by the judicial body varies from case to case. Nonetheless, the vast majority of the cases are decided in a timeframe of 6 months to one year.