

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by
Chile****5 June 2018**

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm

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Chile

1. Chilean Competition Act and Leniency Guidelines

1. Chilean Competition Act, contained in Law Decree No. 211 of 1973 (“Chilean Competition Act”), seeks to promote and defend competition in the markets. The National Economic Prosecutor’s Office (“FNE”) and the Competition Court (“Competition Court”) are the agencies responsible for enforcing the Chilean Competition Act.

2. In order to effectively detect, sanction and deter collusion, articles 39 bis and 63 of the Chilean Competition Act establish and regulate a leniency program. Law No. 20,361 of 2009, which amended the Chilean Competition Act, first introduced the program. The FNE, in fulfilment of its legal mandate of enforcing the Chilean Competition Act, and within the scope of its jurisdiction, published in October 2009 the first leniency guidelines (“2009 Guidelines”) establishing the criteria and internal procedures employed when enforcing the provisions contained in the Chilean Competition Act relating to the leniency program.

3. Later, Law No. 20,945 of 2016 introduced new amendments to the Chilean Competition Act, including new sanctions, the criminalization of cartels and changes to the leniency program. In order to update to international standards and adjust the 2009 Guidelines to the amendments introduced by Law No. 20,945, the FNE published new leniency guidelines in March 2017 (“2017 Guidelines”). 2017 Guidelines were subjected to three public consultation processes and include comments, suggestions and inputs of different public and private institutions, both national (such as the Chilean Bar Association) and international (such as the American Bar Association, International Bar Association and the United States Department of Justice).

2. Chilean Leniency Program

2.1. Civil/Administrative infraction

4. Article 39 bis of Chilean Competition Act establishes the requirements to obtain leniency for the administrative infraction contemplated in article 3 letter a) of Chilean Competition Act, which sets forth the cartel provision¹. According to article 39 bis, whoever engages in any of the conducts set out in the foregoing article 3 letter a) may be

¹ “Article 3°.- Whoever should execute or enter into, individually or collectively, any deed, act or agreement that impedes, restricts or thwarts competition, or tends to produce such effects, will be sanctioned with the measures established in article 26 of this act, notwithstanding the application of the preventive, corrective or restrictive measures ordered with respect to such deeds, acts or agreements in each particular case. Among others, the following deeds, acts or agreements will be deemed to impede, restrict or thwart competition, or deemed to tend to produce such effects: a) Agreements or concerted practices among competitors, consisting of fixing sale or purchase prices, limiting output, assignment of market zones or quotas, affecting the outcome of tender processes, as well as agreements and concerted practices that, conferring market power to the competitors, consist of determination of marketing terms and conditions, or the exclusion of current or potential competitors.(...)”.

exempted from any sanction (fine or dissolution of the undertaking) if it submits to the FNE proof of the conduct and/or information allowing to identify the responsible parties.

5. In order to obtain the benefit, the person engaging in the conduct must fulfil the following requirements:

1. Supply precise, truthful and verifiable information that constitutes an effective contribution for the establishment of sufficient supporting evidence to justify the filing of a complaint before the Competition Court;
2. Refrain from disclosing the application for these benefits until the FNE has filed the complaint or ordered to close the case, unless the FNE expressly authorizes any such disclosure; and
3. Cease any participation in the conduct immediately after the submission of the application for benefits.

6. In order to be eligible for the exemption of a sanction in addition to the requirements indicated in the previous paragraph, the person engaging in the conduct must also be the first party to contribute the information to the FNE, from amongst the group of parties responsible for the accused conduct.

7. To qualify for a fine reduction, in addition to fulfilling the requirements detailed above, the person engaging in the conduct must provide additional information to that submitted by whoever first supplied the information to the FNE under the leniency program. In any event, the reduction of the fine the Prosecutor proposes in the complaint before the Competition Court shall only be applicable to the second party submitting information and cannot be higher than 50% of the fine that would have been requested otherwise.

8. In such complaint, the Prosecutor will identify each person engaging in the conduct that fulfilled the requirements to qualify for any of the benefits referred to above. If the Competition Court finds that the conduct has been proven, it cannot sanction any person identified as beneficiary of an exemption, nor a fine higher than that proposed by the Prosecutor in respect of whomever is individualized as the beneficiary of a fine reduction, except if, during the proceedings, there is proof that one of the beneficiaries was the organizer of the illicit conduct, coercing the others to participate therein.

9. Any party alleging the existence of a cartel with the purpose of damaging other economic agents by applying to the benefits of the leniency program, knowingly based on false or fraudulent information, may be subject to criminal sanctions.

10. Under no case may this benefit or reduction regime apply to the compensation of damages that may be awarded.

2.2. Criminal offense

11. On the other hand, article 63 of the Chilean Competition Act establishes the leniency benefit for the criminal offense set forth in article 62 of the Chilean Competition Act related to cartel cases². The foregoing article 63 establishes that the persons that have

² “Article 62.- Any party that executes or orders the execution, performance or organization of an agreement involving two or more competitors, to fix sale or purchase prices for goods or services in one or more markets; restrict output or supply; divide, assign or distribute market zones or quotas; or affect the

been the first to contribute information to the FNE in accordance with article 39 bis shall also be exempted of criminal liability for the offense sanctioned in article 62. The FNE's complaint shall identify the persons exempted from criminal liability, which shall be declared by the Competition Court.

12. The persons identified in the preceding subsection shall submit to the Criminal Public Prosecutor and the competent criminal court the same information that they previously provided to the FNE, and testify in the corresponding criminal trial.

13. A legally summoned witness shall be deprived of the criminal liability exemption if he or she fails to appear without justified cause or refuses to ratify the deposition that it has submitted before the FNE, and the competent criminal judge at the request of the Criminal Public Prosecutor declares such circumstance.

14. For the second leniency applicant, the established criminal sanction shall be reduced in one degree regarding the persons that have contributed additional information to the FNE in accordance with article 39 bis, and will not be punished with imprisonment when said persons appear before the Criminal Public Prosecutor and the competent criminal court and ratifies the deposition that they submitted to the FNE, unless the latter's complaint solely and mutually involves two competitors and one of said competitors is entitled to the fine exemption benefit declared by the Competition Court in accordance with article 39 bis. The FNE's complaint shall identify the beneficiaries of the penalty reduction, whose situation will be declared by the Competition Court.

2.3. 2017 Guidelines

15. As mentioned above, the FNE first published its leniency guidelines in 2009, which were replaced by the new "Internal Guidelines on Leniency in Cartel Cases" published in 2017³.

16. The process for obtaining the leniency benefits may be summarized as follows: the leniency applicant initiates the leniency process by requesting that its place in the roster of applications be marked ("Marker Request"). This request will allow applicants to reserve a place to apply for the exemption or reduction benefits in a particular case. Once the Marker Request has been filed, the FNE will inform and guarantee to the applicant its place in the roster of applications by issuing a marker ("Marker"). Along with issuing the Marker, the FNE will set a deadline within which the formal application must be made, accompanied by the information on which the leniency application is grounded ("Benefit Request"). If the Benefit Request fulfils the requirements indicated in the 2017 Guidelines, the FNE will grant the requested benefit provisionally ("Provisional Benefit") by issuing an official letter ("Official Letter of Conformity") that will establish the requirements that the applicant must fulfil to obtain the definitive benefit ("Definitive

result of tender processes conducted by public companies, private companies that render public services, or public bodies, shall be punished with the penalty of minor imprisonment in its maximum degree to major imprisonment in its minimum degree. Additionally, any such offender shall be punished with the temporary absolute disqualification, in its maximum degree, to exercise the position of director or manager of a publicly traded corporation or a corporation subjected to special provisions, the position of director or manager of State-owned companies or companies in which the State holds a stake, and the position of director or manager of a trade or professional association. (...)".

³ The text of the 2017 Guidelines may be downloaded from the FNE's website in the following link: http://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines_Leniency_Cartel_Cases.pdf

Benefit”). If the applicant fulfils the requirements established in the Official Letter of Conformity, the Provisional Benefit will become Definitive upon the FNE’s filing of the complaint before the Competition Court.

3. Challenges experienced in connection with the Chilean Leniency Program

17. Like any other competition agency, the FNE has encountered several challenges in implementing and applying its leniency program from its beginning. The recent amendment to our competition act, and the subsequent modification of our Guidelines, aimed to tackle those challenges. Thus, it is uncertain, at this point, which challenges the FNE’s leniency program will face under the new rules. Taking this into account, we analyse in the following paragraphs the challenges we faced before the amendment, which are those the amendments were designed to deal with.

3.1. Confidentiality

18. The Chilean Competition Act establishes that the Prosecutor may declare *ex officio*, or upon request of an interested party, that certain documents of the case file be classified as reserved or confidential, provided that the aim of the confidential treatment is to protect the identity of those who have deposed or provided information under the leniency program. The same law, also establishes that all officials of and other persons that supply services to the FNE shall be bound to maintain the confidentiality in regard to all information, data, or material that it has access to in the exercise of its powers being subjected to criminal and administrative sanctions if such obligation is not complied with.

19. In line with these rules, the FNE has implemented several measures to maintain the confidentiality of the information provided under a leniency process. For example, a permanent leniency officer was appointed and an *ad-hoc* leniency team is formed for each case. This team in the first steps of the process do not share the information provided by the leniency applicant with the Anti- Cartel Unit (which are the case handlers for cartel cases). It is only after the Prosecutor grants the benefit that other teams in the FNE have access to the leniency information and they also have the obligation to keep it confidential throughout the investigation.

20. It is important to highlight that the FNE officers are not the only ones that have access to the leniency application. The leniency applicants, as well as their legal advisors and executives, have access to the leniency documentation. Likewise, given that our competition regime involves two entities throughout the process (FNE in the investigation phase and the Competition Court in the litigation process), the FNE has to disclose the leniency documentation to the Competition Court in the context of litigation. Additionally, after the 2016 amendment, if the Competition Court declares the existence of a cartel, such conduct may trigger a criminal claim (which may be filed only by the FNE). If the FNE decides to file a criminal complaint, the criminal prosecutor may have access to leniency documents if it is so authorized by the Competition Tribunal.

21. One important challenge will be to keep the information provided by leniency applicants confidential during the several stages of the process, in which different bodies are involved.

3.2. Articulation of the leniency program with criminal prosecution

22. Before the existence of Law No. 20,945 of 2016, cartels were only a civil/administrative infraction. Notwithstanding this, the Criminal Public Prosecutor understood that conducts that were broadly similar to cartels, could also be framed into other criminal offenses under the Criminal Code. For example, in a cartel case related to the retail market, during trial before the Competition Court, the Criminal Public Prosecutor requested the Competition Court to grant access to the leniency information to pursue an investigation related to a criminal offense, enacted in the 19th century that criminalized the fraudulent tampering of natural prices. The FNE defended the confidentiality of such information based on the protection of rights that Chilean law grants to leniency applicants. The Competition Court ruled against the petition of the Criminal Public Prosecutor, as later also did the Constitutional Court and a Court of Appeals, on the same grounds proposed by the FNE.

23. As we explained earlier, cartels are a criminal offence since 2016. The FNE have not prosecuted cartels under the new law. Thus, it is too soon to tell which challenges the FNE will face in the future regarding this matter.

3.3. Incentives to apply for leniency

24. Considering that the members of a cartel have to make a decision assessing the benefits and costs of applying for leniency, the risk of been sanctioned for the cartel offence should be greater than the benefits of committing such offense. Before the amendment introduced by Law No. 20,945 of 2016, the fines imposed for cartel cases were relatively low (There was a cap of thirty thousand *unidades tributarias anuales*, approximately US\$29 million). Likewise, there was no criminal offense associated to the cartel, which also contributed to having fewer incentives to apply for leniency.

25. However, Law No. 20,945 increased maximum possible fine to thirty percent of the sales of the offender in relation to the product or service line associated with the infringement during the period in which it was committed, or up to the double of the economic benefit received as a result of the infringement. The 2016 amendment also created a new sanction for the members of a cartel (prohibition of contracting with governmental entities) and the already referred to criminal offense. It is also too soon to assess the effects of these new rules.

3.4. Co-ordination with other competition agencies in connection with leniency programs

26. There have been few occasions in which the FNE had to co-ordinate with other agencies in connection with a leniency application. This may be the consequence of several factors, such as the size of the Chilean market, the number of multi-jurisdictional companies present in Chile and certain obligations set forth in the Chilean leniency guidelines that may be different from other leniency programs.

27. In order to address those differences with other leniency programs which could hinder the internationalization of the programme, and following the commentaries received by international institutions (such as the American Bar Association, International Bar Association, among others), the 2017 Guidelines introduced new changes to the Chilean leniency program, such as:

- A paperless leniency application process: applicants may request the marker via telephone or e-mail, in addition to the online form available on the FNE's website; the application meeting may be held through remote means of communication; the benefit request may be submitted verbally in both Spanish and English;
- Duty to refrain from disclosing the application: There is a prohibition against disclosure of participation in the leniency program, unless the FNE expressly authorizes such disclosure. The FNE will determine when to grant this authorization, depending on each specific case and taking into consideration, among other factors, the existence of applicable national or foreign regulations requiring this authorization;
- All documents and background information may be submitted in either Spanish or English.

28. Regarding the experience of the FNE co-operating with other competition agencies, there have been few cases in which the leniency applicant has granted a waiver allowing other agencies and the FNE to share information obtained from a leniency application. For example, in an international cartel case regarding the transportation market, an agency sent an information notice to the FNE after launching a coordinated dawn raid with other agencies, whereupon the FNE opened an investigation and received two leniency applications. Later, the leniency applicants granted the FNE a waiver to allow the co-operation of the latter with other antitrust agencies in which those applicants had also requested leniency.

29. Considering that the 2017 Guidelines have been recently published, it is also not possible at this stage to assess the new challenges that the leniency program will face regarding co-ordination with other antitrust agencies.

4. Improvements to the Chilean Leniency Program

30. As has already been explained, the new 2017 Guidelines were published to tune existing rules with international best standards, to address issues that were not working adequately according to the accumulated experience, and to update the rules considering the amendments introduced to the Chilean Competition Act.

31. The main changes introduced to the Chilean leniency program are the following:

- Applicants may request the marker via telephone or e-mail, in addition to the online form available on the FNE's website.
- Application meeting may be held through remote means of communication.
- In qualified cases, the applicant can submit its benefit request verbally in both Spanish and English.
- It is possible to make "hypothetical enquiries" before requesting a marker to know which benefit is still available, without disclosing the identity of the party interested in obtaining leniency.
- Right to withdraw the benefit request.
- Causes, procedure and effects of the revocation of the benefit.

- Inclusion of the “amnesty plus” benefit. This tool allows the second applicant, to obtain the maximum percentage of reduction of fine established by the law, if such applicant provides evidence of collusion related to a second market.
32. These new changes made to our leniency program aim to increase predictability and transparency of the program and enhance incentives for co-operation with authorities.
33. Given the recent changes to our competition regime, it is uncertain at this point which challenges the FNE will face in the future concerning the leniency program.