

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Chile****4 June 2019**

This document reproduces a written contribution from Chile submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

Please contact Ms. Despina Pachnou if you have any questions about this document.

Email: [Despina.Pachnou@oecd.org](mailto:Despina.Pachnou@oecd.org)

**JT03447451**

## Chile

### 1. Legal framework and standard of review

1. The relevant authorities in competition law in Chile are the National Economic Prosecutor's Office ("FNE") and the Competition Tribunal ("TDLC"). The FNE is the national competition authority responsible for defending and promoting competition in all the Chilean markets. The TDLC is a specialised and independent court that adjudicates competition matters and is subject to the directive, correctional and economic authority of the Supreme Court.

2. The Chilean competition enforcement system is mostly an adversarial system, whereby the FNE is in charge of investigating competition law violations and initiating legal proceedings to challenge conducts that harm competition. Hence, the FNE does not have adjudicatory power generally. The only exception to this rule is the FNE's recent mandate to clear -with or without remedies- or reject certain mergers with effects in Chile (Law No. 20.945 enacted in August 2016). The decisions whereby the FNE rejects a merger transaction can be challenged before the TDLC.

3. The FNE has broad powers to investigate competition law infringements and reach settlements with economic agents. However, some investigative powers are subject to judicial approval and others can be challenged by the affected parties. Additionally, extrajudicial settlements agreed between the FNE and economic agents subject to an investigation also require approval by the TDLC.

4. The adjudication power resides within the TDLC, an independent court, which receives the cases submitted by the FNE or private parties or public institutions acting as plaintiffs. The FNE may join a private party's claim and vice versa. In general terms, there are two types of proceedings that are led by the TDLC: contentious proceedings and non-contentious proceedings. The main difference between these two proceedings is that, in contentious proceedings, the plaintiff accuses the defendant of engaging in anti-competitive conduct and said accusation needs to be proved in court; whereas in non-contentious proceedings, the interested party only asks the TDLC whether a specific act or contract is contrary to competition law, without seeking responsibility of the economic agent.

5. Judgments issued by the TDLC in contentious proceedings and decisions issued by the TDLC in non-contentious proceedings can be challenged before the Supreme Court, that has a variety of jurisdictional competences, as the court of last appeal in Chile.

#### 1.1. Review of investigative powers

6. The FNE's investigative powers are not unlimited. Some of the FNE's investigative powers are subject to judicial approval and others can be challenged by the affected parties.

7. Firstly, the FNE must seek approval from the TDLC in order to request documents qualified as secret or reserved from any employee of public institutions and services; from the municipalities; or from companies, entities or partnerships where the State or its companies, entities or partnerships, or the municipalities, have a contribution, representation or participation. In order to grant the aforementioned authorisation and thus lift the restrictions on access to secret or confidential information, the TDLC requires that

the requested information is specific and essential for the investigation and unavailable in other freely accessible sources. In this way, it is safeguarded that the exercise of this power only applies in qualified cases, and hence, privacy of information is protected. The FNE shall adopt all the necessary safeguards to maintain confidentiality of the data obtained in the exercise of this power.

8. Secondly, the FNE must request authorisation from the TDLC and, subsequently, the relevant Judge of the Court of Appeals on duty to order search and seizure measures or the interception of communications in serious and qualified cases of investigations aimed at proving cartels. In order to grant authorisation, the TDLC and the Judge of the Court of Appeals must verify the existence of precise and serious grounds regarding the existence of concerted actions, based on evidence gathered by the FNE prior to the request. If the FNE does not comply with the requirements and formalities established by law for the exercise of these powers, the affected parties are entitled to file a complaint before the relevant Judge of the Court of Appeals, who will immediately decide on the matter, in a single hearing, after having heard the parties.

9. Thirdly, private individuals or entities from which the FNE requests documents or information deemed necessary for undergoing investigations may challenge this request before the TDLC when the remittance of said documents or information could allegedly cause harm to their interests or those of third parties. This legal challenge must be well-founded and must be submitted before the FNE within five days following the FNE's request for information. The TDLC will then decide the legal challenge in its nearest session, considering an oral or written report of the FNE, and its decision will not be subject to any appeal whatsoever.

10. Lastly, the FNE must seek approval from the TDLC in order to impose a fine on an economic agent that, unjustifiably, does not answer a request for information deemed necessary for an undergoing investigation or does not appear to testify before the FNE about facts, acts or conventions subject to an investigation, when summoned by said institution.

## **1.2. Review of extrajudicial (out-of-court) settlements**

11. The FNE is entitled to enter into extrajudicial settlements with economic agents involved in its investigations, with the purpose of safeguarding competition in specific markets. These agreements must be approved by the TDLC, who will be informed of the settlement in a single hearing, during which it may hear the parties and whoever has a legitimate interest. In these cases, the TDLC has ruled that it exercises a mere control function, with the purpose of verifying that the extrajudicial settlement effectively protects free competition. Consequently, when approving this kind of settlement, the TDLC does not exercise a judicial review; its analysis is not intended to examine the facts that gave rise to it. In addition, the TDLC is only empowered to accept or reject the settlement (Resolution dated 30.10.2018, Case No. AE-16-2018).

12. This decision is binding upon the parties to the settlement and can only be reversed by means of a request for reconsideration decided by the TDLC. According to the law that regulates extrajudicial settlements, only the parties of said agreement are entitled to file a request for reconsideration, since they are the only parties that can suffer legal detriment by the TDLC's decision that approves or rejects such a settlement. In this regard, the TDLC has ruled that the mere fact that a third party intervenes in the hearing does not convert said third party into a party affected by the extrajudicial settlement (Resolution dated

30.10.2018, Case No. AE-16-2018). For this reason, the TDLC's decision to accept or reject an extrajudicial settlement does not generate binding effects in its respect.

### 1.3. Review of judicial settlements

13. The FNE is also entitled to enter into judicial settlements with one or more parties against which it has filed a complaint before the TDLC for engaging in anti-competitive conduct. Judicial settlements also require authorisation from the TDLC. The TDLC shall authorise a judicial settlement whenever said settlement: does not harm competition, includes a recognition or an agreement about the facts involved in the lawsuit, and incorporates commitments from the defendants.

14. Parties with a legal standing to litigate that did not take part in the judicial settlement may challenge the TDLC's decision authorising said settlement before the Supreme Court. This review has taken place on rare occasions. For instance, in the Pharmacy Cartel case (Judgment No. 119/2012) the FNE reached a judicial settlement with one of the three main pharmacy chains against which it had filed a complaint. The pharmacy chain (FASA) admitted engaging in cartel conduct, provided specific evidence related to the case, paid a sum of money to the State and agreed to adopt certain obligations and, in exchange, the FNE withdrew its claim against said pharmacy chain. After the TDLC's approval, another pharmacy chain against which the FNE had filed the claim and other parties appealed before the Supreme Court requesting that the judicial settlement be set aside (Supreme Court Case No. 3344-2009). The Supreme Court showed considerable deference towards the TDLC's decision, conducting a marginal review of the grounds invoked by the TDLC to determine that the terms of the judicial settlement did not harm competition.

15. Examples of judicial and extrajudicial settlements that have been approved by the TDLC can be found in the Note by Chile on Commitment Decision in Antitrust Cases, submitted for Item 9 of the 125<sup>th</sup> meeting of the OECD Competition Committee on 15-17 June 2016: DAF/COMP/WD(2016)37.

### 1.4. Standard of review applied by the Supreme Court in contentious proceedings

16. Contentious proceedings can be initiated by the FNE or by a private plaintiff (or by other public institutions acting as a plaintiff) against economic agents who have engaged in anti-competitive conducts such as cartels and dominance abuses. These proceedings have an adversarial nature and will generally conclude with a judgment issued by the TDLC declaring whether there has been a breach of competition law and, in the affirmative, imposing a fine and/or preventive, corrective or prohibitive measures that must be adopted by the corresponding economic agents. According to the latest official statistics presented by the TDLC, the average duration for contentious proceedings is 405 days.

17. The TDLC, in order to impose a sanction on an economic agent for breach of competition law, analyses the existence of different facts and circumstances depending on the conduct that is accused. For example, in cases of abuse of a dominant position, the TDLC assesses the existence of a dominant position in a certain relevant market, in addition to the existence of the abusive behaviour that is being accused and an efficiencies defence is admitted. In hard-core cartel cases, the TDLC reviews the existence of the agreement or concerted practice that is accused with all the specific elements (such as participants, duration, and implementation, among others).

18. The FNE and the affected parties can challenge the judgment issued by the TDLC before the Supreme Court. According to general procedural law, parties are entitled to challenge a decision whenever it causes them legal detriment. Chilean Competition Law (Decree Law No. 211) does not further specify the legal nature nor the contents of this legal recourse. Despite this lack of clarity in the law, in the cases in which parties have challenged a judgment issued by the TDLC, the Supreme Court has consistently conducted a full review of the merits of the case. This full review is applied to questions of fact and law. Where the TDLC's decision addresses policy matters or entails complex economic assessments, the Supreme Court has also engaged in a full review.

19. The Supreme Court, based on factual considerations, has modified the judgments issued by the TDLC in the following proceedings: FNE v. Asfaltos Chilenos S.A. y otros (Case No. 5128-2016); FNE v. Sociedad de Transportes Línea Uno Collico S.A y otros (Case No. 32.149-2014); GPS Chile S.A. v. Entel PCS S.A. (Case No. 97-2009). The Supreme Court has also modified judgments issued by the TDLC based on considerations of law, in the following proceedings: WSP v. Superintendence of Health (Case No. 47555-2016); Conadecus v. Telefónica Móviles Chile y otros (Case No.11363-2015); Sonda v. Civil Registry (Case No. 13972-2013).

20. The standard of proof applied by the TDLC when it evaluates cartel accusations is the existence of conclusive evidence (Judgement No. 160/2017 issued in the Tissue Cartel case and Judgement No. 171/2019 issued in the Shipping Cartel case). The Supreme Court applied the same standard of proof when it resolved the appeal in the Pharmacy Cartel case (consideration 11, Judgement issued in Case No. 2578-2012).

### 1.5. Standard of review applied by the Supreme Court in non-contentious proceedings

21. The FNE or a private plaintiff (or public institutions acting as plaintiffs) can also initiate non-contentious proceedings before the TDLC regarding facts, actions or existing or future contracts not related to a merger control procedure, referred to matters that could amount to a violation of competition law. In its decision, the TDLC is entitled to impose binding measures on economic agents related to the corresponding facts, actions or contracts, in order to avoid a violation of competition law. According to the latest official statistics presented by the TDLC, the average duration for non-contentious proceedings is 509 days.

22. The TDLC shall impose said measures when the information submitted by the parties and the information gathered directly from the TDLC reveals the existence of relevant risks to free competition and efficiencies do not counterbalance such risk. Following the usual criteria in the matter, the measures that the TDLC can impose must meet certain requirements: (i) proportionality, that is, they must respond fairly and reasonably to the risks that they intend to enervate; (ii) materially possible to apply and execute; (iii) effective, as their application implies a counterweight with respect to detected risks; and, (iv) susceptible to supervision and independent and effective monitoring (Decision No. 54/2018).

23. The FNE and the affected parties can challenge the TDLC's decision before the Supreme Court by means of the same legal recourse contemplated for contentious proceedings. The Supreme Court has expressly referred to the legal nature of this recourse, noting that the law has not specified its legal nature, expressing that the *travaux préparatoires* regarding the establishment of this recourse "allow[s] the Supreme Court to

*fully review the grounds on which the TDLC bases its decision, including the legal and economic reasoning behind said decision” and that “the Supreme Court can examine not only the measures imposed in the proceedings, but also the global approach surrounding the issue at hand, given the tight relationship between the issue and the measures that the TDLC decides to adopt” (considerations 5-8, Case No. NC-4797-2008).*

### **1.6. Standard of review applied by the TDLC regarding a decision of the FNE that prohibits a merger**

24. In August 2016, Law No. 20.945 introduced major amendments to the Chilean Competition Law, establishing a merger control procedure in charge of the FNE. The decisions whereby the FNE rejects a merger transaction are subject to review by the TDLC. Before said amendment, the FNE only reviewed mergers that came to be known by the agency by its own means of investigation, or through reports presented by third parties. At present, all mergers that surpass certain thresholds regarding individual or joint sales in Chile, must be previously notified to the FNE in order to receive the corresponding approval. Failure to notify is deemed an antitrust violation and entitles the FNE to bring proceedings against the involved economic agents before the TDLC.

25. In assessing each merger, the FNE is subject to a legal standard, set forth in Articles 54 and 57 of the Chilean Competition Act. In accordance with that standard, mergers are only deemed to present risks -and can therefore be prohibited- if they possess the ability to substantially lessen competition. Whenever the FNE determines that a certain merger does not exhibit such an ability, it must clear the merger without further investigation. However, when the agency finds that the proposed merger *might* lessen competition in the relevant markets, without arriving to the conviction that it actually *can*, then it must extend the investigation for up to ninety more days (in what is known as a Phase II investigation). If efficiencies are not enough or do not countervail the risks involved in the merger, the FNE will clear it subject to certain remedies.

26. The decisions whereby the FNE rejects a merger transaction are subject to review by the TDLC. The TDLC has ruled that it has the power to review in depth the analysis of the FNE on a concentration operation reviewing the merit and the validity of the FNE’s resolutions that prohibit the operation. In this sense, the TDLC can use the background information contained in the FNE investigation file and the information that it directly collects, either *ex officio* or at the request of a party (Judgement No. 166/2018).

27. These decisions are subject to review by the Supreme Court only if they impose additional or different remedies to those offered by the parties in the course of the FNE’s investigation. To date, this has never occurred.

### **1.7. Note on criminal actions**

28. One major amendment introduced to the Chilean Competition Law in August 2016, by Law No. 20.945, is the establishment of the criminal prosecution of cartels. The FNE is in charge of filing, before Criminal Courts, criminal claims against economic agents that have engaged in hard-core cartels that seriously compromise the markets. However, this filing can only take place when the TDLC’s judgment declaring the existence of the corresponding cartel has become binding and no legal recourses are pending. To date, there has been no TDLC decision on post August 2016 facts giving ground to an eventual criminal complaint.

## 2. Court's access to competition expertise

29. The TDLC is a specialised court in competition law. It is comprised of five judges (three lawyers with an antitrust background and two members with undergraduate or graduate studies in economics). The President must be a lawyer and have renowned professional or academic activities in competition, commercial or economic law, and a minimum of ten years of professional experience. All members of the TDLC must have expertise in competition law.

30. It is common for parties in contentious and non-contentious proceedings involving complex legal and/or economic issues to voluntarily present legal and/or economic submissions to support their case. A party may present as many legal and economic submissions as it deems necessary. For example, in the recent non-contentious proceedings related to the review of certain joint business agreements that main airline companies intended to enter into, that concluded with Decision No. 54-2018 (Case No. NC-434-16), 14 economic reports (approx. 3 by party) and 8 economic studies were presented. In the recently concluded contentious proceedings related to the Pharmacy Cartel case (Judgment No. 167/2019), a total of 6 economic reports and 9 legal reports were presented.

31. Even though the TDLC has broad powers to order evidentiary measures and could request external expert advice *ex officio* on a specific matter, it is not usual for the TDLC to request a report from experts in law or economics, given that it is a specialised tribunal. However, in the Pharmacy Cartel case (No. C-184-2008) the TDLC ordered a technical expert report about the sequence of movements in the prices of the medicines included in the lawsuit (Resolution of 08.08.2010).

32. In contentious proceedings, authors of economic submissions are commonly summoned by the parties as witnesses. However, since in most cases experts lack precise knowledge of the facts underlying the accusation, the scope provided for their declarations is usually too narrow. This is why, in some of the latest contentious proceedings (Banks case, No. C-323-17; Laboratories case, No. C-312-16), the TDLC has concurrently summoned the authors of economic submissions to a *sui generis* hearing in order to question them about the content and methodology of their economic opinions. In the hearing concerning the Banks case, the TDLC went one step further and after having questioned the economic experts, allowed them to comment and question expert witnesses from the other parties on their respective reports. After that, counsel was allowed to cross-examine the economic experts of the opposite parties.

33. In proceedings before the Supreme Court, it is not very common for parties to submit economic reports. For example, in the past five years, parties have submitted economic reports in 2 out of 20 proceedings that have been initiated to review judgments issued by the TDLC and in 2 out of 5 proceedings that have been initiated to review decisions regarding non-contentious matters issued by the TDLC. The same is true for legal reports. In the past five years, parties have submitted legal reports in 4 proceedings concerning the review of TDLC judgments and in 2 proceedings concerning the review of TDLC decisions regarding non-contentious matters.

34. In general, the Supreme Court does not adopt evidentiary measures related to economic issues. Nevertheless, in Case No. 73.923-2016 (review of TDLC Judgement No. 154/2016) the Supreme Court ordered an expert report to: inform on the minimum spectrum required to provide services with 4G technology, point out the technical feasibility to provide 4G services in the spectrum bands currently assigned to the incumbents, and analyse its economic impact (Resolution of 25.05.2017).