



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

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Working Party No. 3 on Co-operation and Enforcement

**ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND
ADMINISTRATIVE PROCEEDINGS**

-- Chile --

16 February 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 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. 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). The TDLC’s rulings are subject to appeal before the Supreme Court. The Competition Act is Decree Law N° 211, enacted in 1973 and its amendments¹.

2. Q&A

2.1 *How does your antitrust regime handle transparency with respect to the substantive legal standards; agency policies, practices, and procedures; identity of the decision-maker(s); and the order and likely timetable of key proceedings?*

2. Both the Competition Tribunal and the Agency have self imposed transparency policies of the highest level in regard to legal standards, policies, practices and procedures, even before the transparency amendments were incorporated into our legislation². The Competition Tribunal’s web page (www.tdlc.cl) publishes all of the Tribunal’s work, including final decisions, intermediate decisions, and guidelines regarding procedures of general application. These documents are all available online and are updated on a regular basis. The Agency also publishes in its web site (www.fne.gob.cl) all relevant actions, such as submission of charges, decisions not to continue investigations, speeches and interviews of the head of the Agency, decisions by the Competition Tribunal and the Supreme Court, internal guidelines, and other useful information to the public.

3. As it was stated above, under Chilean Law, the Competition Tribunal is the adjudicatory body. On every final decision it issues, the name of the members of the Tribunal which concurred is public. Dissenting votes are individualized.

4. In regard to order and likely timetable of key proceedings, Chilean law does not establish a maximum period of time for the proceedings once of the submissions of charges has been presented before the Competition Tribunal. Nevertheless, the Competition Tribunal publishes statistics from which parties can draw likely time frames. Currently, adversarial procedures take approximately 2 years including the review by the Supreme Court. Non adversarial procedures take approximately 1 year and three months, including review by the Supreme Court.

2.2 *Do the subjects of antitrust investigations have opportunities to meet with the agency at key points in the investigation? At what level? In what circumstances?*

5. Subjects of antitrust investigations can meet with the agency during the investigation. They can formally request a meeting with the Head of the Agency or the team in charge of the investigation. Meetings with the Head of the Agency are made public in the institutional web site, in order to prevent

¹ 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.

² In 2005, an amendment to article 8 of the Constitution established the publicity of all public acts and decisions, with very limited exceptions. Law 20.285 of 2008 regulates how public offices should comply with article 8 of the Constitution.

abusive lobbying. This does not apply when the matter requires confidentiality (e.g. protection of witnesses, leniency applicants, etc.)

6. Subjects of investigations can access the content of the Agency's investigation. Nevertheless, parts of a certain investigation can be declared confidential by the Head of the Agency, if such publicity may jeopardize the effectiveness of the investigation.

7. Also, a complete investigation can be declared restricted by the Head of the Agency, who must notify this decision to the Tribunal and to the affected party.

2.3 *How and when are subjects of enforcement proceedings informed about the factual basis, economic theories, and legal doctrines relevant to the allegations against them?*

8. As a general rule, subjects of enforcement proceedings are notified that an investigation 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.

9. A full description of the factual basis, the economic theories and legal doctrines relevant to the allegations against subjects of enforcement proceedings is informed at the time the Agency submits charges before the Tribunal. Nevertheless, the Agency can present or reveal further evidence throughout the trial.³

2.4 *What opportunities do subjects of enforcement proceedings have to respond to the agency's enforcement concerns? What opportunities do they have to make arguments and offer evidence, and what time constraints apply to these opportunities?*

10. Subjects of investigations can respond the agency submission of charges during the formal proceedings before the Competition Tribunal. This is a procedure regulated by the Competition Law. There is a 15 to 30 day period to respond to the submission of charges, a 20 day period to submit evidence and a 10 day period to observe the other party's evidence. After these stages, the Tribunal calls the parties to orally defend their cases. Any additional written evidence such as expert reports can only be presented up to 10 days prior to the hearings mentioned before.

2.5 *Is there opportunity for a hearing prior to an agency decision? What rules apply to the hearing and hearing officer, and what rights does the subject of the enforcement proceeding enjoy?*

11. As it was explained before, under Chilean Law, the adjudicatory body is the Competition Tribunal. Before the Competition Tribunal makes a decision, subjects of investigation and the Agency have the opportunity to orally present their main arguments and contradict those of the opponent. Parties have an equal maximum period of time to present their cases and may request the inability of a member of the Tribunal if there is a risk of impartiality. For these purposes, the Law establishes a strict catalogue of inabilities and incompatibilities that may affect members of the Tribunal.

³ In March 26, 2009, a party in a very famous case presented a claim before the Constitutional Tribunal arguing that the Agency had infringed substantive constitutional due process provisions by submitting charges, but not the grounding evidence, and thus tried to force the agency to show the evidence before the period provided by law for the submission of evidence. The Constitutional Tribunal did not agree and declared the claim inadmissible. Case number 1344-2009.

2.6 *Are there any limits on the length of an agency's investigation? Are there rules on the publication and content of the agency's adverse enforcement decisions, and on consideration of evidence offered by the subject of the investigation?*

12. The Competition Act does not establish a time limit for the agency's investigation. Nevertheless, there is an implicit time limit given by the statute of limitations set by the Law. This statute of limitations is of five years for hard core cartel conducts, counted from the moment the cartels effects are no longer present in the market, and of three years for all other competition law infringements, counted from the moment the anticompetitive act is executed.

13. There are no explicit rules regarding the content of the Tribunal decisions that are adverse to the agency's claims. Notwithstanding the above the Tribunal publish all final decisions, including those in which the Agency's claims are dismissed.

14. As a general rule, decisions state which evidence served as a basis for its conviction, but the Tribunal does not have a legal obligation to analyze each piece of evidence offered by the parties.

2.7 *Is the agency required to make any public announcement when an investigation is closed without taking an affirmative enforcement decision, or when an investigation is concluded by a settlement or consent decree? Are there rules on the content of any such announcements?*

15. The agency is not legally required to make a public announcement when an investigation is closed without taking an affirmative enforcement decision. Nevertheless, the Agency does publish decisions to close investigations on its web site, although the full content of the grounds of the decision is not included.

16. Settlements, consent decrees and withdrawals are published both in the Tribunal and the Agency's website.