

**OECD's Roundtable on "Commitment Decisions in Antitrust Cases"**  
**Competition Committee (June 2016)**

The Chilean competition law is contained in the Decree Law N° 211 ("**DL 211**")<sup>1</sup>, which purpose is to promote and defend competition in the markets<sup>2</sup>. This task is conferred on the Economic National Prosecutor's Office ("**FNE**") and the Competition Court ("**TDLC**"), within the scope of their respective powers<sup>3</sup>.

The FNE is a decentralized public service, independent from any other entity or service. It is entrusted with the investigation and prosecution in courts of the antitrust infractions, representing the general interest of the collective economic order<sup>4</sup>. The FNE has to investigate the antitrust infractions, but it cannot impose sanctions, which are imposed by the TDLC. In addition, the FNE is empowered to request the TDLC the exercise of any of its powers<sup>5</sup>, such as the proposition to amend legal and statutory precepts, and the review of non-contentious matters (e.g. mergers). For these purposes, the FNE has several powers such as: (i) request from third parties information and background deemed necessary for the purposes of the undergoing investigations<sup>6</sup>; (ii) summon to declare, or request a written declaration from, people that could have knowledge of facts, acts or conventions object of the investigations and<sup>7</sup>; and (iii) request the collaboration of any employee of public bodies and services, and request them to provide access to background deemed necessary for the FNE's investigations or complaints<sup>8</sup>. In addition, in case of cartel investigations,

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<sup>1</sup> DFL N°1 of 2005, of the Ministry of Economy, Development and Tourism, which sets the revised, coordinated and systemized text of the DL N° 211 of 1973.

<sup>2</sup> Article 1 of the DL 211.

<sup>3</sup> Article 2 of the DL 211.

<sup>4</sup> Articles 33 and 39 of the DL 211.

<sup>5</sup> Article 39, letter c), of the DL 211.

<sup>6</sup> Article 39, letter h), of the DL 211.

<sup>7</sup> Article 39, letter j), of the DL 211.

<sup>8</sup> Article 39, letters f) and g), of the DL 211.

the FNE has the ability to perform dawn raids and wiretappings<sup>9</sup>, and is allowed to grant leniency<sup>10</sup>. The persons that do not comply with the FNE's powers can be arrested for up to 15 days<sup>11</sup>.

The TDLC is the court in charge of sanctioning, in the first instance, affronts to the competition law. The TDLC is a special and independent jurisdictional body, subject to the steering, correctional and economic oversight of the Chilean Supreme Court<sup>12</sup>. It is integrated by five members: three lawyers, one of them who presides it, and two professionals experts in economics<sup>13</sup>.

The DL 211 establishes two types of proceedings, a contentious proceeding and a non-contentious proceeding. Both proceedings can be initiated by request of the FNE or a third party.

The contentious proceeding is established to oversee and try situations that could constitute violations of the competition law<sup>14</sup>. Such proceeding resembles the scheme of an adversarial trial, with a complaint or lawsuit, a response, an evidentiary period, and a sentence<sup>15</sup>. In the definite sentence, the TDLC can adopt the following measures: (i) Modify or terminate acts, contracts, covenants, systems or agreements contrary to the provisions of the DL 211; (ii) Order the modification or dissolution of partnerships, corporations and other legal persons of private law that could have intervened in the acts, contracts, covenants, systems or agreements contrary to the provisions of the DL 211; and (ii) Impose fines for fiscal benefit<sup>16</sup>. The definite

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<sup>9</sup> Article 39, letter n), of the DL 211.

<sup>10</sup> Article 39 bis of the DL 211.

<sup>11</sup> Article 42 of the DL 211.

<sup>12</sup> Article 5 del of the 211.

<sup>13</sup> Article 6 del of the 211.

<sup>14</sup> Article 19 of the DL 211.

<sup>15</sup> Articles 21 and 25 of the DL 211.

<sup>16</sup> Article 26 of the DL 211.

sentence can only be subject to a complaint recourse filed before the Supreme Court, within ten business days, counting from the date of the respective notification<sup>17</sup>.

On the other hand, the non-contentious proceeding is established to oversee and try non-contentious matters that could infringe the provisions of the DL 211, so that the TDLC can determine the conditions which must be met in actions, acts or existing or to be executed contracts<sup>18</sup>. This proceeding is non-adversarial: once it is initiated, the TDLC establishes a period so any who have a legitimate interest can submit background<sup>19</sup>. Once such term is expired, the TDLC summon a public hearing, so that those that submitted background can present their opinion<sup>20</sup>. The resolutions issued by the Tribunal in these proceedings can only be object of a complaint recourse filed before the Supreme Court, within ten business days, counting from the date of the respective notification<sup>21</sup>.

The FNE's investigations not necessarily lead to a TLDC's proceeding. Besides the filing of a contentious or non-contentious complaint or lawsuit, the FNE can dismiss an investigation or can enter into an extrajudicial agreement.

### **1. Filing of a contentious complaint or lawsuit**

As mentioned above, the FNE can file a contentious complaint or lawsuit so that the TDLC can oversee and try situations that could constitute violations of the competition law. According to the rules applicable to any civil proceedings<sup>22</sup>, its parties may enter into a settlement in order to close the proceeding. In such

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<sup>17</sup> Article 27 of the DL 211.

<sup>18</sup> Article 31 of the DL 211.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> Applicable to the competition proceedings, pursuant to article 29 of the DL 211.

connection, the DL 211 establishes a mandatory conciliation hearing<sup>23</sup>. If an agreement is reached in such hearing, the Tribunal will resolve and approve the same, provided that the agreement is not anti-competitive<sup>24</sup>.

The possibility to enter into a settlement is determined case by case by the FNE, but it is a tool that has been used in several occasions during the last years, for the different type of conducts (i.e. cartels, abuse of dominance, mergers).

Year	Judicial Settlement				
	Cartels	Abuse of Dominance	Mergers	Others <sup>25</sup>	Total
2013	3	0	1	1	5
2014	0	2	0	2	4
2015	0	0	0	0	2
<b>TOTAL</b>	3	0	0	2	11

The FNE can enter into full or partial settlements. Full settlements put an end to the proceeding. In this type of settlements, the parties agree to some undertakings that can mitigate the risk detected by the FNE. The proceeding ends with the agreement, and, therefore, there is no court ruling.

For example, in 2012 the FNE filed a complaint against Unilever for entering into contracts with exclusivity and loyalty rebates clauses with its clients in the laundry detergent market. In 2013, the FNE and Unilever subscribed a conciliation settlement and it was approved by the TDLC. To reach the abovementioned agreement, Unilever assumed various obligations that constituted a significant change of its commercial practices, with the objective that third parties – detergent manufacturers and importers – improved their chances of exhibiting and distributing their products effectively, with the consequent benefit to consumers in having more brands to choose at the different stores. The commitments assumed by Unilever

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<sup>23</sup> Article 22 of the DL 211.

<sup>24</sup> *ibid.*

<sup>25</sup> This category includes compliance with the TLDC decisions.

were not limited to the detergent market, but were extended to other categories of products of mass consumption, such as softeners, dish detergents, mayonnaise, ketchup, toilet soap, toothpaste, deodorant and tea. Unilever undertook to: (i) eliminate any retroactive incentive, prize or rebate to its customers, conditioned to the fulfillment of sales goals; (ii) eliminate, during a 3 year period, discounts intended to display their products in order to use a shelf space exceeding 90% of its market share at the different centers of distribution; (iii) implement a compliance program; and, (iv) terminate any agreement or incentive intended to become an exclusivity agreement with any distribution channel, including both wholesalers and supermarkets. The judicial procedure was consequently terminated. The full implementation of the conciliation agreement was reviewed by an independent consultant, and a report was submitted to the FNE. This was the first of five auditing processes; the last one would be in 2019.

On January 2013, the TDLC approved a judicial settlement between the FNE and several contracting parties of CineHoyts/Cinemundo, a transaction involving the merger between two major cinema exhibitors in Chile. By virtue of the settlement, the companies committed to make divestitures of assets in Estación Central (a Department in Santiago city) and Valparaíso city, to unrelated and independent entities. The proceeding had been initiated by a FNE's complaint against the companies, submitted before the TDLC by the end of June 2012.

On the other hand, in case of a partial settlement, the proceedings continue and finish by a TDLC sentence. The benefits to the FNE in this type of settlements are mainly procedural, for example the recognition of facts, the waiver to introduce some type of evidence or to file a complaint recourse, which are agreed in exchange of a reduction of the fines request by the FNE. This type of settlement has been mainly used in case of cartels.

For example, in 2013, the FNE and four transport companies (Turbus, Pullman Bus, Transportes Romaní and Transportes Cometa) subscribed a conciliation settlement.

The FNE had accused those companies for entering into an agreement aimed to impede or hinder the entry of competitors in the intercity bus terminals of the cities of Valparaiso, Coquimbo, La Serena and Antofagasta. Among other methods utilized, the companies involved were occupying all available office space in the terminal, leaving no space for offices or ticket selling-points for potential entrants. In the settlement approved by the TDLC, the companies admitted to the charges and were obliged to abide to a series of measures to avoid infringement of the competition law in the market of public intercity transport. Among others, the measures included, evacuate office space in terminals across the country to facilitate entry of competitors; inform the FNE of any construction of new intercity bus terminals; and notify any merger or acquisition among incumbents. In addition, the companies waive the possibility to file an appeal before the Supreme Court against the TDLC's decision. In exchange, the FNE reduced the fines requested to the TDLC. Although the conciliation settlement was approved by the TDLC, the judicial process continued and in January 2014 the TDLC issued its decision fining the four accused companies.

## **2. Filing of a non-contentious complaint or lawsuit**

The FNE can file a non-contentious complaint or lawsuit so that the TDLC can determine the conditions which must be met in actions, acts or existing or to be executed contracts.

Due to the non-adversarial character of this type of proceedings, is not usual to have settlement in them. In fact, there has only been one settlement in the last 3 years in this type of proceedings.

In April 2014, FNE consulted the TDLC on the accordance with antitrust regulation of the project pursued by the four major national broadcasters to create an Over-the-Top (OTT) video distribution platform. Although the parties stated that only two broadcasters would be directly involved in the project's first stage, the information gathered by the FNE suggested that the remaining broadcaster were negotiating

and may eventually become part of the OTT platform in the future. The TDLC ended the non-adversarial proceeding, since all the television channels were still negotiating an agreement to create the Platform. The broadcasters agreed that, if an agreement to create the OTT platform was reached, it would be informed to the competition authorities prior to its subscription.

**3. Extrajudicial agreement**

Since 2009, and pursuant to a legal amendment introduced to the DL 211<sup>26</sup>, the FNE has the power to enter into extrajudicial agreements with economic agents involved in its investigations. These extrajudicial agreements must be approved by the TDLC, and once executed, are binding upon the parties to the agreement.

This type of agreements has been only used in case of abuses of dominance and mergers.

Year	Extrajudicial Agreements				
	Cartels	Abuse of Dominance	Mergers	Others	Total
2013	0	1	0	0	1
2014	0	1	2	0	3
2015	0	0	2	0	2
<b>TOTAL</b>	0	2	4	0	6

In January 2016, the TDLC approved an extrajudicial agreement between the FNE and free-to-air television broadcasters in connection with a project that the channels wanted to implement together. The project was about the use of satellite capacity in conjunction for distributing the television signal to different geographic isolated territories within Chile. The settlement recognized benefits and efficiencies of the common project, as saving costs on the infrastructure for the digitalization of terrestrial television. However, some risks in terms of horizontal cooperation and exchange of information were identified. To this respect, the television broadcasters

<sup>26</sup> Law N° 20.361, published in the Official Gazette on July 13, 2009.

overtook as a commitment, the realization of an “open season” procedure for allocating the spare capacity of the satellite in a non-discriminatory way to third interest parties.

In September 2015, the TDLC approved an extrajudicial agreement reached by the FNE and Electrolux, which laid down several remedies regarding the competition concerns raised in Chile by the international acquisition of General Electric Appliances by Electrolux, since General Electric commercialized its products in Chile through the local subsidiary of the Mexican company Mabe, a holding in which General Electric hold a stake of 48,4%. The extrajudicial agreement laid down several remedies designed to prevent the risk of loss of rivalry and independence between the domestic subsidiaries of Mabe and Electrolux. The commitments were also tailored to impede Electrolux’s ability to access confidential information of its competitor, Mabe, in Chile. In particular, the settlement reached by the FNE and Electrolux, approved by the TDLC established the following remedies: (i) Electrolux’s waiver of the statutory right to block certain Mabe board decisions regarding Mabe Chile, which would enable Electrolux’s appointed directors in Mabe to influence relevant commercial strategies in respect to the local subsidiary; and (ii) A ‘chinese wall’ between Mabe Chile and Electrolux, in order to prevent the undue exchange of competitive relevant information between the Chilean affiliates.

#### **4. Termination of an investigation due to change of conducts**

The FNE can also dismiss a complaint or terminate an investigation if there is a change of the conduct by the parties involved in such complaint or investigation. As opposed to the extrajudicial agreements, this power is not expressly contemplated in the DL 211, but the FNE understands that it is implied in its general power to enforce and safeguard competition in the markets, and in its obligation to ensure that public funds are properly used. Therefore, if the effects contrary to competition are



no longer observed, the FNE can conclude its investigation without presenting any complaint or lawsuit before the TDLC<sup>27</sup>.

As noted below, its application has increased during the last years, and has been used in several conducts except in cartel cases.

Year	Dismiss of an investigation due to change of conducts				
	Cartels	Abuse of Dominance	Mergers	Others	Total
2013	0	1	0	1	2
2014	0	5	3	0	8
2015	0	5	1	3	9
<b>TOTAL</b>	0	11	4	4	19

For example, in 2015 the FNE dismissed a complaint against a company involved in the market of producing rosehip oil was presented before the FNE. The complaint argued that the company entered into contracts with abusive clauses by implementing exclusivities on the smalls companies selling the raw material (rosehip). The FNE considered the clauses were not justified on efficiencies or commercial purposes, since these clauses increased the switching costs for small providers. The company involved in the practice offered to the FNE to eliminate the controversial clauses. Considering the changed of behavior, the FNE decided to close the investigation on April 14, 2015.

In another case, related with the white spirit market, the National Oil Company (ENAP or *Empresa Nacional del Petróleo*) offered to the FNE different measures to be implemented in the supply contracts with its clients. Mainly, the measures were focused on establishing an equal trade conditions to all its clients without introducing arbitrary discrimination between them. The FNE evaluated the commitments and decided to close the investigation in November, 2015.

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<sup>27</sup> In such connection, see the Internal Instructions for the National Economic Prosecutor's Office Enforcement Proceedings of May 2013, paragraph 88.

Finally, in public health sector, the FNE has received several complaints regarding public tenders to acquire drugs and medical supplies organized by public hospitals. Particularly relevant is a where a public hospital had opened a public tender and the terms of the tender were designed in such a way that only one company could fulfill them. After holding conversations and discussions between the members of the hospital and the FNE, the members of the hospital decided to organized a new tender with terms aligned with the competition law issues represented by the FNE. Therefore, the investigation was closed with positive results on the numbers of pharmaceutical companies that could submit bids for the tender, and subsequently, on the price and quality of the products acquired.