



# **Internal Guidelines for Filing Criminal Claims for Cartels**

**Santiago, June 2018**

## FOREWARD

Law No. 20,945 reintroduced a criminal cartel offence into Chilean competition law, contained in Law Decree No. 211 of 1973 (“**DL 211**”). Criminal investigations for this offence may only be initiated by a criminal claim filed by the National Economic Prosecutor’s Office (*Fiscalía Nacional Económica* or “**FNE**”), once the Competition Court (*Tribunal de Defensa de la Libre Competencia* or “**TDLC**”) has made a final decision (non-appealable) establishing the existence of a collusive agreement.

Congress decided that the administrative and criminal prosecution should be consecutive, in order to avoid parallel proceedings. Considering that not every cartel punished by the TDLC should necessarily be prosecuted criminally, our legislature conditioned the initiation of criminal investigations to the submission of a criminal claim. Finally, Congress granted the FNE the power to file criminal claims for this offence, a power that in certain cases is forced to exercise. The law identifies the FNE as the best-suited entity to assess which agreements constitute a greater danger to competition, and to decide in which cases criminal prosecution is the most effective mechanism to strengthen the set of rules that protect competition.

It is very relevant for the FNE, and for competition policy in general, that criminal sanctions are effectively applied in cartel cases that severely affect competition.

The FNE has prepared these Internal Guidelines for the Filing of Criminal Claims for Cartels (“Guidelines”) in accordance with its powers established in DL 211. This document seeks to specify the general criteria under which the FNE will exercise its authority to file criminal claims for cartel offences. Our objective is to disclose the reasons that will guide the FNE’s activity in this matter, limiting the scope of discretion conferred by law to the agency.

Sincerely,

Felipe Irrázabal Ph.  
National Economic Prosecutor

## I. INTRODUCTION

1. Law No. 20,945 introduced a new Title V to DL 211, labeled “*On Criminal Sanctions*” consisting of four articles.

2. Article 62 defines the criminal cartel offence, establishes the applicable penalties and regulates the judicial assessment and enforcement of the applicable sanctions.<sup>1</sup> Article 63 regulates the exemption from criminal liability or reduction of the penalties for leniency applicants. Article 64 regulates the conditions and proceedings for exercising criminal action. Finally, article 65 establishes the statute of limitations of the criminal action.

3. The submission of criminal actions for a cartel offence is subject to a set of special rules. First, under subsection 1 of article 64, the Criminal Prosecutor (*Ministerio Público*) can only initiate a criminal investigation for a cartel offence after the TDLC has established the existence of a cartel agreement in a final judgement. Thus, the law provides that criminal prosecution can only start after a final judgement in the administrative proceeding establishes the existence of a cartel (horizontal agreement).

4. Furthermore, the same article establishes the submission of a criminal claim by FNE as a precondition for criminal prosecution of the cartel offence, thereby excluding the possibility of criminal claims by third-party claimants or an ex-officio initiative by the Criminal Prosecutor (*Ministerio Público*). The history of law 20,945 shows that Congress considered the FNE as the agency best suited to assess which cartel cases deserve criminal prosecution.

5. The submission of a criminal claim is, as a general rule, not compulsory for the FNE. This conclusion can be drawn from the language of the law, which stipulates that the FNE “*shall be entitled*” to file a criminal claim once the TDLC has established the existence of a cartel. This conclusion is reinforced by subsection 3 of the same article, which forces the National Economic Prosecutor to issue a ‘reasoned decision’ if, after the TDLC has established the existence of an agreement among competitors, the Economic Prosecutor “*decides not to submit a criminal claim in connection with the facts described in subsection first of article 62.*”

6. It is worth noting that the law does not consider the possibility for the FNE to merely report the cartel offence to the Criminal Prosecutor. Therefore, it may only choose to act as a criminal claimant, with all the rights, duties and burdens attached to this capacity.

7. The exception to the non-compulsory nature of the criminal claim is contained in subsection two of article 64, which states “*The National Economic Prosecutor’s Office shall file a criminal claim in connection with facts that severely hinder competition in the markets.*”

8. These Guidelines sets forth the general criteria the FNE will observe to assess whether the facts of a case severely hinder competition in the markets, as required by subsection two of article 64. This document also announces the criteria the FNE will take into account to file a claim to prosecute the crime established under article 62 or to justify its determination not to file a claim.

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<sup>1</sup> All references to articles, without reference to the legal body in which they are contained, will be understood as references to DL 211.

## II. REGULATORY FRAMEWORK AND STAGES OF THE FNE'S ANALYSIS

9. Subsection one of article 64 stipulates that a criminal investigation for a cartel offence may only be launched after a criminal claim has been filed, which may only be submitted "*once the existence of the agreement has been established by a final decision issued by the Competition Court*".

10. The expression "*the agreement*" refers to the collusive agreement defined as a crime on article 62. However, the TDLC's final and definitive judgment will apply article 3, not article 62. Article 64 requires the TDLC's final judgment to establish certain facts ("*the existence of the agreement*"), and that these facts fall under the definition of an offence that may be prosecuted criminally.

11. Therefore, at a first stage of analysis, the FNE shall examine whether there is consistency between the facts established in the TDLC'S final judgment and the legal description of the offence in article 62.

12. Once this consistency has been verified, only a complaint filed by the FNE may trigger a criminal investigation, as established in article 64 paragraph 1, which provides that:

*"The investigation of the facts described in subsection 1 of article 62 may only be initiated by a criminal claim filed by the National Economic Prosecutor's Office, which shall be entitled to file such claim once the existence of the agreement has been established through a final decision issued by the Competition Court, (...)."*

13. If the TDLC establishes in a final judgement that a cartel agreement existed, and if this agreement constitutes a criminal offence within the meaning of article 62, the FNE will be forced to file a criminal claim whenever competition in the markets has been severely hindered. In other cases, where the FNE is not bound by this obligation, it may or may not file a criminal claim, but it is required to issue a 'reasoned decision' if it decides not to do so.

14. At a second stage of analysis, the FNE shall assess whether the facts established by the TDLC severely hindered competition in the markets. These Guidelines set out the criteria the FNE will apply in this second stage of analysis to determine whether the agreement severely hinders competition in the markets. If this is the case, the FNE shall be forced to file a criminal claim. If this is not the case, it will move on to the third and last stage of analysis.

15. At a third and final stage of analysis, the FNE will consider whether to exercise its power to file a criminal claim. For this purpose, the Guidelines set out the criteria under which the FNE will adopt that decision. These criteria will also constitute the basis of its reasoned decision not to file a criminal claim for a cartel offence, if such is the case.

## III. CONSISTENCY BETWEEN THE AGREEMENT ESTABLISHED BY THE TDLC'S JUDGMENT AND THE CARTEL OFFENCE

16. The FNE may only exercise its power to file a criminal claim if the existence of an agreement is established in a final and binding decision in the administrative proceedings. The FNE must verify the consistency between the agreement, the existence of which is determined in the judgment by the TDLC, and the qualifying condition of the cartel offence contemplated in article 62. Some of the factors the FNE will take into consideration to carry out this consistency analysis are set out below.

17. Article 64 requires the existence of the agreement to be established in a final and binding judgment passed by the TDLC. The FNE understands the law requires an enforceable final judgment issued in proceedings before the Competition Court. Thus, if the TDLC does not establish the existence of a collusive agreement, but the Supreme Court does in appeal proceedings, the FNE shall nevertheless carry out the consistency analysis. Conversely, the FNE understands that the condition set out in article 64 to trigger criminal proceedings will not be fulfilled if the TDLC establishes the existence of the collusive agreement, but the Supreme Court overturns such decision.

18. Both article 3 and article 62 set forth a variety of hypotheses amounting to collusion. The FNE understands that the consistency analysis will be fulfilled if the existence of an agreement is established in respect of one or more collusion hypotheses under article 3, and in addition that this agreement falls within the meaning of article 62. However, should the TDLC establish the existence of behavior encompassing more than one hypotheses under article 62, the FNE shall not necessarily file a criminal claim for each of the collusion hypotheses, the existence of which was established in administrative proceedings. Rather, it will proceed based on the criteria set out in these Guidelines.

19. According to DL 211, the consistency test is not fulfilled, and therefore the FNE will not file a criminal claim, when the final and binding judgment issued by the TDLC (or the Supreme Court, as the case may be) establishes the existence of a concerted practice, or of a cartel agreements to rig bids in tenders launched by private suppliers who do not offer public utilities, or agreements to fix marketing conditions or the exclude actual or potential competitors.

20. The DL 211 does not require the final and binding judgment issued by the TDLC or the Supreme Court to establish the liability of those individuals who may be criminally prosecuted.

#### **IV. THE DUTY TO FILE A CRIMINAL CLAIM**

21. Once the aforementioned consistency is established, the FNE will analyze whether the facts of the case severely hinder competition in the markets. This section sets out the criteria or interpretation parameters based on which the FNE will decide whether the facts established in the final and binding judgment satisfy this legal precondition.

22. The FNE will consider that the facts asserted by the TDLC severely hinder competition in the markets, within the meaning of article 64 paragraph 2 of DL 211, when the following requirements are met:

1. That the agreement, established by final and binding judgment, may be qualified as a violation of literal a) of article 3;
2. That the economic effects of the conduct are of significant magnitude and capable of causing a systemic impact upon the markets;
3. That the conduct affects mass consumption goods or essential goods or services; and,
4. That at least one of the following scenarios occur:
  - (a) The conduct covers a significant period of time, considering the nature of the conduct and of the affected market. The FNE will consider significant any period of time beyond 3 years; or,
  - (b) The conduct affects all or a significant part of the national territory.

23. To determine whether the aforementioned conditions are met, the FNE shall examine the facts judicially established in the administrative proceedings and the evidence gathered during the investigation. It is important to note that the FNE understands that any assertions or statements relating to the severity of a conduct, issued by the FNE, the TDLC, or the Supreme Court for the purposes set forth in literal c) of article 26, do not necessarily entail that such conducts severely hinder competition in markets under the terms required by article 64, subsection two. Likewise, any such assertions made by the FNE, the TDLC or the Court of Appeals of Santiago when applying article 39, literal n), do not constitute binding qualifications for this purpose.

## **V. THE POWER TO LODGE A CRIMINAL CLAIM**

24. Once the FNE has determined that the facts established by TDLC's final judgment and the qualifying conditions of the cartel offence are consistent, but the joint requirements established in the preceding section to consider that the events severely hinder competition in markets are not fulfilled, the FNE must make a decision regarding the pertinence of the criminal claim. This conclusion is based on the terms of subsection 1 and literal r) of article 39, and on subsections 1 and 3 of article 64. Pursuant to this last provision, whenever the National Economic Prosecutor decides not to file a criminal claim, it shall issue a reasoned decision in this regard.

25. This section contains a series of guiding criteria that the FNE may take into account to decide whether to exercise its power to bring criminal charges. If it decides not to do so, its decision will be justified based on one or more of these criteria.

#### **A) CRITERIA PERTAINING TO THE PUNISHABLE ACT**

26. **That the agreement is contrary to article 3 literal a).** The FNE may take into account to exercise its power to bring criminal charges whether the agreement has been qualified as a violation of literal a) of article 3 by final and binding judgment, and whether the existence of such agreement had been made known to the public or, on the contrary, it had an eminently secret nature.

27. **Magnitude of the effects produced by the agreement.** The FNE may take into account the effects that the unlawful act caused or was evidently apt to cause, specifically regarding any of the following scenarios:

- (1) Whether the conduct affected or was apt to affect the population on a massive scale;
- (2) If the conduct conferred or was apt to confer market power to offenders in the relevant market that the offense occurred;
- (3) If the conduct affected or was apt to affect all or a significant part of the national territory.

28. **Magnitude of the economic benefits.** The FNE may take into consideration if the cartel agreement reported economic gains to its members, the amount of such gains or an estimation thereof, as judicially established in the administrative proceedings.

29. **Duration of the agreement in time.** The FNE may take into account whether illegal conduct covered a significant period of time, considering the nature of the conduct and of the affected market. The FNE will consider significant any period of time beyond 3 years;

30. **Nature of the market.** As to the market of the products or services affected by the agreement, the FNE may take into consideration the purpose of the agreement(s), specifically observing if it affected:

- (1) Essential goods or services ;
- (2) Goods or services of mass consumption; and

- (3) The goods or services were of low or null substitutability, i.e., the consumers' willingness to substitute a product for another as a response to changes in prices or offered quantities.

31. **Involvement of an Association.** The FNE may take into account whether the agreement was organized, coordinated, entered into, carried out, or monitored with the participation of an association or entity that gathers competitors.

**B) CRITERIA PERTAINING TO THE CONDUCT OF THE PERSONS THAT ARE CRIMINALLY LIABLE FOR THE OFFENSE**

32. When deciding whether to file a criminal claim, the FNE may take into account the manifest severity of the individual involvement and the functions performed by the individuals that were identified or are identifiable within the organization, execution and/or performance of the collusive agreement. Likewise, the FNE may take into consideration the fact that the individuals have previously been involved in other violations of article 3 and, in general, the background information indicating the need to request the application of the penalty of disqualification foreseen by the law.

**C) CRITERIA PERTAINING TO THE LIKELIHOOD OF SUCCESS OF THE CRIMINAL ACTION AND THE OBJECTIVES OF COMPETITION POLICY**

33. The FNE understands that the power to file a criminal claim for the cartel offence established in article 62 shall be directed towards achieving its institutional objective of protecting competition, specifically punishing and deterring conducts that affect the freedom of market operators and harm consumers and the economy as a whole. Consequently, the FNE will weigh, on a case by case basis, whether a criminal claim is necessary, proportional and compatible with the integral fulfillment of the objectives provided for the FNE under the DL 211.

34. The FNE will assess whether the prospective exercise of a criminal action has a significant probability success, in terms that it appears reasonably plausible that the criminal claim will result in a fair conviction of the defendants, in the understanding that only these cases will effectively deter illegal conducts.

35. In this regard, the FNE shall verify the existence of evidence available in the adversarial case file to demonstrate the facts on which the criminal claim is based.

**VI. OTHER PROVISIONS**



36. The Head of the FNE's Litigation Department, or whoever is acting as his/her alternate, shall inform its reasoned opinion to the National Economic Prosecutor regarding the pertinence, or lack thereof, of filing a criminal claim charging the crime set out in article 62, at the latest, within the term of five months, as from the date when the FNE is notified of the final judgment rendered by the Competition Court.

37. The National Economic Prosecutor may request internal or external reports deemed adequate in connection with the exercise of the power contained in subsection third of article 64.

38. During the criminal investigation and proceedings the FNE shall preserve confidentiality of all information in respect of which it has been decreed or is admissible pursuant to the terms of the DL 211, notwithstanding the Criminal Prosecutor's power to request to the Competition Court to release the confidentiality or privacy of certain sections of the case file, as per article 64.

39. In cases when the National Economic Prosecutor decides to refrain from filing a criminal claim, based on a duly reasoned decision, said decision must be published in the FNE's website.

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