

# **Internal Guidelines on Leniency in Cartel Cases**

**Santiago, March 2017**

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## FOREWORD

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

Collusion is the most harmful practice for competition in the market place. So-called “hard-core cartels” are particularly serious among collusive practices. Law No. 20,945, recently published, has established drastic sanctions for whoever engages in this type of conduct.

Collusion drives up prices, restricts supply, reduces product variety and quality, and affects economic efficiency, or tends to produce such results. This is all to the detriment of consumers, firms, and the economy as a whole. Therefore, collusion has been systematically sanctioned around the world, and it is one of FNE’s top enforcement priorities.

In order to effectively detect, sanction and deter collusion, articles 39 bis and 63 of DL 211 establish and regulate a leniency program. This program allows individuals or companies who engaged in collusive conduct to be exempted from the relevant sanctions, or to have them reduced, provided that the applicant provides information that can be used to prove the conduct and identify the parties involved.

Discharging its legal duty to apply DL 211, the FNE has prepared these “Guidelines on Leniency in Cartel Cases” (“**Guidelines**”). This document sets forth the criteria and internal working guidelines used by the FNE to apply article 39 bis of DL 211. Our objective is to provide legal certainty to whoever wishes to obtain leniency benefits, and to limit the scope of discretion conferred by the law to this agency.

Sincerely,

Felipe Irarrázabal Ph.  
Fiscal Nacional Económico

## I. LENIENCY BENEFITS

1. **Leniency.** Anyone who colludes is subject to administrative and criminal sanctions, including the deprivation of liberty. Leniency can exempt applicants from such sanctions, or have them reduced. To obtain these benefits, the party that engaged in the collusive conduct must provide evidence that assists in proving the conduct and in the identification of the parties involved.

### A) EXEMPTION BENEFIT

2. **Exemption Benefit.** The first Applicant to contribute information to the FNE regarding conduct established in article 3, letter a) of DL 211<sup>1</sup> will be exempted from: (i) the sanction of compulsory dissolution of a legal entity established in article 26, letter b); (ii) the fine established in letter c) of that article, and (iii) criminal liability for the crime of collusion, as defined under article 62 ("**Exemption Benefit**").

3. **Requirements to obtain the Exemption Benefit.** To obtain the Exemption Benefit, the Applicant must:

- (1) Provide precise, truthful and demonstrable evidence that represents an effective contribution to satisfy the standard of proof required to sustain a complaint;
- (2) Refrain from disclosing the leniency application until the FNE has filed a complaint or ordered the application to be archived, unless the FNE expressly authorizes such disclosure, and;
- (3) Put an immediate end to its involvement in the conduct after the benefit application has been filed.

### B) REDUCTION BENEFIT

4. **Reduction Benefit.** The second Applicant to contribute information to the FNE in connection with the conduct established in article 3, letter a) will obtain the following benefits: (i) a reduction of up to 50% of the fine that would have been otherwise requested; (ii) a reduction by one degree of the penalty for the crime of collusion defined in article 62; and (iii) the Applicant will not be required to comply with the minimum one year of effective imprisonment established in subsection four of article 62, if the FNE's complaint involves more than two competitors, and provided that the beneficiary fulfills the requirements established in Law No. 18,216 to substitute the enforcement of penalties involving the deprivation of liberty ("**Reduction Benefit**", and jointly with the Exemption Benefit, "**Benefits**").

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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.

5. **Requirements to obtain the Reduction Benefit.** To obtain the Reduction Benefit, the Applicant must:

- (1) Provide evidence in addition to what has been already contributed by the Applicant who obtained the Exemption Benefit, which must be precise, truthful and demonstrable, that represents an effective contribution to satisfy the standard of proof required to sustain a complaint;
- (2) Refrain from disclosing the leniency application until the FNE has filed a complaint or ordered the application to be archived, unless the FNE expressly authorizes such disclosure, and;
- (3) Put an immediate end to its involvement in the conduct after the benefit application has been filed.

6. **Factors for determining the fine reduction.** To determine the percentage of the fine reduction by virtue of the Reduction Benefit, the FNE will consider the evidentiary value of the additional information provided by the Applicant. The FNE will use the following criteria to determine the percentage in which the fine will be reduced:

- (1) If the additional information is, by itself, sufficient to sustain a complaint, the fine that would have been requested without the benefit will be reduced between 40% and 50%;
- (2) If the additional information significantly supplements the information provided by the first Applicant, the range of the fine reduction will be between 20% and 40%, and;
- (3) If the additional information supplements the information provided by the first Applicant, the reduction of the fine will not exceed 20%.

7. **Leniency plus.** Parties that cannot apply for the Exemption Benefit because they do not have the first place among Applicants may confess the existence of a second act of collusion to the FNE, different from the first. In this case, if the applicant fulfills the requirements to obtain the Reduction Benefit with respect to the first conduct, and the requirements to obtain the Exemption Benefit with respect to the second conduct, then the FNE will grant the maximum permitted reduction with respect to the first collusive conduct and the Exemption Benefit with respect to the second conduct.

8. **Notification of the reduction percentage obtained by an applicant.** If the FNE approves the Benefit Reduction application, it will inform the Applicant of the percentage reduction of the fine obtained. The exact amount of the fine requested by the FNE will be determined upon filing the complaint.



### C) EXTENT OF THE REQUIREMENTS TO OBTAIN BENEFITS

9. **Duty to provide information.** The duty to provide precise, truthful and demonstrable information, that represents an effective contribution to satisfy the standard of proof required to sustain a complaint, will include, at least, the following:

- (1) Delivering without delay all the information and evidence pertaining to the collusion and the affected market, that is in the Applicant's possession or that it can obtain;
- (2) Take all steps reasonably within the Applicant's control to ensure the cooperation of natural persons who could provide information, whether officers, employees, advisors and/or agents, past or present;
- (3) Remain at the FNE's disposal to promptly respond to any requests for information or explanations that could clarify facts and add evidence;
- (4) Avoid any losses or destruction of evidence or information relevant to the collusive conduct;
- (5) Refrain from refuting, denying or controverting the facts acknowledged before the FNE, notwithstanding the precisions, corrections and additions that may occur in the course of the investigation, and;
- (6) In general, cooperate truthfully, opportunely and continuously with the FNE during the course of the investigation.

10. **Applications with ongoing investigations.** Applications may be made regardless of whether or not there is an open investigation with respect to the facts of the application for leniency. However, the standards to determine whether the information is an effective contribution will vary case-by-case. If the facts were being already investigated by the FNE upon filing the application, then the standard will be more stringent than if the application is filed prior to the commencement of an investigation.

11. **Duty to provide information in criminal venues.** If the National Economic Prosecutor files a criminal claim with respect to the conduct for which leniency is being sought, each person exempted from criminal liability, as declared by the TDLC, shall provide to the Public Prosecutor and the corresponding criminal court the same information that was previously provided by each of those natural persons to the FNE, and each of them must appear and provide testimony as a witness in criminal proceedings, pursuant to article 63.

12. **Duty to refrain from disclosing the application.** The FNE will consider that the application for any of the Benefits has been disclosed when the Applicant, directly or through its officers, employees, advisors and/or agents, reveals to third parties the existence of

leniency proceedings or certain elements that reasonably allow to infer the application for the benefit, unless the Applicant has been previously authorized to do so in writing by the FNE. The FNE will determine when to grant this authorization, depending on each specific case and taking into consideration, among other factors, the possibility of requesting a warrant pursuant to article 39, letter n), the existence of applicable national or foreign regulations requiring this authorization, and the degree of confidentiality that would be expected from the recipient of such information. In the case of information that listed companies are required to disclose under subsection 8 of article 39 bis, this authorization will not be necessary.

13. **Duty to put an end to the conduct.** The FNE will consider that the Applicant has put an end to the collusive conduct when its commercial decisions, such as pricing, production, markets, sales conditions and potential involvement in tender processes, are made independently of its competitors' decisions.

#### **D) BENEFICIARIES**

14. **Who can request the benefits.** Any person, natural or legal, may request the Benefits, provided that some form of liability could be attributed to that person for participating in any of the conduct set forth in article 3, letter a), regardless of the degree of intervention or role within the cartel ("**Applicant**"). Thus, for example, a company could apply for the benefit if it participated in a cartel, as well as any of its current or former officers, employees, advisors and/or agents, on their own behalf, and trade associations, including their officers, that facilitated the cartel. If the Applicant is a legal person, it shall act through its duly authorized legal representatives.

15. **Applicants that are legal persons.** If the Applicant is a legal person, then, in addition to the Applicant itself, the legal persons that belong to the same business group, as well as their current and former officers, employees, advisors and/or agents will also be beneficiaries. So that the FNE may comply with the provisions of subsection 5 of article 39 bis and subsections 1 & 4 of article 63, the Applicant shall identify the legal and natural persons that it wants to include in its application, as specified in paragraph 51.

16. **Applicants that are dependent natural persons.** If the Applicant is a natural person that participated in the conduct as an officer, employee, advisor and/or agent of an economic agent, the Benefits will not extend to other natural or legal persons. Nevertheless, the FNE will accept joint applications filed by one or more natural persons who are or have been officers, employees, advisors and/or agents of the same economic agent that participated in the conduct, in which case the Benefits will apply only to them.

17. **Applicants that are natural persons acting as independent economic agents.** If the economic agent that participated in the conduct is a natural person, such person may file an application and include, as beneficiaries, any persons that worked as his or her officers, employees, advisors and/or agents, past or present. So that the FNE may comply

with the provisions of subsection 5 of article 39 bis and subsections 1 & 4 of article 63, the Applicant shall identify the natural persons that it wants to include in its application, as specified in paragraph 51. In this case, the Benefits will not extend to legal persons.

## II. PROCESS FOR OBTAINING THE BENEFITS

18. **Summary of the process.** The 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 one of the 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**”. 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 applications are founded (“**Benefit Request**”). If the Benefit Request fulfills the requirements indicated in these 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 fulfill to obtain the definitive benefit (“**Definitive Benefit**”). If the Applicant fulfills the requirements established in the Official Letter of Conformity, the Provisional Benefit will become Definitive upon the FNE’s filing of the complaint.

### A) FNE OFFICIALS

19. **Officials participating in the process.** The following FNE officials will participate in the leniency process: (a) the leniency officer, or his or her alternate; (b) the leniency team, and (c) the National Economic Prosecutor or his or her legal alternate.

20. **Leniency Officer.** This is the FNE official in charge of maintaining direct communications with the Applicants and Beneficiaries, supporting them throughout the entire course of the process (“**Leniency Officer**”). The Leniency Officer will have at least the following duties and functions:

- (1) Answer inquiries regarding the availability of Benefits;
- (2) Receive Marker Requests;
- (3) Summon the Applicant to a meeting to issue the Marker;
- (4) Deliver a Marker to the Applicant if the relevant requirements have been fulfilled, or reject the Marker Request if they have not;
- (5) Create and maintain custody over the leniency application file (“**File**”) with the information provided by the Applicant;
- (6) Receive Benefit Requests, and;

- (7) Once the Provisional Benefit has been granted, transfer the File to the team in charge of the investigation, or return the information to the Applicant if the application is rejected by the National Economic Prosecutor, or in case the Applicant withdraws its application.

21. **Leniency Team.** This is the group of FNE officials appointed to process an application for an Exemption or Reduction Benefit (“**Leniency Team**”). The Leniency Team will:

- (1) Act as the Applicant’s technical counterparty, providing guidance regarding the compilation of information needed to obtain the requested benefit, including, to that end, arranging any meetings that may be necessary with the Applicant;
- (2) Preserve and analyze the submitted evidence;
- (3) Receive the information filed preliminarily by the Applicant to support its application, which will be added to the File;
- (4) Interview one or more of the current or former officers, employees, advisors and/or agents of the Applicant, whose depositions will be considered as information relating to the application, as well as other persons that could have knowledge of the facts that support the application or of the market or industry in which the violation occurred. These depositions may be recorded through an audio system or any other system defined by the FNE. At the end of each deposition minutes will be drafted, in which the deponent will ratify his or her statement. These minutes will be added to the File, and;
- (5) Recommend the National Economic Prosecutor the acceptance or rejection of the Benefit Request.

22. **Functions of the National Economic Prosecutor.** The National Economic Prosecutor, or his or her alternate or replacement, will make the decisions pertaining to the leniency application proceedings established in these Guidelines, such as: (i) the approval or rejection of the Benefit Requests; (ii) the approval of the Provisional Benefit, and; (iii) the revocation of the Provisional Benefit. The National Economic Prosecutor will make these decisions in a deliberative manner, after the Applicant has been offered an opportunity to be heard.

## **B) INITIATION OF THE PROCESS**

23. **Opportunity for initiating the process.** The FNE recommends that potential applicants initiate the leniency application process through a Marker Request as soon as they have suspicions of participating or having participated in a cartel. In any event, the Benefits can be requested regardless of whether or not the FNE is currently conducting an investigation based on the same events or regarding the same market to which the

application refers, and regardless of whether or not the FNE has requested or exercised any of the powers granted under article 39 letter n), up to the filing of a complaint based on the same facts.

24. **Manner of initiating the process.** The leniency process is initiated by submitting a Marker Request. Prior to commencing the process, the Applicant may make enquiries to the FNE regarding the availability of Benefits in connection with a violation that has occurred within a given market.

25. **How to contact the FNE.** The only valid ways to file a Marker Request or query regarding the availability of Benefits are: (i) by logging in through the link available at [www.fne.cl](http://www.fne.cl) (“Leniency” tab), or (ii) by contacting the Leniency Officer, at the following phone number: +56 227535603 or at the following e-mail address: [encargadodelacioncompensada@fne.gob.cl](mailto:encargadodelacioncompensada@fne.gob.cl). If you are contacting the FNE via a telephone call, a voice mail message will not be considered sufficient, nor will sending a text message or another type of message, since actual contact with the Leniency Officer is required.

### C) HYPOTHETICAL ENQUIRIES

26. **Who can make them.** Any person, acting on behalf of a party interested in obtaining any of the Benefits, is entitled to ask the Leniency Officer if the Benefits are available regarding a violation that has occurred within a given market, without the need to identify the interested party (“**Hypothetical Enquiry**”).

27. **Required information.** To make a Hypothetical Enquiry, the interested party must provide a description of the market in which the collusion has allegedly occurred, although the specific facts that constitute the conduct need not be specified. Whoever files the Hypothetical Enquiry will be responsible for the accuracy and veracity of said description, and neither the Leniency Officer nor the FNE will be responsible for any misunderstanding that might arise as a result of the description.

28. **Availability of Benefits.** The Officer will answer the Hypothetical Enquiries informing if the Exemption Benefit or the Reduction Benefit are available at the time of the enquiry. The Exemption Benefit will be available at the time of the enquiry if there is no prior Marker Request in the same market. The Reduction Benefit will be available at the time of the enquiry if there is only one prior Marker Request in the same market. If the Officer indicates that the Exemption Benefit is available and no Marker Request is received within the term of 5 days, then the FNE will be entitled to initiate, *ex officio*, an investigation in the same market.

29. **A Hypothetical Enquiry does not guarantee the availability of the Benefits for the interested party.** Only the Marker Request ensures the availability of the Benefits. Consequently, if a potential applicant submits a Marker Request before the person that made a prior Hypothetical Enquiry does so, then the Request will take precedence.

30. **Registry of Enquiries.** If the Exemption or the Reduction Benefit are not available, the Leniency Officer will keep a confidential registry or record of the Hypothetical Enquiries. If for any reason the Exemption or the Reduction Benefit becomes available again, the Leniency Officer may contact the party that submitted the Hypothetical Enquiry to communicate said availability.

#### **D) MARKER**

31. **Marker.** Any Applicant may request a marker from the FNE specifying the place held with respect of a specific infraction, in order for that place to be reserved by the FNE during a specific period while that party is gathering the information necessary for making a Benefit Request. While the Applicant holds a valid Marker, no other person involved in the infraction can take the place that the former holds for the purposes of obtaining any leniency Benefits. If there is a new Applicant in connection with the same violation, then the FNE will grant a new Marker based on the date and time of the respective submission.

32. **Variation of the ranking of the application.** If any Applicant abandons its application, fails to file the Benefit Request within the allotted timeframe, has its Benefit Request rejected (any of the three situations being a **“Cause for Termination”**), or if the Applicant’s Provisional Benefit is revoked, then subsequent Applicants will move up in order. The FNE shall inform the Applicants in the event that any of the aforementioned circumstances affects the ranking of their application, and provide the interested party with a new Marker reflecting that.

33. **Marker Request.** In order to obtain a Marker, the Applicant must submit a Marker Request through any of the means set forth in paragraph 25, containing the following information:

- (1) Full name, telephone number and contact e-mail address;
- (2) Identification of the natural person or the legal entity being represented, when applicable;
- (3) Domicile in Chile. If there is not one, a domicile in Chile must be established for these purposes, and;
- (4) A general description of the conduct and the affected market.

34. **Receipt for the submission of the request.** The order of the applications received for Marker Requests will be established based on the date and time of their respective submission. A receipt containing this information will be issued. If a Marker Request is made via telephone, the Leniency Officer will, during the phone conversation, expressly communicate the exact time at which the request was received and make available to the Applicant the receipt certifying that.

35. **Inadmissible Marker Request.** The Leniency Officer may declare the inadmissibility of a Marker Request in the following cases:

- (1) If any of the information required under paragraph 33 was not submitted within the forms that have been established in paragraph 25;
- (2) If the information presented manifestly does not constitute an offense established under article 3, letter a);
- (3) If the FNE has already filed a complaint before the TDLC regarding the same facts; or
- (4) If the Marker Request is submitted jointly by various participants in the collusive conduct, that are independent actors from one another in the market affected by the conduct.

36. **Return of the information.** If the Marker Request is declared inadmissible, the Leniency Officer shall return all information provided by the Applicant, if any, and destroy any copies made of the same.

37. **Summons to an Application Meeting.** Once the Marker Request has been received, and to the extent that the Applicant has provided the information required by paragraph 33, and none of the grounds for inadmissibility established under paragraph 35 are present, the Leniency Officer, within a period of 3 days, will summon the Applicant to a meeting (“**Application Meeting**”), in order to provide to the latter its Marker. Minutes will be drafted upon the conclusion of the Application Meeting.

38. **Remote Application Meeting.** In exceptional cases, the Leniency Officer may order that the Application Meeting be held through remote means of communication, in which case minutes will also be drafted.

39. **Failure to attend the Application Meeting.** If the Applicant fails to attend the Application Meeting along with a second meeting scheduled by the FNE for the same purposes, the Marker Request shall be automatically rendered void. The Leniency Officer shall draft minutes recording the failure to attend the meetings.

40. **Verification of the identity of the Applicant during the Application Meeting.** During the Application Meeting, the Leniency Officer shall verify the identity of the Applicant by means of an identification card or passport, or other similar document, and shall request the document evidencing a power-of-attorney, if applicable. If this last instrument is not provided, the Leniency Officer shall set a timeframe for its subsequent delivery. If there are any problems with the accreditations, the Leniency Officer shall inform the Applicant at the meeting or within 24 hours, and will set a deadline for any such problem to be resolved. If the instrument containing the relevant accreditations is not filed within the allotted timeframe, or if the problem is not remediated on time and/or in due form, then the Marker

Request shall be rendered void. The Leniency Officer shall draft a minute stating such circumstance.

41. **Guidance to the Applicant.** During the Application Meeting, the Leniency Officer will provide a general orientation to the Applicant regarding the leniency process, and answer any queries it may have.

42. **Submission of information during the Application Meeting.** The information submitted by the Applicant during the Application Meeting may be delivered verbally or in writing, with the exception of the power-of-attorney, which must be in writing. Likewise, the Applicant may show the Leniency Officer information related to the alleged conduct, that could be provided in connection with the Benefit Request.

43. **Issuance of the Marker.** Once the Application Meeting has been adjourned, the Officer shall issue a Marker, which will remain in the possession of the Leniency Officer, although a copy of the same may be delivered to the Applicant if it so required.

44. **Content of the Marker.** The Marker shall contain the following information:

- (1) Name and domicile of the Applicant and of its representative, if applicable;
- (2) The industry, market, product or service, affected by the potential violation;
- (3) The place held by the Applicant, and;
- (4) The period within which the Applicant must present the Benefit Request and the information on which its application for leniency is founded.

45. **Suspension of the term to submit the Benefit Request.** The term for submitting the Benefit Request of an Applicant shall be suspended until those submitted by other Applicants with earlier Markers have been resolved. Thus, for the party that holds the second place in the application ranking, the term for submitting the Benefit Request shall not begin until the admission of the Benefit Request of the party that holds the first place in the application ranking, or when a Cause for Termination is applicable. The same will occur regarding the party holding the third place in the ranking of application in respect of the party holding the second place, and so on and so forth. Notwithstanding the foregoing, while the process is suspended, the Applicant can still move forward with the compilation of information on which its Benefit Request is founded and submit to the FNE any documents that it deems convenient.

46. **Resumption of the process due to the approval of the preceding Benefit Request.** If the Benefit Request of the first Applicant has been admitted, the second Applicant will be informed that it is entitled to opt for the Reduction Benefit, thereby initiating the term within which to file its Benefit Request. If the Benefit Requests of the first and second applicants are admitted, the parties holding the following Markers will be notified of



that circumstance. These latter parties can maintain their Markers, if they so decide, in the event that any of the Benefits are revoked and become available again.

47. **Resumption of the process due to a Cause for Termination of a preceding Benefit Request.** If any Cause for Termination is applicable to a Benefit Request, the following Applicants will move up in the respective ranking. The FNE shall inform the Applicants if any of the respective circumstances alters the ranking of their application, and will make available to the respective interested party or parties a new Marker indicating that. In addition, the period for the submission of the Benefit Request shall resume for the Applicant following the party whose Request was not successful.

## **E) BENEFIT REQUEST**

48. **Benefit Request.** A party interested in obtaining any of the Benefits of the leniency program must file a Benefit Request, pursuant to the terms set forth in paragraph 51.

49. **Period within which to file a Benefit Request.** The period set forth in the Marker for submitting the Benefit Request will not, as a general rule, exceed 50 days in the case of collusive agreements of a national or domestic scope, or 100 days in the case of cross-border or international cartels. This term may be extended if the Applicant files a request in this regard prior to the expiration of the original term, and the FNE considers such an extension necessary. The Benefit Request can be submitted at any time between the issuance of the Marker and the expiration of the term established therein, or any extension thereof, at the Applicant's discretion.

50. **Late filing of the Benefit Request.** If the Benefit Request is not submitted within the allotted time period, the process shall be terminated and the Marker shall be automatically rendered void, with the Applicant thus losing its place. The interested party may request a new Marker, in which case its place in order of preference will be linked to the date of submission of the new Marker Request.

51. **Content of the Benefit Request.** In its Benefit Request, the Applicant must, in full detail:

- (1) Describe the conduct to which the Benefit Request refers;
- (2) Describe the industry or market within which the conduct takes place;
- (3) Make the statements indicated in paragraph 53;
- (4) Provide the documents and information necessary for proving the conduct and its participants, as per the terms of paragraphs 54 and 56, and specify any information that has already been provided during the process, and;

- (5) Identify the legal persons of its business group, and current and former officers, employees, advisors and/or agents that the Applicant wants to include in the Benefit Request, pursuant to paragraphs 15 and 17.

52. **Verbal Benefit Request.** In qualified and exceptional cases, duly and previously authorized by the FNE, the Applicant may submit its Benefit Request verbally and even in the English language. In such cases, the Application must still contain all of the information detailed in paragraph 51, including the submission of the documents and information described in number 4 of that paragraph. The verbal Benefit Request may be recorded by any means capable of producing conviction, and any such record will remain in possession of the FNE, without prejudice to the Applicant's right to request a copy of the same. In addition, at the conclusion of this process, minutes containing basic information will be drafted and signed by the Applicant.

53. **Statements to be made by the Applicant in its Benefit Request.** In its Benefit Request, the Applicant must state:

- (1) That it understands that it must fulfill the requirements to which it will be subject if any such benefit is granted, and that it accepts each and every one of the terms of these Guidelines;
- (2) That the information provided is precise, truthful and demonstrable;
- (3) That it shall refrain from disclosing the leniency application until the FNE has filed a complaint or ordered the investigation to be archived, or until the FNE has expressly authorized the Applicant to disclose it;
- (4) That as of the date of the Benefit Request, it has ceased any participation or involvement in the conduct;
- (5) That it will cooperate with the FNE during the investigation and before the TDLC, also undertaking to assist and cooperate in any subsequent criminal investigation and procedure, if any, and;
- (6) That it has not been the organizer of the unlawful conduct, coercing the other parties into participating in the same.

54. **Information in support of a Benefit Request.** In order to be granted the requested benefit, the Applicant must provide to the FNE precise, truthful and demonstrable information, that represents an effective contribution to satisfy the standard of proof required to sustain a complaint before the TDLC, such as:

- (1) Documents or information that refer to the existence of and participation in the collusive conduct, including negotiations or mechanisms for coordination or monitoring, compensation or any other act of execution of the conduct that could

directly or indirectly provide evidence of violations to article 3, letter a), such as, minutes of board of directors meetings, assembly minutes, travel documents, notepads, commercial papers, circulars, minutes of negotiations or meetings, calendars, letters and e-mails, written communications, phone logs, phonographic and/or audiovisual recordings;

- (2) Data storage devices, such as, *inter alia*, desktop computers or laptops, flash drives, telephone equipment or other technological devices, or access to e-mail accounts used by officers, employees, advisors and/or agents of the Applicant or of third parties, that have been directly or indirectly involved in the collusive conduct;
- (3) The FNE may request the Applicant to conduct – either directly or through a reputable external firm – searches of electronically stored information, in which case the Applicant undertakes to submit to the FNE all of the information resulting from such searches related to the violation. The Leniency Officer may request the inclusion of certain keywords and/or documents in the search, and/or that such searches be conducted in the presence of members of the Leniency Team;
- (4) Declarations by the Applicant's officers, employees, advisors and/or agents, who have participated in the challenged conduct or who possess any pertinent information conducive to ascertainment of the facts;
- (5) Studies, reports, statistics, databases or other information that refer to the industry or market within which the acts occurred, or which refer to and establish the facts being disclosed, or which provide supplementary or contextual information regarding the collusion, and;
- (6) Generally, any other indicia or information that is adequate for establishing the existence of collusion or for justifying the exercise of any of the powers set forth under article 39 letter n).

55. **Standard of information required from the Applicant.** For the purposes of determining whether or not the information supplied by the Applicant provides an effective contribution for the investigation, as set forth by article 39 bis, the FNE shall take into consideration various factors, such as:

- (1) If the Applicant is a natural or legal person;
- (2) The level of participation or involvement of the Applicant in the collusive conduct;
- (3) The fact that the collusive conduct is the object of an ongoing FNE investigation, opened prior to the Applicant's initiation of the procedure, and;
- (4) The national or international nature of the cartel.

56. **Suitability of the information provided to be submitted in trial.** All information that the Applicant submits within the context of the Benefit Request shall be suitable to be submitted in trial, complying with the following requirements:

- (1) Language and format: All documents and background information must be submitted either in Spanish or English. Documents in another language must be translated. Notwithstanding the foregoing, the FNE shall request that the Applicant submits a translation into Spanish of all documents submitted in English when those documents must be provided to courts of competent jurisdiction. The costs of all translations will be borne by the Applicant.

The documents must be submitted in physical and/or digital format (for example, Word, Excel, PDF, TIFF), in accordance with the instructions issued by the Leniency Team;

- (2) Thoroughness: The FNE must be able to use the information during the investigation and potential judicial procedure to investigate and establish the existence of the collusive conduct, and the information must be complete and reliable;
- (3) Confidentiality or reserve: The Applicant shall draft public versions of the documents and background information provided when the FNE so requests it. In those, the Applicant must redact only the information covered by the grounds for reserve or confidentiality of article 39, letter a). In all events, the redactions must allow the reader to understand the context and basic contents of the document. The FNE may review the quality of the redactions and assess their sufficiency for the purposes of complying with the regulatory and jurisprudential standards established by the TDLC. If the FNE considers the redactions to be excessive, the Applicant must provide new public versions that comply with the criteria established by the FNE. The FNE may submit to the TDLC public versions that it considers appropriate if it rejects the public versions offered by the Applicant;
- (4) Originals and copies: The documents attached to the Benefit Request must be originals, unless the Applicant provides justification for, and the FNE accepts, the filing of copies;
- (5) Transcriptions: In the case of interviews recorded by audio systems during the course of the leniency process, the FNE may require the Applicant to assume the costs related to the transcription of the same, as well as those of a certifying official verifying that the original and the public version of the transcription are faithful representations of the original audio registry. In those cases, the transcriptions and public version shall remain in the possession of the FNE, without prejudice to the Applicant's right to request copies thereof;

- (6) Authorship: In the case of information drafted by the Applicant, it must explicitly identify the author of the document, its date and the sources of information used in it, if possible, and if applicable, the Applicant shall include the background information used as the basis for drafting the relevant information, and;
- (7) Legality of the evidence: The information and evidence submitted must have been obtained through lawful means. No information obtained illegally or compiled in a manner that manifestly infringes third-party rights or guarantees shall be accepted.

If these requirements are not fulfilled, the submitted information may be disregarded by the FNE and returned to the Applicant.

57. **Existence of other background information in possession of third parties.** In its Benefit Request, the Applicant may also disclose to the FNE the existence of documents, communications or background information of any nature, that could be conducive to clarifying the facts and the understanding of the market in which the conduct took place, that are not in its power or in the possession of persons related to the Applicant, but the existence of which is certain and that could be obtained by the FNE through investigatory procedures.

58. **Period for the analysis of the information.** Once the Benefit Request has been made, the FNE shall have a period of 60 days to analyze the submitted information. This term can be extended for an additional 60-day period if the FNE considers that the complexity or volume of the information, or another exceptional condition, justifies this extension.

59. **Request for clarification or additional background information.** The Leniency Team may request clarifications that considers appropriate, as well as the filing of additional background information. In that case, the Applicant shall clarify uncertain points, provide new background information or, alternately, provide grounds justifying its inability to do so, within the period set forth by the Leniency Officer.

60. **Withdrawal.** The Applicant may withdraw its Benefit Request at any time prior to the granting of the Provisional Benefit, in which case the Leniency Officer shall draft minutes evidencing this withdrawal. Once the withdrawal minutes have been executed by the Leniency Officer:

- (1) The Applicant shall lose all its rights in the process, without prejudice to the possibility of filing a new application, in which case its place in line shall be based on the Marker available on such date;
- (2) The Leniency Officer shall make available to the Applicant all the information included in the File, except for administrative documents of the File that are

specifically identified in the withdrawal minute. All copies of the information returned to the Applicant will be deleted and will not be used in current or future investigations, unless the information is obtained from an independent source, and;

- (3) The FNE officials who have been part of the Leniency Team will not be assigned to participate in any investigation related to the specific market in which the aforementioned conduct have existed, whether an open investigation had existed before the occurrence of leniency or subsequently opened in virtue of new antecedents.

## **F) REJECTION OF THE BENEFIT REQUEST**

61. **Procedure upon failure to comply with the requirements for the Benefit Request.** The Leniency Team shall inform the Applicant if it considers that any of the grounds indicated in paragraph 64 for the rejection of the Benefit Request, are applicable. If after a reasonable period, which shall be determined on a case-by-case basis, the Applicant fails to provide information that changes the Leniency Team's position regarding this matter, the latter will recommend the National Economic Prosecutor to reject the Benefit Request.

62. **Applicant hearing in the event of an unfavorable recommendation.** The Applicant shall be notified of an unfavorable recommendation made by the Leniency Team. In that act, the Leniency Officer shall set a reasonable deadline so the Applicant may request a hearing to present its arguments for the approval of its Benefit Request before the National Economic Prosecutor.

63. **Decision of the National Economic Prosecutor.** Once the Applicant has been heard, or upon the expiration of the deadline mentioned in the preceding paragraph 62, the National Economic Prosecutor shall decide whether to approve or reject the Benefit Request.

64. **Grounds for the rejection of the Benefit Request.** The National Economic Prosecutor may reject the Benefit Request, through a duly reasoned resolution, in the following cases:

- (1) If the conduct for which the benefit is requested does not constitute an offense defined in article 3, letter a), or if the Applicant denies having engaged in the same;
- (2) If there is a failure to fulfill any of the requirements set forth in paragraph 3, in the case of an Exemption Benefit request, or in paragraph 5, in the case of a Reduction Benefit request, and;

- (3) If the contents of the Benefit Request are incomplete or insufficient, in accordance with paragraph 51.

65. **Return of information in the event a Benefit Request is rejected.** Once an Applicant has been notified regarding the rejection of the Benefit Request, the Leniency Officer will make available to the Applicant all the information included in the File, with the exception of administrative documentation explicitly mentioned in the minutes drafted to this effect. All copies will be deleted and will not be used in current or future investigations, unless the information had been obtained in a different manner to the one referred on these Guidelines.

66. **Investigations in markets in which a Benefit Request was rejected.** If the Benefit Request is rejected, the FNE officials that were part of the Leniency Team shall not be designated to participate in investigations related to the specific market in which the conduct described in the Application allegedly occurred, regardless of whether there was an open investigation in place prior to the leniency application or if one is opened as a result of newly received information.

67. **New application.** The rejection of the Benefit Request shall not prevent the Applicant from submitting a new application, which will be processed in accordance with the rules set forth in these Guidelines. In such case, the Applicant shall be eligible for the benefit that is available at the date of its new Marker Request.

#### **G) GRANTING OF THE PROVISIONAL BENEFIT**

68. **Favorable recommendation.** If the Leniency Team considers that the Benefit Request fulfills the requirements set forth in paragraph 51, it will recommend the National Economic Prosecutor to grant the requested benefit.

69. **Granting of the Provisional Benefit.** Once the National Economic Prosecutor has approved the Benefit Request, the FNE will issue an Official Letter of Conformity granting the Provisional Benefit, and specifying the rights and obligations acquired by both the Applicant and the FNE, as per the terms of the approval.

70. **Contents of the Official Letter of Conformity.** The Official Letter of Conformity shall identify the persons to which the benefit will apply, the conduct in connection with which it is granted, the affected product and geographical markets, the duration of the conduct, the parties involved, and the requirements that the Applicant must fulfill to obtain the Definitive Benefit, which shall be the following:

- (1) Refraining from disregarding, rejecting or disputing the facts acknowledged before the FNE and that were subject to the Benefit Request;
- (2) Cooperating continuously and truthfully with the FNE's investigation;

(3) Refraining from disclosing the Benefit Request until the FNE has filed its complaint or ordered the application to be archived, unless the FNE has expressly authorized its disclosure, and;

(4) Putting an end to its participation in the conduct described in the Benefit Request.

71. **Amendment of the Benefit Request.** If there are appropriate grounds, the Applicant may request the clarification, extension, restriction or correction of its Benefit Request, which may be approved by the National Economic Prosecutor if there is enough merit. If the Applicant requests the clarification, extension, restriction or correction of its Benefit Request after the granting of the Provisional Benefit and said request is approved by the National Economic Prosecutor, a new Official Letter of Conformity shall be issued.

#### **H) REVOCATION OF THE PROVISIONAL BENEFIT**

72. **Failure to comply by the Applicant.** If the Applicant fails to comply with any of the requirements set forth in the Official Letter of Conformity, the Leniency Officer shall formally inform the Applicant of the situation. On that same occasion, it shall inform the Applicant that the Provisional Benefit may be revoked, so that the latter may present its arguments and information that it deems relevant within a reasonable period to be determined by the Leniency Officer.

73. **Decision of the National Economic Prosecutor.** Upon reception of the Applicant's arguments, or once the period determined in accordance with the preceding paragraph 72 has elapsed, the Leniency Officer shall make the information available to the National Economic Prosecutor, who may revoke the Provisional Benefit if any of the requirements established in the Official Letter of Conformity are infringed. Prior to any decision, the National Economic Prosecutor may grant a hearing to the Applicant if the latter so requests.

74. **Extent of the revocation.** The Provisional Benefit may be revoked with respect to both the Applicant and any of the beneficiaries identified in its Benefit Request. The revocation may apply jointly or individually as between the Applicant and other beneficiaries, affecting only the natural or legal person that fails to comply with the conditions for the approval of the benefit.

75. **Effects of the revocation.** If the FNE revokes the Provisional Benefit as to any of the beneficiaries, and if a complaint is filed, the FNE may request that the TDLC impose on the person regarding which the benefit was revoked, the sanction that would have applied if the benefit had not been granted.

76. **Preservation and use of information.** If the Provisional Benefit has been revoked, the FNE may keep in its possession the information filed by the Applicant and it may use it against it and third parties during the course of the investigation and trial. In such case, the



FNE may request the TDLC to consider that situation as collaboration for the purposes of reducing any fine, in accordance with the provisions of the final subsection of article 26.

#### **I) DEFINITIVE BENEFIT**

77. **Granting of the Definitive Benefit.** Pursuant to the provisions of subsection 5 of article 39 bis, the Provisional Benefit becomes a Definitive Benefit once the FNE files a complaint in relation to the conduct referred to on the Benefit Request.

78. **Identification of the beneficiaries.** The complaint filed by the FNE in relation to the conduct described in the Benefit Request shall identify the parties that participated in the conduct and fulfilled the requirements established in the Official Letter of Conformity, thereby enabling them to become beneficiaries of the Definitive Benefit.

79. **Duty to cooperate during the trial before the TDLC.** An Applicant that has obtained a Definitive Benefit shall faithfully and effectively cooperate with the FNE in the trial initiated because of the complaint before the TDLC and in subsequent criminal procedures, if applicable, and it shall make all necessary efforts to ensure the cooperation of its current and former officers, employees, advisors and/or representatives

#### **J) CONFIDENTIALITY OF INFORMATION SUBMITTED THROUGHOUT THE PROCESS**

80. **Duty of confidentiality of the FNE's staff.** In accordance with the provisions of article 42 and the grounds set forth in numerals 1, letters a) and b), 2 and 5 of article 21 of Law No. 20,285 on Access to Public Information, the FNE's staff shall maintain strict confidentiality regarding all information, data or documentation that they may have access to in connection with the leniency application, which may only be used in fulfilling the FNE's duties and the filing of actions before the TDLC or the courts of justice. The foregoing does not prevent the FNE from the possibility of obtaining a waiver from the Applicant in order to disclose said information to another agency of the State or any foreign or international authority.

81. **Confidentiality.** To protect the efficiency of its investigations, the FNE shall keep confidentiality regarding the existence of the Benefit Request. Such confidentiality will cease when a complaint is submitted, in which case the identity of those who have made statements or provided background information in the framework of the Benefit Request will be protected as any other information that may affect the competitive development of its holder.

82. **Protection of confidentiality in connection with requests issued by authorities or third parties.** If any national or foreign Court or authority requests access to any type of information provided by the Applicant within the context of the application for any of the

leniency Benefits, the FNE shall seek to protect the confidentiality of said information using available legal means.

83. **Waiver in the event of international cartels.** Regarding international cartels, the FNE may request that the Applicant sign a waiver regarding one or more jurisdictions in which it has requested clemency or leniency, or executed collaboration agreements regarding the same collusive conduct, in order to exempt said agencies from the confidentiality obligation with regards to the FNE in connection with such requests or negotiations, and provided that they refer to the conduct described in the application filed before the FNE.

#### **K) MISCELLANEOUS**

84. **Closing of an investigation.** If the FNE decides to archive an investigation in which a Benefit Request has been submitted or a Provisional Benefit has been granted, it will notify the Applicant in order to allow it to withdraw its request. In such case, and if the Applicant so requests it, the Benefit Request and all information submitted with it shall be returned and all copies shall be destroyed. The report and resolution recommending and ordering to archive the investigation will be public, but shall not refer to the submission of a Benefit Request.

85. **Interpretations and amendments to the Guidelines.** The FNE may issue duly reasoned interpretations on the application of these Guidelines, as well as grounded specifications regarding a particular case. The FNE may amend these Guidelines if it considers it necessary, and particularly if there is a legislative reform, in which case the amendments will apply to applications filed under the validity of the new Guidelines. These Guidelines are issued in Spanish and English; however, the Spanish version shall prevail for all purposes.

86. **Time periods.** The time periods in days established by these Guidelines shall be suspended on Saturdays, Sundays and holidays.

87. **Notices.** Decisions made by the National Economic Prosecutor or the Leniency Officer shall be communicated to the Applicant personally, via email or certified mail sent to the mail address or domicile provided by the Applicant for such purposes.

### III. GLOSSARY OF LEGAL TERMS AND MEANINGS

88. For the purposes of these Guidelines, the following definitions apply:

**Applicant:** Any person, natural or legal, that requests any of the Benefits, to whom some form of liability could be attributed for participating in any of the conduct set forth in article 3, letter a), regardless of the degree of intervention or role within the cartel.

**Application Meeting:** Meeting in which the Leniency Officer provides the Marker to the Applicant.

**Benefit Request:** Formal application made by the Applicant in order to obtain any of the Benefits regarding a given conduct, which includes the information on which the leniency application is founded.

**Benefits:** Exemption Benefit and Reduction Benefit, jointly.

**Cause for Termination:** Event that puts an end to the leniency process, which consists in the withdrawal of the application, the failure to file the Benefit Request within the allotted timeframe or the rejection of the Benefit Request.

**Definitive Benefit:** Exemption or Reduction Benefit, as applicable, definitely granted by the FNE, by means of the submission of a complaint before the TDLC.

**Exemption Benefit:** Benefit that is obtained by the first Applicant to contribute information to the FNE regarding a conduct established in article 3, letter a), which consists in the exemption from: (i) the sanction of compulsory dissolution of a legal entity established in article 26, letter b); (ii) the fine established in letter c) of that article, and (iii) criminal liability for the crime of collusion, as defined under article 62.

**File:** File conformed by the information provided by the Applicant and the administrative acts performed by the FNE regarding the leniency process.

**Hypothetical Enquiries:** Enquiry directed to the Leniency Officer, in order to find out if the Benefits are available regarding a violation that has occurred within a given, without the need to identify the interested party. Market

**Leniency Officer:** The FNE official in charge of maintaining direct communications with the Applicants and Beneficiaries, supporting them throughout the entire course of the process.

**Leniency Team:** Group of FNE officials appointed to process an application for an Exemption or Reduction Benefit.

**Marker:** Document by which the FNE informs and guarantees the Applicant the place held to obtain the Benefits with respect of a specific infraction.

**Marker Request:** Request by which the Applicant starts the leniency process, requesting that its place in the roster of applications be marked regarding a given conduct.

**Official Letter of Conformity:** Official Letter issued by the National Economic Prosecutor, which grants the requested benefit provisionally, and establishes the requirements that the Applicant must fulfill to obtain the definitive benefit.

**Provisional Benefit:** Exemption or Reduction Benefit, as applicable, provisionally granted by the FNE, by means of the issuance of an Official Letter of Conformity.

**Reduction Benefit:** Benefit that is obtained by the second Applicant to contribute information to the FNE in connection with the conduct established in article 3, letter a), which consists in: (i) a reduction of up to 50% of the fine that would have been otherwise requested; (ii) a reduction by one degree of the penalty for the crime of collusion defined in article 62; and (iii) the applicant will not be required to comply with the minimum one year of effective imprisonment established in subsection four of article 62, if the FNE's complaint involves more than two competitors, and provided that the beneficiary fulfills the requirements established in Law No. 18,216 to substitute the enforcement of penalties involving the deprivation of liberty.

