

Procedural fairness in competition enforcement The Chilean experience

Ms Marcia Pardo
Senior officer - Research and Advocacy Division
Fiscalia Nacional Economica (Competition Authority)

March, 2011

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Chilean Competition System: A brief overview

Chilean Competition System

DL No 211 Competition Act

From 1973.

Mayor amendments 2003 (creating a dual system) and 2009 (regarding leniency provisions)

Aimed to “*promote and defend the **free competition***”. Protect competition at all stages of the economic activity

Entities targeted by law: Any private or public entity could be targeted by law, without exemptions or exclusions.

Scope “... any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects...” (Art.3)

Adversarial procedures: Cartels and unilateral abusive conducts
Non-adversarial procedures: Mergers

Dual system: Enforced by the **FNE**, an independent agency. Also **private enforcement**
 Decisions are made by the **TDLC**, a separated judicial body.

Decisions can be punitive (fines), restrictive or corrective.

TDLC’s decisions can be appealed to the **Supreme Court** by the parties.

Procedural fairness

■ Two separated process

Investigation process

- Handled by the **FNE**
- Not described in the DL 211
- Internal guidelines: “*FNE’s Internal Guideline for Investigations and for Judicial Proceedings*”, issued in December 2008
- Fairness issues:
 - Transparency
 - Contact with the investigated party
 - Confidentiality
 - Due process

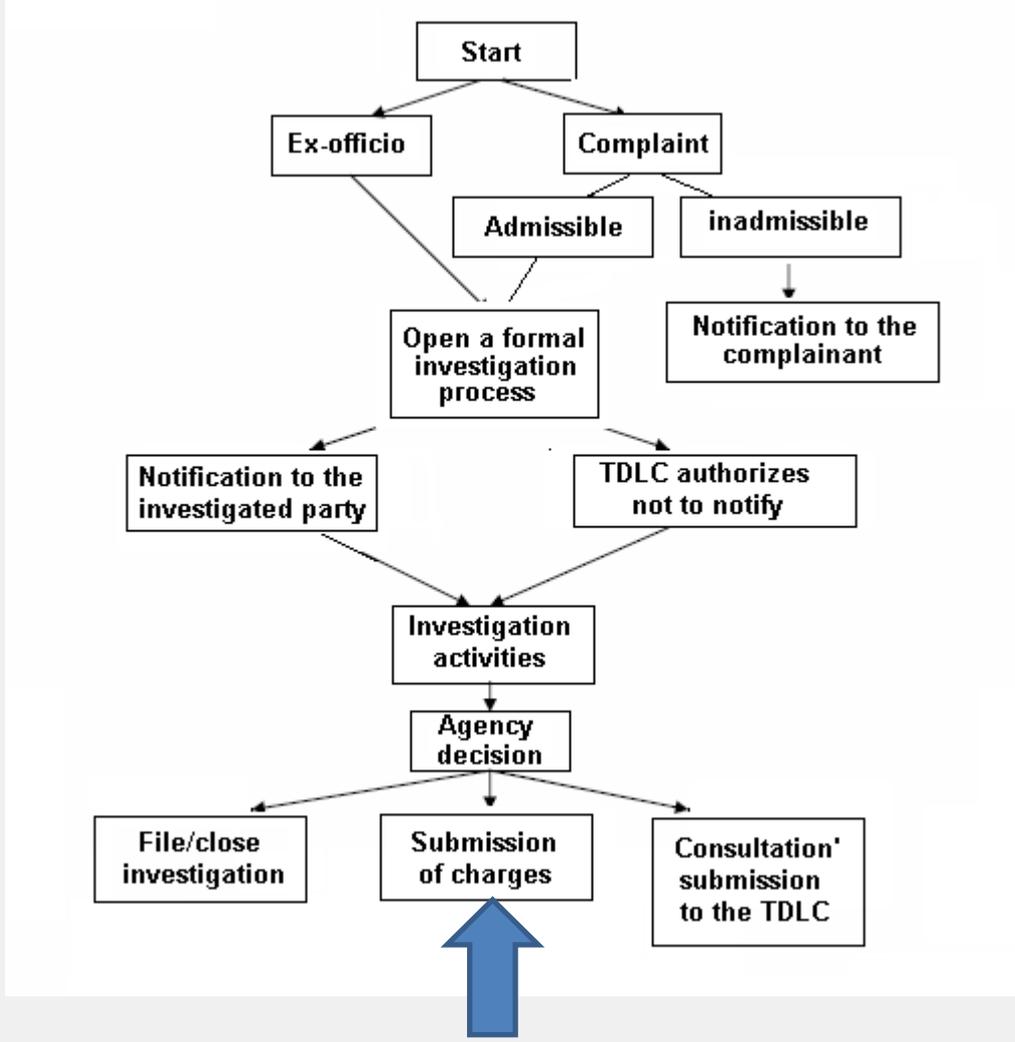
Judicial proceeding

- Handled by the **TDLC**
- Fully described in the DL 211
- Complemented by TDLC’s internal instructions (‘*Auto Acordados*’)
- Fairness issues:
 - Transparency
 - Confidentiality
 - Due process
 - ‘*Recurso de Reclamación*’

Investigation process

Judicial proceeding

Investigative processes by the FNE



Transparency

- **Political Constitution of the Republic of Chile**
CRC, Art. 8 → publicity of all public acts and decisions (very limited exceptions)
- **Law on Transparency and Access to Public Information (TA)**
Law 20,285, in force since 2009, regulates how public offices should comply with CRC
- Among others, the **FNE publishes in its website (www.fne.gob.cl) all relevant actions**, such as:
 - Internal guidelines (Investigations procedures, Mergers, Leniency)
 - Submission of charges
 - Decisions to no continue investigations
 - Interviews of the Head and Deputy Head of the agency (except those where confidentiality is requested, e.g., leniency applications)

All documents are available on line and updated on a regular basis

Contact with the investigated parties

Aimed to allowing the right to defence to the parties:

- **Notification** [Art. 39°, a)]

Parties are notified when an investigation is being conducted, exposing a general overview of the facts in the case. Exceptionally, some investigations may be restricted and parties could be not notified, prior authorization of the TDLC (e.g. cartel cases)

- **Delayed notification**

The Agency's Head may ask the TDLC's authorization to delay parties' notification of the investigation in certain cases where it may jeopardize the effectiveness of the investigation (usually is granted for 30/60 days, assessed case by case)

Contact with the investigated parties

- **Contact between the parties**

Subjects of competition investigations can meet with the agency during the investigation process (with case handlers teams and/or the Head of the agency)

- **Disclosure of information**

Investigated parties may have access to all or the some of the agency's investigation file, accordingly to TA, considering two previous filters:

* Consultation to third parties in order to protect their commercial interests: The agency must consult third parties before giving access to any information provided by them

* No disclosure of certain documents in order to protect the efficiency of the investigation: The agency's Head may declare some documents of the investigation file confidential if their publicity and/or notification and disclosure to the affected party may jeopardize the effectiveness of the investigation.

Confidentiality



- **General policy of protect confidentiality and reputation of the investigated parties** as long as it not interfere with the agency's due prosecution process
- **Treatment of confidentiality**
 - Information obtained by the FNE can be declared reserved or confidential, both *ex-officio* or by request of the affected parties. In the latter, if such motion is denied, the affected party can challenge the decision before the FNE. This is not expressly establish in DL 211, but is it a general rule that applies to all public entities.
- **Confidentiality rules for agency's officers**
 - FNE's officers must keep strict confidentiality of all information gathered as part of investigations [Art. 42°, DL 211].
 - Any infringement of such provision can be punished a criminal sanctions.

Due process / fairness

- **Request of information to the investigated and third parties** [Art. 39°, h)]

The investigated party can request reconsideration of the information requested and/or deadlines to the Head of the competition agency. Although this is not expressly established in DL 211, it is a general rule that applies to public entities.

Party also can request to the TDLC to limit, condition or invalidate the FNE's request of information if it successfully argues that harm can be derived if the request is satisfied in its terms.

- **Responses of investigated parties**

During the investigation, the investigated party do not present formal responses before the FNE. Once the charges were submitted before the TDLC by the FNE, initiating the formal judicial proceeding, the affected party can submit its formal response according to timeframe defined by law.

Transparency

- The TDLC's webpage (www.tdlc.cl) publishes all its work:
 - Final decisions and rulings
 - Intermediate decisions
 - Guidelines regarding procedures of general applications
 - TDLC's internal instructions ('Auto Acordados')

All documents are available on line and updated on a regular basis.

- **At their decisions**

- On every final decision the TDLC issues, the name of the members of the Tribunal which concurred is public.
- Dissenting votes are individualized.

Confidentiality

- During the trial, public versions must be made of all confidential/reserved documents. These public versions must have enough information available to grant an adequate legal defense.

The TDLC decides whether the public version is sufficient. If it's not, the TDLC will declare that the information be made available to the parties.



Due process / fairness

- **Submission of charges and parties' responds**
 - This procedure is regulated by the DL 211
 - The party is notified once the submission of charges is received by the TDLC.
 - A full description of the factual basis, the economic theory and relevant legal doctrines considered in the enforcement proceeding is informed to the party
 - There is a 15 to 30 days period for the party to respond the submission of charges
 - There is 20 days period to submit evidence, and 10 days period to observe the other party's evidence
 - Hearings: Parties can orally defend their cases before the TDLC
 - Any additional written evidence (such as export reports) can only be presented up to 10 days prior the hearings.



Due process / fairness

- **Incompatibilities / inabilities**

The DL 211 establishes a strict catalogue of inabilities / incompatibilities that may affect the TDLC's members



- **Decision making process**

The TDLC is legally bound to consider all the evidence gathered in the case to be decided, and must take care that the due process of law is carried on in every decision.

All involved parties have equal right to present their evidence and arguments.

Reviewing process

The DL 211 considers a special reviewing process in charge of the Supreme Court of Justice (SC).

Constitutional issues are solved by the Constitutional Tribunal.



- **'Recurso de Reclamación'** After a decision has been notified by the TDLC, any party or the agency can challenge said decision before the SC [Art. 27° DL 211].

The SC reviews TDLC's decision in broad terms such as:

- Whether due process was respected or not;
- Whether the TDLC issued a decision within the remit of its attribution;
- The factual basis of the ruling, and
- The reasonableness of the sanctions or remedies imposed

Concluding remarks

Concluding remarks

The Chilean Competition System has been built considering:

- An adequate balance between transparency and confidentiality, granting during the trial the right to defence and the business' right to the confidentiality of their strategic information.
- That the DL 211 assures that all involved parties have equal right to present their evidence and arguments.
- The premise of equality of parties in an adversarial system. The competition agency stands on an equal basis with its counterpart (the potential offender).

Creating a Competition Culture

Contact details
international@fne.gob.cl
www.fne.gob.cl