

COMPETITION ENFORCEMENT IN CHILE

FISCALÍA NACIONAL ECONÓMICA
SANTIAGO, SEPTEMBER 2013

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LEGAL FRAMEWORK

DECREE LAW 211 OF 1973 (“DL 211”)

- DL 211 is the Chilean competition statute, which was enacted in 1973 by the military regime shortly after the September 1973 coup d'état.
- Article 1 provides that it is aimed to promote and protect free competition in the marketplace. Its original wording was inspired by the Sherman Act.
- DL 211 originally created two separate types of commissions and the FNE:
 - **The Preventive Commissions** issued recommendations regarding queries submitted both by the Fiscalía Nacional Económica (“FNE”) or others.
 - **The Resolutive Commission** acted as a tribunal and could sanction anticompetitive conduct.
 - The **FNE** was established as a prosecuting entity.
- In 2003, an amendment to DL 211 replaced the commissions with the Competition Tribunal (Tribunal de Defensa de la Libre Competencia or “TDLC”), strengthened the FNE’s powers to investigate antitrust conduct, increased fines for anticompetitive conduct, and removed imprisonment as an available sanction.
- In 2009, another amendment to DL 211 gave the FNE new powers to investigate cartels (including performing dawn raids and intercepting communications), created a leniency regime, and gave the FNE the ability to reach settlements. This amendment also increased fines, particularly for cartels, and modified the statute of limitations for antitrust lawsuits.

DECREE LAW 211 OF 1973 (“DL 211”) (Cont.)

• Article 1:

“The purpose of the present law is to promote and defend competition in the marketplace. Economic activities infringing competition will be adjusted, prohibited or punished in the manner and with the sanctions provided in this law.”

• Article 3:

“Anyone who enters into or concludes, individually or collectively, any action, act or convention that impedes, restricts or hinders competition, or that tends to produce such effects, will be sanctioned with the measures provided in article 26 of the present law, without prejudice to preventive, corrective or prohibitive measures that may be applied to said actions, acts or conventions in each case.

Among others, the following will be considered as actions, acts or conventions that impede, restrict or hinder competition or which tend to produce such effects:

- a) **Express or tacit agreements among competitors, or concerted practices between them**, that confer market power upon them, and that consist of fixing selling or purchase prices or other marketing conditions, limiting production, assignment of marketing territories or quotas, excluding competitors, or affecting the result of bidding processes.
- b) The abusive exploitation on the part of an economic agent, or a group thereof, of a dominant position in the market, fixing selling or purchase prices, imposing a tie with another product, assigning market zones or quotas, or imposing other similar abuses.
- c) Predatory practices, or unfair competition, done with the object of obtaining, maintaining or increasing a dominant position.”



COMPETITION AUTHORITIES

COMPETITION AUTHORITIES

FISCALIA NACIONAL ECONOMICA (“FNE”)

- The FNE is a public service in charge of investigating and bringing actions before the Competition Tribunal.
- The head of the FNE is the *Fiscal Nacional Económico*, the National Economic Prosecutor, who is appointed by the President of the Republic for a four year term from three candidates chosen in public selection process. The Prosecutor can only be removed with cause, and after approval by the Supreme Court.
- The FNE is currently organized into four separate divisions: Administration; Mergers, Advocacy and Studies; Litigation; and Investigations. The Anti-Cartel Unit is part of the Division of Investigations.
- Investigations by the FNE may be initiated *ex officio* or following a complaint brought to its attention.
- The FNE represents the public interest before the Competition Tribunal and the Supreme Court, and has the power to file lawsuits against anti-competitive conducts.

COMPETITION AGENCIES (cont.)

TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA (“TDLC”)

- The TDLC was established by DL 211 as a specialized tribunal which hears only competition matters. It is part of the judiciary and is under supervision of the Supreme Court.
- Actions involving anticompetitive conduct may be brought before the TDLC by the FNE or by private parties.
- “Non-litigious” matters (involving some mergers, joint ventures, etc.) may also be brought before the TDLC by the FNE or those who have a legitimate interest in the matter.
- The TDLC is the entity empowered under Article 26 of DL 211 to impose sanctions for anticompetitive conduct. Available sanctions include:
 - Fines of up to approximately US\$26 million for cartels;
 - Fines of up to approximately US\$18 million for unilateral conducts;
 - Enjoining anticompetitive conduct or agreements;
 - Ordering the dissolution of corporate entities.

COMPETITION AGENCIES (cont.)

THE SUPREME COURT

- The Chilean Supreme Court may review the sanctions imposed by the TDLC in a contentious proceeding and the measures established by the tribunal after a non-contentious consultation process.



CARTEL POLICY

CARTEL POLICY

THE 2009 AMENDMENTS TO DL 211

•Prior to 2009, the FNE had limited investigative powers, which primarily involved the ability to conduct interviews and request information from those under investigation, or from third parties or government agencies.

•Law No. 20,361 of 2009 modified the law regarding powers to investigate agreements among competitors and concerted practices:

1. Increased the statute of limitations in cartel cases from 2 to 5 years. The statute does not start running while the effects of the conduct persist in the market.
2. Increased the maximum fines in cartel cases from US\$17 million to approximately US\$26 million.
3. Introduced a provision (Article 39 bis) making leniency available before the FNE files a complaint before the TDLC. Full immunity from fines and other measures is available to the first applicant, and reductions (up to 50% of the highest fine requested by the FNE) to subsequent applicants
4. The FNE was given new powers to investigate cartels.

CARTEL POLICY

NEW POWERS AVAILABLE TO THE FNE FOR INVESTIGATING CARTELS

•**Article 39 (n):**

In serious and qualified cases of investigations destined to prove conduct described in Article 3 (a) [agreements between competitors or concerted practices between them], with the authorization of the Competition Tribunal and a Judge of the corresponding Court of Appeals, the Police (uniformed or civil), under the direction of the FNE, may:

- (n.1) Enter public or private premises, raid, break and enter;
- (n.2) Register and seize all kinds of objects and documents;
- (n.3) Intercept communications; and
- (n.4) Order any telecommunications company to provide copies and registries of the communications transmitted or received by it.

CARTEL POLICY

NEW POWERS AVAILABLE TO THE FNE (Cont.)

Increased powers come with greater controls:

- Only available in serious and qualified cases, in investigations aimed at proving cartels. In the authorization process, the measures must be specified in detail, as must be the time during which they will be performed and the persons whom those measures could affect.

- Jurisdictional approval is required by the TDLC and a Court of Appeals judge who must verify the existence of precise and serious evidence gathered by the FNE regarding the existence of collusive practices.

- In the event the FNE does not comply with any of the requirements or formalities set forth in the law, the affected parties may file a complaint before the Judge of the Court of Appeals who approved the order.

CARTEL POLICY

NEW POWERS AVAILABLE TO THE FNE (Cont.)

- In June 2011, the FNE filed two complaints against cartels in the transportation sector which relied, for the first time, on information obtained through wiretapping.

- In one case, the FNE accused three bus companies of colluding to allocate and fix prices on the bus route between the capital city of Santiago and another city.

- In the other, the FNE accused four of the most important intercity bus transportation companies in the country of agreeing to block the access by other relevant competitors to terminals throughout Chile, thereby preventing or hindering them from entering at least four of the most populous cities in the country.

- In December 2011, the FNE brought a complaint against three poultry companies, Agrosuper, Ariztía, Don Pollo, and the Poultry Producers Association of Chile, for colluding to limit the production of chicken and fix prices. This was the first complaint resulting from the FNE's newly-acquired powers to search and seize objects and documents.

CARTEL POLICY

NEW POWERS AVAILABLE TO THE FNE (Cont.)

Continuing Challenges

•With respect to obtaining evidence:

- Identifying the location of evidence without a leniency applicant.
- Obtaining electronic data located on remote company servers.
- Obtaining data located in the “cloud,” perhaps in foreign jurisdictions.
- Conducting effective interrogations and interviews.

•With respect to evidence obtained:

- Extraction, analysis and organization of voluminous emails and other data.
- Chain of custody and authentication of electronic evidence in trial.
- Getting expertise to perform forensic examination of electronic evidence.

•International Cooperation.

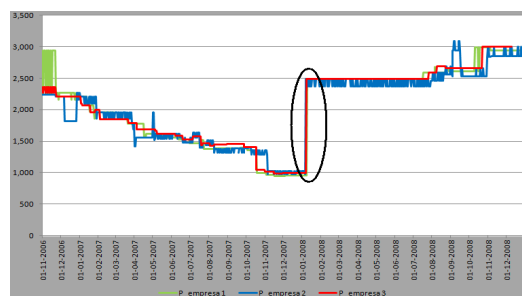
CARTEL POLICY: INITIATION OF CARTEL INVESTIGATIONS

•Most FNE cartel investigations have been initiated *ex officio* or following a complaint and not following a leniency application.

•Because of challenges in applying the leniency program, the Investigations Division has had to gather information on its own in order to request judicial authorization to perform dawn raids or intercept communications.

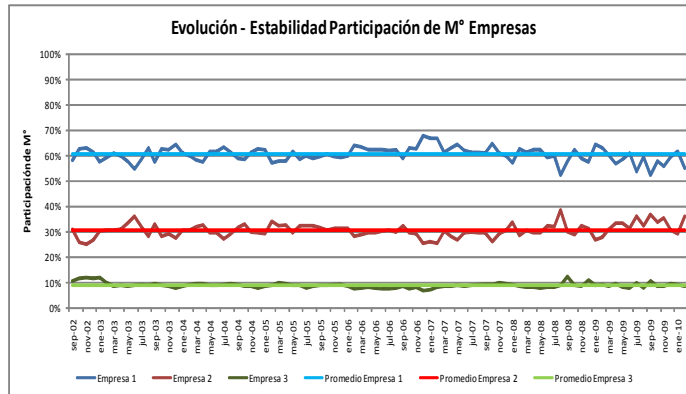
•The FNE's focus has been on market screening, which has been used to identify markets prone to collusive behavior (structural screening) and to study behavior that is not consistent with competitive behavior (conduct screening).

•The following example from the pharmacies cartel case (in which the TDLC recently sanctioned the participants) shows a simultaneous change in prices:



CARTEL POLICY: INITIATION OF CARTEL INVESTIGATIONS

- During the investigation of the poultry cartel, the FNE observed stability of market shares, which was compared to cost information and prices.



CARTEL POLICY

LENIENCY PROGRAM

- Regulation: DL 211 Article 39 bis and the FNE's "Guidelines on Leniency."
- Applicable before an action is filed with the TDLC, and at any stage of the investigation.
- Only the first applicant is eligible for full leniency, provided the applicant provides information that leads to proving the existence of a cartel and to the identification of the members of the cartel.
- Second and subsequent applicants can receive a 50% reduction in fines.
- The applicant cannot be the cartel organizer who coerced other members of the cartel.
- The applicant must cease its participation in the cartel.

CARTEL POLICY

LENIENCY PROGRAM (cont.)

- To date, the following actions have been filed following a leniency application:
 - **FNE v. Tecumseh Do Brasil Ltda. et al:** In June 2012, the TDLC fined Whirlpool US\$10 million in the first cartel case triggered by a leniency application. Tecumseh do Brasil was exempted from fines after alerting the FNE of the anti-competitive conduct and providing the required cooperation and assistance with the investigation.
 - **FNE v. Servicios Pullman Bus Costa Central S.A. et al:** This matter is currently pending before the TDLC.

