CÁMARA
CHILENO BRITÁNICA
DE COMERCIO

Doing Business in Chile
Guide 2025

COMPETITION LAW

Executive Summary

OVERVIEW: Almost a Decade Since Law 20,945: Consolidation and Changes

In this edition of Doing Business in Chile 2024, the regulatory framework of the national competition system marks the seventh anniversary from the implementation of the Law 20,945, which represents one of the most relevant legal modifications to the Chilean Competition Law.

These amendments were important because it introduced a general improvement of several aspects of Decree Law Number 211 of 1973 ("DL 211" or the "Law"), such as the new infringement hypothesis, tougher sanctions and criminal prosecution for cartelization, but also because it established several ex ante measures and assessments of concentration in markets, which has been one of the main objectives of antitrust regulation from its very beginning.

Since the implementation of Law 20,945, substantial progress has been achieved. In respect of mergers, the mandatory control system has produced favourable results. From 2017 to 2023, a total of 215 control operations were approved outright; 23 were approved with mitigation measures; and 4 were prohibited[1]. In 2024, 14 notifications have been received, with 2 cases currently under admissibility review, 3 cases in Phase I, and 1 case in Phase II[2].

Moreover, the Competition Agency, or National Economic Prosecutor's Office ("Fiscalía Nacional Económica" or "FNE"), has solidified its new powers, which include (i) the authority to initiate investigations up to one year after a merger has been executed[3], (ii) the pursuit of infringements added in Article 3 bis to date, the FNE has conducted two cases of interlocking directorates, two cases for providing false information[4], and one case regarding gun jumping[5]–, and (iii) the investigation and prosecution of breaches concerning the duty to notify direct or indirect minority holdings that exceed 10% of a compet-

1 Please refer to: https://www.fne.gob.cl/fusiones/estadisticas/

2 Please refer to: https://www.fne.gob.cl/wp-content/uploads/2024/07/Estadisticas-Division-de-Fusiones-Junio-2024.pdf

3 According to Article 48, penultimate paragraph of DL 211.

4 TDLC acoge requerimiento de la FNE contra Disney por entregar información falsa al notificar adquisición de 21 Century Fox y la condena al pago de $2.300 millones and FNE pide al TDLC multa de US$ 6,5 millones para Cadena Comercial Andina, matriz de Oxxo Chile y Ok Market, por entregar información falsa e incumplir una medida adoptada en aprobación de operación de concentración

5 FNE lawsuit Requerimiento-Minerva-JBS

itor's capital[6]. The FNE has initiated two actions against companies for such infringements[7].

The head of the FNE stated in the Public Account for the year 2024 that challenges remain: "We must continue to refine our investigative techniques, we must continue to file strong indictments and achieve exemplary convictions. We must continue to present strong exemplary sentences. We must continue to push for improvements in the application of the merger control system, and we must continue to promote in a committed manner the implementation of the recommendations we make in our market studies"[8].

This work reviews the main aspects of the Chilean Competition Law framework, including the relevant institutions and prohibited conduct, emphasizing the above-mentioned amendments. It is organized as follow: (i) organic structure, (ii) procedures, (iii) sanctions, (iv) private actions, (v) anticompetitive conduct, (vi) the obligatory merger control procedure, (vii) the prohibition of interlocking, (viii) the obligation to inform the Agency (FNE) about minority shareholdings between competitors, and more.

6 This obligation is triggered only when each involved company has revenues exceeding 100,000 Unidades de Fomento ("UF") in the last calendar year. Please refer to: https://centrocompetencia.com/que-es-empresa-competidora-para-la-notificacion-de-participaciones-minoritarias-conciliacion-fne-los-orientales/

7 Please refer to: "FNE pide multas por un total de $ 780 millones en los primeros dos requerimientos contra empresas que no notificaron su participación en competidores".

8 Free translation of part of the speech of Jorge Grunberg, Public Account of the FNE 2024: https://www.fne.gob.cl/wp-content/uploads/2024/05/Cuenta-publica-2023-2024-vf.pdf

REGULATORY FRAMEWORK: DL 211

The legal regime regulating competition in Chile is contained in DL 211, which sanctions any act or agreement that prevents, restricts or hinders competition, or that tends to produce any of the aforementioned effects.

As mentioned above, DL 211 was subject to an important modification by virtue of Law Number 20,945, which was enacted on 19 August 2016, after two years of discussion in Congress.

ORGANIC STRUCTURE

Under DL 211 the main institutions in charge of promoting and protecting competition in Chilean markets are the Competition Court ("Tribunal de Defensa de la Libre Competencia", "TDLC" or the "Competition Court") and the FNE.

I. Competition Court

The Competition Court is independent of the Government and subject to the jurisdictional control of the Supreme Court. Its main objective is to prevent, amend and punish any acts, contracts or operations which are or may be deemed to violate the Competition Law. The Court also rules on the legality of existing or proposed acts, contracts or operations.

The Competition Court is chaired by a lawyer appointed by the President of the Republic from a list of candidates prepared by the Supreme Court. The other members of the TDLC are two permanent lawyers and two economists. One of the lawyers and one of the economists are appointed by the Central Bank of Chile. The President of the Republic appoints the other two from a list of candidates prepared by the Central Bank. The TDLC has two alternate members, one lawyer and one economist. These judges can only be removed or dismissed by the Supreme Court. The members of the Competition Court hold sessions at least three times a week.

Furthermore, according to the latest modification of DL 211, the work of the permanent judges is considered full time during their appointment. Therefore, they cannot practice their corresponding professions during this period.

Pursuant to Article 18 of the Competition Law, the TDLC has the following powers and duties:

- To review, at the request of an interested party or the FNE, circumstances that might constitute violations of DL 211.
- To review, at the request of the FNE or a party with legitimate interests, non- contentious matters that may be contrary to law. These matters can be either proposed or existing facts, acts or contracts, that are not concentration operations. In any case, the Competition Court can issue conditions that must be complied with.

- To issue general instructions which are to be considered by private individuals when executing an act or a contract, in order to regulate actions that could affect the functioning of the free market[9].

- To assist legislators by proposing amendments or the elimination of legal and regulatory provisions which, in the Competition Court´s opinion, are contrary to competition. The TDLC can also propose the enactment of legal or regulatory provisions, wherever necessary, to encourage competition or to regulate the exercise of certain activities which take place in non-competitive conditions[10].

- To review, only at the request of the filing party, the appeals against the rejection of a merger notified to the FNE. This power was instituted by the recent amendment of DL 211.

- To issue internal instructions (Auto Acordados), related to procedural matters, for instance, procedural rules regarding contentious and non-contentious cases, or to regulations regarding the standards for confidentiality and reservation of the information provided in processes. This power was instituted by the recent amendment of DL 211[11].

- Any other powers and duties established by the law.

II. FNE

The FNE is an independent agency that has broad legal powers to carry out investigations and inquiries in order to represent the national interest in the defence of competition. It is chaired by the National Economic Prosecutor (Fiscal Nacional Económico), who is chosen by the President of the Republic from a list of candidates selected in a public process. It has a multi-disciplinary staff composed of 108 civil servants, most of them lawyers and economists[12].

The FNE acts independently and presents its findings to the Competition Court. The FNE can also seek injunctions and judicial rulings from the Competition Court. It also has the duty to act as an informant in those cases to which is not a party, to supervise compliance with the judgments issued by the TDLC and to arrange extrajudicial agreements with the

9 The Competition Court has issued five instructions: regulations that Municipalities must adhere to in bidding processes within the solid waste market (General Instructions No. 1 of 2006, Case NC No. 98-05, and General Instructions No. 3 of 2013, Case NC No. 409-12, which amend General Regulation No. 1-2006); in the telephony and telecommunications market, notably emphasising the imposition of limits to distinguish between the per-minute pricing of on-net and off-net calls (General Instructions No. 2 of 2012, Case NC No. 386-10, and General Instructions No. 4 of 2015, Case NC No. 423-14); and iii) in the market for Credit Card, Debit Card, and Prepaid Card Payment Systems (General Instruction No. 5 of 2022, Case NC No. 474-2020).

10 The Competition Court has issued 20 regulatory propositions, the latest being the one regarding the card payment market, in Proposition No. 20 of March 2020, Case ERN 26-18.

11 The Competition Court has issued 30 Auto Acordados regarding several matters, including confidentiality in the process before the TDLC and other procedural issues.

12 According to 2024 statistics at https://www.fne.gob.cl/wp-content/uploads/2024/05/Cuenta-publica-2023-2024-vf.pdf

economic agents under investigation.

A. *FNE Investigations*

Overall, the FNE is structured into the following divisions: Cartels Unit, Antimonopolies Unit, Merger Control Unit, Litigation Unit, Markets Studies Unit, Administration Unit, Audit Unit (ensure compliance with measures imposed), and, Institutional Relationships Unit.

In carrying out its investigations, the FNE follows its internal (non-binding) guidelines ("Instructivo interno para el desarrollo de investigaciones de la Fiscalía Nacional Económica") issued in May 2013. These instructions regulate the process, timing and other aspects of the investigations it carries out.

According to these instructions, an investigation may be initiated ex officio -by the FNE itself- or by complaint. If a complaint is presented to the FNE, the FNE carries out an admissibility test.

The FNE may decide not to initiate an investigation when: (i) the complaint relates to acts or conventions that are not or may not appear to constitute violations of DL 211, (ii) the facts must or should be known to other government agencies, (iii) the statute of limitations for the action has expired, (iv) there is not enough evidence in the facts in the accusation, or (v) if an investigation seems unjustified for other reasons.

In principle, the admissibility test cannot exceed four months, and the FNE does not indicate a specific term within which the investigation should be completed; it only indicates that the investigation must be carried out within a "reasonable term" from the date of the resolution that initiated the investigation.

During the investigation, the FNE may require information from the affected party or third parties and may also take depositions from the representatives, managers or workers of any entity, or from any person whose testimony it deems necessary for the investigation. Further, the FNE may require the assistance of any public entity in gathering the information needed.

Law Number 20,945 of 2016 introduced the possibility of imposing criminal sanctions and fines on those who impede or do not collaborate with the correct outcome of an investigation in course. In this regard, the DL 211 establishes the following sanctions:

- Up to 61-540 days of prison for supplying incorrect, false or misleading information in response to a request from the FNE. In order to apply this sanction, the FNE will send the corresponding records to the Criminal Prosecutor Office ("Ministerio Público").
- Up to 2 Annual Tax Units[13] ("Unidades Tributarias Anuales") for each day of delay, if an entity does not respond or

13 According to the Internal Revenue Service web page, https://www.sii.cl/valores_y_fechas/utm/utm2023.htm, one Annual Tax Unit for November 2024 is valued at 799,536 Chilean Pesos (approximately US $858 on November 2024). For this document, we are using de value of the US dollar informed by the Central Bank of Chile for the last trimester of 2024, that it is equal to 931,57 Chilean Pesos. Please refer to: https://si3.bcentral.cl/Siete/ES/Siete/Cuadro/CAP_TIPO_CAMBIO/MN_TIPO_CAMBIO4/

gives a partial response to a request for information.

- Up to between 1 Monthly Tax Unit[14] and 1 Annual Tax Unit for those who, with no justification, refuse to provide a statement when this is requested by the FNE.

The investigation may lead to the following outcomes:

- The filing of a claim before the Competition Court.
- A consultation before the Competition Court for a non-contentious issue.
- The reaching of an extrajudicial agreement.
- A requirement for the Competition Court to issue a general instruction, to issue a report, or to propose enactments, amendments to, or the elimination of, legal or regulatory provisions.
- The closing of the file.

The FNE may order the closing of the file when: (i) the FNE has not been able to prove the existence of acts or conventions contrary to DL 211, or participation therein, (ii) there is not enough evidence to establish a claim, (iii) there is a previous ruling of the Competition Court or other courts on the matter, (iv) there have been changes in circumstances, (v) there are reasons of efficiency and effectiveness for not persevering in the investigation, or, (vi) the matter is not relevant enough to persevere in the investigation.

B. *Special Powers of the FNE for Cartel Prosecution*

Since 2009, the FNE has had important tools for prosecuting cartels. Among these powers, it is important to highlight the following:

- To enter into public or private premises and, if necessary, raid, break in and enter.
- To register and seize all types of objects and documents that may prove the existence of an infringement.
- To authorize the wiretapping of all types of communications; and order any company that offers communications services to provide copies and records of communications transmitted or received thereby.
- To apply a leniency program.
- To file criminal actions given the occurrence of hard-core cartels sanctioned by the TDLC.

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14 According to the Internal Revenue Service web page, https://www.sii.cl/valores_y_fechas/utm/utm2023.htm, one Monthly Tax Unit for November 2024 is valued in 66,628 Chilean Pesos (approximately US $71,5 on November 2024).

C. *Leniency Program*

In 2009, Law Number 20,361 introduced a leniency program (called Delación Compensada), which was later modified in certain aspects by Law Number 20,945, by virtue of which a person involved in a cartel that collaborates with the FNE may obtain an exemption or a reduction of the sanctions specified in the Law.

According to Article 39 bis of the Law, to apply for the leniency program, the person involved in the cartel must fulfil the following requirements:

- Provide precise, truthful and verifiable information that effectively contributes to establishing sufficient evidence on which to base the complaint before the Competition Court.
- Keep under reserve the leniency program application until the FNE has filed the complaint or closed the investigation.
- Cease its participation in the cartel immediately after submitting the leniency program application.

A person applying for leniency may obtain an exemption from: (i) the dissolution sanction, (ii) the fines provided for in Article 26 of the Law, and (iii) the criminal sanctions provided for in Article 62 of the Law, when it is the first applicant that successfully provides to the FNE information that leads to the proof of the conduct and the identification of the responsible parties.

In order to obtain a reduction of (i) the fines provided for in Article 26 of the Law, and (ii) the criminal sanctions provided for in Article 62 of the Law, a person involved in the cartel, apart from complying with the requirements referred above, must provide additional information to that submitted by the first applicant that successfully qualified for the leniency program. In this event, the reduction of the fine cannot be greater than 50% of the largest fine requested for the defendants. This reduction should only be applicable to the second person that successfully qualified for the leniency.

These benefits cannot be granted to the person that organized the cartel, forcing the other members to participate in it.

In any event, the qualification for the leniency program does not protect the applicant from the damages lawsuits that may be filed by third parties.

In October 2009, the FNE published internal guidelines that regulate the leniency program. This guideline were updated in 2017[15] and it details the specific requirements for obtaining benefits and the internal procedure that regulates leniency applications.

D. *FNE's Power to Reach Extrajudicial Agreements*

Article 39, letter ñ) of DL 211 enables the FNE to reach extrajudicial agreements with the parties involved in its investigations. Nonetheless, the agreement must be approved by the Court in order to have legal validity[16].

15 "Internal Guidelines on Leniency in Cartel Cases", 2017.

16 On 2023, the FNE had come to 8 extrajudicial agreements approved by the TDLC. https://www.fne.gob.cl/wp-content/uploads/2024/05/Cuenta-Publica-FNE-Borrador-publico-.pdf

E. *Other Powers of the FNE*

Under the legal modifications introduced into DL 211 by Law Number 20,945 of 2016, the FNE also has the following attributions:

- To establish thresholds and receive merger filings by virtue of the new obligatory notification merger regime.
- To open sector inquiries regarding the competitive evolution of specific markets.
- To propose to the President, through the corresponding Ministry, amendments or the elimination of legal and regulatory provisions which, in the FNE's opinion, are contrary to competition. The FNE can also propose, by virtue of an investigation or sector inquiry, the enactment of legal or regulatory provisions, wherever necessary, to encourage competition or to regulate the exercise of certain activities which take place under non-competitive conditions.
- To dictate Internal Guidelines.

F. *FNE's Guidelines and Advocacy Documents*

Before the legal attribution to dictate Internal Guidelines, established in the recent amendment to DL 211, in the context of the framework of FNE's competition advocacy role, this institution had already launched some Internal Guidelines (Guías or Instructivos) which provide guidance and instruction regarding relevant issues.

Although these Guidelines are not binding for either the Competition Court or for the Supreme Court, they inform the market about the interpretative criteria of the FNE. The FNE has issued the following Guidelines:

- Leniency Program Guidelines of 2009.
- Horizontal Merger Guidelines ("Guía Interna para el Análisis de Operaciones de Concentración Horizontal") of 2012.
- Internal Guidelines for Carrying Out Investigations ("Instructivo Interno para el desarrollo de investigaciones de la Fiscalía Nacional Económica") of 2013.
- Development of Market Research ("Guía Interna para el Desarrollo de Estudios de Mercado") of 2017.
- Interposition of Complaints for the Crime of Collusion ("Guía Interna para la Interposición de Querellas por el Delito de Colusión").
- Applications for Fines ("Guía Interna para Solicitudes de Multa de la Fiscalía Nacional Económica") of 2019.

In addition to the issuance of these Guidelines, the FNE has launched some Advocacy Documents ("Materiales de Promoción") which address certain subjects for the purpose of promoting competition. The FNE has issued the following Advocacy

Documents:

- Trade Associations ("Asociaciones Gremiales") and Competition of 2011.
- Public Procurement ("Compras Públicas") and Competition of 2011.
- Forestry Activities ("Actividades Silvoagropecuarias") and Free Competition of 2011.
- Competition Compliance Program ("Programa de Cumplimiento de la normativa de Libre Competencia") of 2012.
- The Public Sector and Competition ("Sector Público y Libre Competencia") of 2012.
- Vertical Restraints Guidelines ("Guía para el Análisis de Restricciones Verticales") of 2014.

III. Supreme Court

The Supreme Court is the last institution that comprises the Chilean antitrust system. It has the power to review the decisions of the Competition Court when an appeal is presented.

The Supreme Court is divided into four Chambers, and it may also review certain issues by a plenary session of its judges. Antitrust cases are reviewed by the Third Chamber, which review constitutional and administrative matters.

PROCEDURES

In general terms, DL 211 establishes two types of procedures before the TDLC: contentious and non-contentious procedures. Both are explained with further detail below.

I. Contentious Procedures

A contentious procedure is an adversarial and jurisdictional procedure. It is designed to: deal with potential offences against competition; determine their effects on the market; and correct, prevent, and if necessary, punish them.

The FNE or any other party with a legitimate interest may use the contentious procedure to file a claim with the Competition Court for any action which is deemed to be contrary to antitrust law, such as collusion, abuse of a dominant position, predatory practices, unfair competition, or any fact, act or convention which impedes, restricts or distorts free competition, or which tends to produce such effects.

The main features of the contentious procedure are as follows:

- The FNE or any individual or corporate entity, public or private, with a legitimate interest, may file a claim. The defendant has 15 days to respond to the claim. This term can be extended by a maximum period of 30 days by the Competition Court.
- Any person with a legitimate interest may participate in the procedure as a related third party.
- Once the response has been filed by the defendant, or the period for responding has elapsed, the Competition Court grants a 20-day term to submit the evidence. Afterwards, the parties attend a hearing, and the Competition Court must rule on the matter within 45 days after it has issued a decision stating that all procedures have been complied with and the case is ready for a final ruling.
- The judgment may either dismiss the claim or apply one of the measures or sanctions established in Article 26 of the Law.

However, in practice, the average duration of contentious procedures, from the filing of the claim until the decision of the Competition Court, is over two years (763 days)[17]. If a ruling is appealed at the Supreme Court, this adds approximately one more year.

II. Non-Contentious Procedure

The Law also establishes a non-contentious procedure, in which the parties involved in an actual or proposed act or contract, or any person with a legitimate interest in the transaction, may ask for the decision of the Competition Court. When filing this consultation, the parties are required to suspend the implementation of the transaction.

Besides the consultation regarding any act or contract that can affect competition, the non-contentious procedure may apply to the issuance of general instructions or reports by the Competition Court, or to the proposal of enactments, amendments or the elimination of legal or regulatory provisions.

The main features of this procedure are as follows:

- Any person with a legitimate interest may file the consultation.
- Any person with a legitimate interest can present arguments in connection with an operation which is being reviewed by the Competition Court. Although the Law refers to a "legitimate interest", it does not define what this means.

17 According to statistics provided by Centro de Competencia Universidad Adolfo Ibáñez ("CeCo") at ¿Cuánto tardan las autoridades chilenas de Libre Competencia en emitir sus decisiones? | CeCo (centrocompetencia.com)

- After the FNE and the interested parties have submitted their arguments to the Competition Court, it will issue a resolution calling for a public hearing to be held no sooner than 15 days and no later than 30 days from the service date of the resolution. A notice regarding the hearing will be published in the Official Gazette and on the web site of the Competition Court.
- Ex officio -by virtue of the FNE- or at the request of any party, the Competition Court may procure and receive the evidence deemed pertinent.
- The Competition Court must issue a decision following the hearing in which it determines the conditions that must be met in the actions, acts or contracts.

This non-contentious procedure is relevant because of the "guarantee" set out in Article 32, which establishes that "acts or contracts executed or performed in accordance with decisions of the Competition Court shall not create any liability in this matter, except where subsequently, and on the basis of new evidence, they are deemed to be against free competition by the same court (...)".

In practice, the duration of a non-contentious procedure usually takes around 432 days[18]. If a ruling is appealed at the Supreme Court, this adds approximately one more year.

III. Outcomes of both Procedures

The normal way of ending a contentious or non-contentious procedure is with the decision of the Competition Court. Nevertheless, there are different ways to end a procedure besides a final decision. For example, a non-contentious procedure may end because of the voluntary dismissal of the parties. Further, a contentious procedure may end by means of a conciliation agreement or compromise settlement (Avenimiento or Transacción), if they are approved by the TDLC.

IV. Appeals

In general terms, whether in a contentious or non-contentious procedure, the parties may appeal the Competition Court's final decision through a named Recurso de Reclamación. This special kind of appeal must be filed with the TDLC and directed to the Supreme Court within 10 days, aiming to reverse the TDLC's decisions. This appeal is also applicable to resolutions approving conciliatory agreements, final judgments resolving damage claims, and resolutions concluding non-contentious procedures or against judgments resolving the substance of special review appeals.

18 According to statistics provided by CeCo, at ¿Cuánto tardan las autoridades chilenas de Libre Competencia en emitir sus decisiones? | CeCo (centrocompetencia.com)

In addition to the "Recurso de Reclamación", it is relevant to note that Law also provides a "Recurso de Revisión Especial" against FNE's decisions that prohibit a concentration operation. This appeal is filed directly by the transaction's parties with the TDLC within 10 days.

Finally, the "Recurso de Queja" has been used to request the Supreme Court to amend serious errors or abuses committed by the TDLC Ministers when deciding contentious or non-contentious proceedings. This appeal has overturned decisions of the FNE and the TDLC, for example, the case of health insurance providers, where both the Prosecutor's Office and the Competition Court prohibited a merger. On 2023, the Supreme Court overturned the decision of the FNE and the TDLC, who prohibited the merger between two health insurance providers (Isapre Nueva MasVida, and Isapre Colmena). This generated a controversy on the degree of deference that the Supreme Court has to have with the Competition institution[19].

SANCTIONS

I. General Sanction Regime

According to Article 26 of the Law, the TDLC may adopt the following sanctions:

- The amendment or termination of the acts, contracts, agreements, systems or arrangements which are contrary to law.
- The amendment or dissolution of a corporation or other private-law entity involved in the acts, contracts, agreements, systems or arrangements that do not comply with free competition law.
- The imposition of fines on the legal entity, its directors, managers and any other person involved in acts against the provisions of DL 211.

According to the provisions established in the context of Law Number 20,945 of 2016 amending DL 211, the TDLC can impose fines, following the rules described below:

- Fines may be up to the equivalent of 30% of the infringer's sales of the products or services associated with the conduct during the period of the infringement or up to double the economic benefit resulting from the infringement.
- If it is not possible to determine the amount of sales or economic benefit obtained by the defendant, the TDLC may impose a fine of up to 60,000 Annual Tax Units[20].

19 Please refer to: https://www.fne.gob.cl/corte-suprema-acoge-recurso-de-queja-y-revierte-decision-de-tdlc-y-fne-aprobando-con-medidas-de-mitigacion-la-concentracion-entre-las-isapres-nueva-masvida-y-colmena/ and CeCo | Fallo de la Corte Suprema sobre fusión de Isapres (centrocompetencia.com)

20 Approximately US $51,5 million on November 2024.

If the fines are imposed on a legal entity, the directors, managers and those persons who knowingly participated and benefited with the infraction may be jointly liable. When setting the fine, the TDLC can consider the economic benefit obtained as a result of the violation, the severity of the conduct, the deterrent effect, the recidivism of the offender over the last ten years, the economic capacity of the infringer, and the collaboration of the later with the FNE before or during the investigation.

II. Special Sanctions

In addition to the general regime, there are special sanctions in our competition system:

- If a party has failed to notify a merger, the TDLC can impose a fine of up to 20 Annual Tax Units[21] per day, for each day of delay from the materialization of the transaction.
- Those who unjustifiably fail to appear to testify, having been previously summoned by the FNE, shall be fined an amount ranging from One Monthly Tax Unit to One Annual Tax Unit[22].
- Those who, in order to hinder, divert, or evade the exercise of the powers of the FNE, conceal information requested by the Prosecutor's Office or provide false information, shall incur the penalty of minor imprisonment, between 61 days to 3 years.
- Those required to respond to information requests made by the FNE and unjustifiably fail to respond or respond only partially shall be fined an amount up to Two Annual Tax Units for each day of delay[23].

III. Special Sanctions for Hard Core Cartels

One of the main aspects of Law Number 20,945 of 2016 amending DL 211, is the introduction of an additional and special regime of sanctions in the case of hard core cartel cases.

In the case of an agreement that involves competitors, involving the fixing of purchase or selling prices, the limitation of production, the sharing of market quotas or zones, or the rigging of bids, the TDLC can also prevent the infringers from celebrating contracts with the State or prevent them from being awarded any infrastructure concessions by the State.

Furthermore, in the cases mentioned above, the FNE can file a complaint before criminal courts once the cartel has been corroborated by the TDLC, seeking the following sanctions:

- Imprisonment of up to between 3 years and 1 day and 10 years.
- Disqualification from acting as director or from managing corporations or trade associations.

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21 Approximately US $17,1 thousands on November 2024.

22 According to the Monthly and Annual Tax Units conversion of November it ranges approximately from US $71,5 up to US $858.

23 According to the Annual Tax Units conversion of November the value is approximately US $1,716 per day.

PRIVATE ACTIONS

To compensates for the damages resulting from infractions against the Competition Law declared by virtue of a TDLC decision, the affected persons may present a civil claim before the same TDLC requesting compensation of damages. This TDLC trial will be subject to the general rules governing a summary procedure (*Procedimiento Sumario*).

When deciding on damages, the TDLC will base its decision on the facts that were established in the prior decision of the same court. Regarding class and collective actions, the Competition Law does not regulate this issue, and it is not clear whether these suits may be based upon decisions of the Competition Court.

However, some recent precedents have arisen in connection with this matter. For instance, in January 2017, CMPC -a tissue paper company- applied for leniency following its participation in a cartel and entered into an agreement with the Chilean National Consumer Agency (*Servicio Nacional del Consumidor*) to repay consumers approximately the 78% of the benefit obtained during the conduct, amounting to USD 150 million[24]. Moreover, in 2020, a similar agreement was reached by a group of pharmacies that were convicted of collusion[25].

STATUTE OF LIMITATIONS

The standard statute of limitations period is three years from the execution of the anticompetitive conduct on which it is based. This statute of limitations is interrupted by a complaint submitted by the FNE or a lawsuit filed by a private party and presented before the TDLC.

However, regarding cartels, the statute of limitations is five years, and the term is not initiated while the effects attributable to the conduct that gave rise to the legal action persists in the marketplace.

ANTICOMPETITIVE CONDUCT

LEGALLY PROTECTED INTEREST

The Law states in its Article 1 that it aims to promote and protect free competition. The above has been complemented by the Supreme Court, which held that although the legally protected interest is freedom of competition, the final goal of the

24 According to the SERNAC web page at Mediación colectiva del papel tissue logra inédito e histórico acuerdo de más de 97 mil 500 millones de pesos. - SERNAC: Noticias

25 Please refer to: Indemnización por colusión del "Caso Farmacias" | CeCo (centrocompetencia.com).

antitrust law is to promote efficiency and, thereby, ensure the consumers welfare[26].

GENERAL RULE

The Law establishes a general rule about conduct that is contrary to free competition and broadly defines this.

Article 3 states that "*Any person who enters into or executes, individually or collectively, any action, act or convention which impedes, restricts or hinders competition, or which tends to produce such effects, will be sanctioned with the measures mentioned in article 26 of the present law, notwithstanding preventive, corrective or prohibitive measures that may be applied to these actions, acts or conventions in each case*".

Therefore, any conduct may eventually be contrary to DL 211 if it produces or could produce effects counter to free market competition[27].

SPECIFIC CONDUCT

After the broad definition of anticompetitive conduct, the Law provides four examples to illustrate the definition:

- Agreements among competitors, or concerted practices between them, which have the purpose of fixing purchasing or selling prices, limiting output, allocating market zones or quotas, or affecting the result of bidding processes, as well as the agreements and concerted practices that, conferring market power to them, have the purpose of determining commercial conditions or excluding actual or potential competitors.
- The abusive exploitation by a business or by a conglomerate of businesses under a common controller, with a dominant market position, by way of fixing purchasing or selling prices, tying product sales, assigning areas or allocating market quotas, or imposing similar abusive practices.

26 Supreme Court decision, Case No. 2578-2012, about the collusion of the Pharmacy chains.

27 Accordingly, a claim may be filed based on the provision of this general rule. This was the case when the FNE challenged before the Competition Court the merger between two cinema chains, and requested divestiture actions and fines for the seller and acquirer. (FNE Case No. 240-12. Lawsuit of the FNE v. Hoyts Cinema Chile and others). As the merger had already been closed by the parties without prior consultation, the FNE in its lawsuit categorized the conduct as a violation of the general rule. Moreover, it explained that "it is possible to conceive as a behaviour contrary to freedom of competition all facts, acts or conventions which harm or endanger free competition, such as merger operations".

- Predatory or unfair competition practices carried out for the purpose of reaching, maintaining or increasing a dominant position.

- Interlocking directorates and common officers between competitors.

Due to the broad categories of transactions that may infringe or violate the provision of free competition as defined by the Law, a more refined and precise definition of the acts and operations that actually infringe the Law has, over the years, evolved through the judgments of the free competition regulatory bodies.

I. Collusion and Other Horizontal Restrictions

The Supreme Court has defined collusion as "*a situation created by certain economic agents in a given market, through agreements which adversely affect competition and lead the agents not to compete or at least diminish the existing competition in order to increase their benefits and/or affect a third party*"[28].

Our jurisprudence has consistently held that collusion is the most serious and harmful illicit behaviour against competition[29]. As the Supreme Court explains: "*of all behaviour which undermines competition, collusion constitutes the most reprehensible and the most serious, inasmuch as it involves the coordination of anticompetitive behaviour among firms*"[30].

According to the Law and our jurisprudence, the elements that constitute the illicit behaviour of collusion are as follows.

A. *Agreement*

In order for there to be collusion, there must be an agreement among competitors. This agreement may be express or tacit, written or oral, of instant or delayed execution, formal or informal.

Collusion has been classified as express and tacit, according to the type of agreement. There is explicit collusion when competitors maintain direct communications with each other and agree to fix prices or carry out other illegal conduct. In other words, competitors create a cartel.

There is less certainty about what constitutes tacit collusion. Even though the FNE has submitted claims accusing the defendants of tacit collusion, the Competition Court has never handed down a conviction in these cases[13]. Nonetheless, while the distinction between tacit and express collusion is relevant for its accreditation, there is no difference in the treatment given by the authorities regarding the fine, statute of limitations or other aspects.

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28 Supreme Court decisions, Case No. 2578-2012, "FNE v. Farmacias Ahumada S.A. and others" and Case No. 7600-2022 "FNE v. FAASA Chile Servicios Aéreos Ltda. y otra".

29 Similarly, decisions C-119 of 2012, 94 of 2010, both of the TDLC. Supreme Court decision, Case No. 1746- 2010 and Case No. 9361-2019.

30 Supreme Court decision, Case No. 10954-2011.

B. *Purpose of the Agreement*

The anticompetitive agreement should generally aim to do one or more of the following:

- Fix prices.
- Limit output.
- Allocate market zones or quotas.
- Exclude competitors.
- Affect the result of bidding processes.

C. *Result of the Conduct*

The anticompetitive agreement, as the Law explains, must impede, restrict or hinder competition or tend to produce these effects; therefore, conduct which does not produce actual effects may also be punished.

It is important to point out that, after the modifications introduced to the DL 211 by Law Number 20,945 of 2016, the agreements or concerted practices among competitors whose purpose is fixing purchasing or selling prices, limiting production, allocating market zones or quotas, or affecting the result of bidding processes are treated as per se infringements, given the fact that the plaintiff does not need to prove that the agreement conferred market power to the defendants.

Conversely, in relation to agreements or concerted practices among competitors whose alleged purpose is to establish commercial conditions or exclude actual or potential competitors, the plaintiff needs to prove that the agreement conferred market power to the defendants.

D. Examples of Collusion Cases

- TDLC decision No. 179 of 2022 "*FNE v. FAASA Chile Servicios Aéreos Ltda. y otra*". Faasa (today *Pegasus South America Servicios Integrales de Aviación SpA*) and Inaer, two helicopter companies for fighting forest fires colluded between 2006 and 2013, affecting public and private bids for forest firefighting. The TDLC imposed fines together amounted to 7,000 Annual Tax Units ("UTA", approximately USD 6 million) and 60 UTA (approximately USD 50,000) to each of the executives involved. The Competition Court also ordered the dissolution of the trade association. The Supreme Court confirmed the decision. Case No. 7600-2022.
- TDLC decision No. 171 of 2019, "*FNE v. CCNI S.A. y otras*". The Chilean shipping companies *Compañía Sudamericana de Vapores* ("CSAV") and CMC (formerly CCNI), the Korean company *Eukor* and the Japanese companies *K-Line, Mitsui O.S.K. Lines Ltd.* ("MOL") and *Nippon Yusen Kabushiki Kaisha* ("NYK"), colluded in a series of contracting processes ("accounts") for the maritime transportation of automobiles, carried out by the manufacturers

or consignees of different brands, for their commercialization in the Chilean market. The TDLC convicted only three of the defendants: CSAV, MOL, and NYK. The Supreme Court partially confirmed the decision of the TDLC. The fines applied to the defendants totalled 40,116 UTA, equivalent to USD 30.5 million.

- TDLC decision No. 139 of 2014, "*FNE v. Agrosuper and others*". The three main Chilean producers of poultry, and the trade association they formed, were accused of collusion to limit output. The Competition Court verified the existence of the agreement and convicted the three poultry companies, applying fines that ranged from UTA 12,000 to UTA 30,000 (approximately between USD 10 million and USD 24 million). The Competition Court also ordered the dissolution of the trade association. The Supreme Court confirmed the decision[31].

- TDLC decision No. 119 of 2012, "*FNE v. Farmacias Ahumada and others*" . The three most important Chilean pharmacy chains (*Farmacias Ahumada*, *Salcobrand* and *Cruz Verde*) were accused of collusion to increase the price of several drugs. During the process, the FNE and *Farmacias Ahumada* reached an agreement whereby the latter recognized its conduct and paid USD 1 million[32]. The Competition Court verified the existence of the violation and convicted *Cruz Verde* and *Salcobrand* to pay the highest fine allowable at that time under applicable law: UTA 20,000 each (approximately USD 19 million). The Supreme Court confirmed the decision[33].

- TDLC decision No. 113 of 2011, "*FNE v. Abercrombie & Kent S.A. and others*". The Competition Court rejected the FNE's claim against several tourism agencies, which were accused of colluding for the purpose of increasing the fees that one client (a hotel) should pay for commercializing its services[34]. The Supreme Court revoked the judgment by establishing that collusion is punishable only for its existence as long as it has the ability to impede, restrict or hinder competition[35].

- TDLC decision No. 63 of 2008, "*FNE v. Almacenes París and Falabella*" . The FNE and Banco de Chile accused the defendants *Almacenes París* and *Falabella* -two large retailers- of colluding with each other for the purpose of pressing their suppliers of technology articles not to participate in a technology fair organized by Banco de Chile. The Competition Court applied the highest fine at that time: UTA 8,000 (approximately USD 7,700,000) for Falabella and UTA 5,000 (approximately almost USD 5 million) for *Almacenes París*. The Supreme Court rejected the retailers appeals but agreed to lower the fines by 25%[36].

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31 Supreme Court decision, Case No. 27181-2014.

32 It is important to note that, at that time, the leniency program was not regulated in our legislation.

33 Supreme Court decision, Case No. 2578-2012.

34 The Competition Court held that, even though the agreement was proved, due to the lack of market power of the defendants and the lack of evidence of concrete actions of the defendants by which they actually pressed their client, the claim had to be rejected.

35 Supreme Court decision, Case No. 10954-2011.

36 Supreme Court decision, Case No. 2339-08.

II. Abuse of Dominant Position

DL 211 sanctions "abusive exploitation by a business or by a conglomerate of businesses under a common controller of a dominant market position". As it is clear from the text, a dominant position is not illegal per se, but the abuse of such a position is.

The Law does not define the term "dominant position" and does not specify a particular threshold of market share that may constitute dominance, but case law has established certain criteria, e.g., the number of companies in the relevant market, the company's market share, entry barriers to the market, size of the company, price-cost relationship of the company, relationship with suppliers and distribution channels, elasticity of demand, substitutability in supply, ability to fix prices, etc.

A very useful reference in this regard is the non-binding Guidelines for the Analysis of Vertical Restrictions issued by the FNE in June 2014, in which the FNE suggests that it will only perform investigations on alleged vertical restrictions if the market share of both the seller and the buyer involved in the restraint exceeds 35%[37].

Through the jurisprudence of the TDLC and the former antitrust commissions, a conceptualization of some conduct that constitutes abuse of a dominant position has been developed. However, considering that there is no exhaustive definition of this practice, the following examples refer only to some of the most important types of abuses that our courts have reviewed.

A. *Arbitrary Discrimination*

This may be defined as treating similar transactions differently, without objective justification based on the transaction. Based on the above, the jurisprudence of the Competition Court has stated that there is no arbitrary discrimination, for instance, when conditions are "general, uniform, objective, reasonably necessary to meet their objectives and are available upon request"[38].

A common type of discrimination is through price discrimination, which means charging different prices under similar conditions or equal prices under different conditions. The Competition Court has held that this practice distorts competition when discrimination is not based upon a valid economic justification[39].

B. *Refusal to Deal*

Jurisprudence of the TDLC has explained that refusal of sale must be understood in a broad sense, as an "exclusionary be-

37 "Guía para el Análisis de Restricciones Verticales" FNE, June 2014, available at https://www.fne.gob.cl/wp-content/uploads/2017/10/Gu%C3%ADa-Restricciones-Verticales-1.pdf

38 TDLC decision, No. 51/2007.

39 Supreme Court decision, Case No. 125433 of 2020. The Supreme Court upheld the appeals filed by a series of banking institutions -Banco Bice, Banco Internacional, Banco Security, Banco Scotiabank and Banco Itaú- against the decision of the TDLC that rejected the claim of these banks against Banco Estado for arbitrary discrimination in the charge for the receipt of bank transfers, together with other unilateral allegations. The Court ordered Banco Estado to set a single fee for interbank transfers.

haviour of an unjustifiable refusal to enter into contracts, abusing a dominant position"[40].

Specifically, the Competition Court has noted that "*the refusal to deal constitutes a competitive constraint when it denies another actor in the market (i) free access on equal terms with its competitors, (ii) the supply of goods and services that are essential to the exercise of their economic activity*"[41].

The Competition Court has set out the conditions that must be met in order to constitute an illegal refusal to deal[42]: (i) that the conduct affects the firm's ability to act or continue to act in the market because it was unable to obtain, on normal commercial terms, the inputs necessary to carry out its business, (ii) a lack of competitiveness among the suppliers of the goods or services which are refusing to deal, (iii) that the affected firm is willing to accept the commercial terms generally established by the supplier with its clients, inasmuch as such acceptance necessarily imposes the obligation to sell or supply what is demanded, (iv) when there is no valid justification.

A landmark case in this regard is Decision No. 104 of 2010, in which the FNE accused the three main Chilean mobile network operators of refusing to provide wholesale network access offers to mobile virtual network operators (MVNOs). In the first instance, the Competition Court rejected the lawsuit based on the fact that at the date in which the lawsuit was filed by the FNE, the MVNOs allegedly affected by the refusal to deal had not obtained the necessary public concessions to operate in the mobile telecommunications market. However, this decision was later revoked by the Supreme Court, based on the circumstance that the absence of these concessions was not a valid justification to deny the said offers[43].

C. *Tied Sales*

When a supplier with a dominant position in the market imposes the commercialization of one product or service tied to the purchase of another product or service, this may constitute an abusive practice.

This conduct has been analysed and sanctioned by the TDLC in regard to the telecommunications market in the context of a case against a dominant firm that conditioned the sale of broad band internet to the provision of a telephone service[44].

Nevertheless, bundled sales may be offered if the products or services are commercialized separately as well, so that the consumers are able to accept the joint offer freely and voluntarily.

D. *Price Fixing and Price Suggestion*

40 Supreme Court decision, Case No. 16 of 2005, and 47 of 2006.

41 Ibidem.

42 TDLC decisions, No. 19-2006, 64-2008, 88-2009, 124 -2012 and 129-2013.

43 TDLC decision, Case No. 7781-2010.

44 TDLC decisions, Case No. 97-2010 and Case No. C 135-2007.

The suggestion of prices must be understood as a practice whereby the supplier provides a recommended price, which is not binding for the client.

By contrast, price fixing occurs when the supplier imposes a price on the distributor, who must sell the product at the price set by the supplier. Thus, we can distinguish between (i) fixing maximum resale prices, and (ii) fixing minimum resale prices.

In this regard, it is also necessary to take into account that while, in principle, the suggestion of prices carries no anticompetitive effects, the FNE has estimated that when the suggestion is accompanied by price incentives or pressure on suppliers, distributors or any other party involved in the business, aimed at obtaining the effective compliance thereof, then it becomes, in practice, resale price fixing, which may constitute a restriction to competition, unless it is proved that the efficiency that motivates that practice may not be obtained by other less damaging means[45].

Additionally, the FNE has pointed out that the suggestion of prices by suppliers may facilitate horizontal price agreements at the retail level. On 2009, the FNE filed a lawsuit against the main Chilean supermarket chains accusing them of coordinating through their common suppliers in order to conclude a hub-and-spoke conspiracy to fix the price of fresh poultry[46].

E. *Discounts*

Discounts from suppliers to consumers and distributors are a common practice in commercial relationships. Nevertheless, discounts may sometimes constitute an infringement of competition rules because of their potential exclusionary effects on the market.

In 2018, a lawsuit was filed by the private postal operator, *Envía Limitada*, against the public postal company *Correos de Chile* ("Correos"), for having carried out practices of abuse of dominant position and unfair competition in the market of mail services, by making discounts. The TDLC sentenced Correos to pay a fine of 6,000 UTA (approximately US $5,1 million) for unfair competition practices and abuse of dominant position. However, the Supreme Court overturned the conviction and acquitted the defendant. Anticompetitive behaviours were not established, and it was also not proven that the discounts offered by Correos compelled corporations to remain loyal to it[47].

In "*FNE v. Compañía Chilena de Fósforos*"[48], the defendant, a firm which produces and sells matches and which holds a market share of at least 80%, was sanctioned for creating artificial barriers to entering the market by applying discounts to its clients on the condition that they offer only that company's products.

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45 In this regard, Resolution of the FNE dated 30 December 2011, related to an investigation for price fixing in the appliances retail market.

46 TDLC decision, Case No. 304-2016.

47 Please refer to: Multa de más de 5 millones de dólares impuesta a Correos de Chile se deja sin efecto por la Corte Suprema. - Diario Constitucional

48 TDLC decision, Case No. 90-2009.

According to case law, discounts should be objective and uniform, related to the sale itself, and should not refer to elements whose consideration could lead to situations of privilege[49].

In this regard, the Competition Court and the former antitrust commission[50] have established that discounts can be applied to the extent that they are comprehensive and non-discriminatory (extended to all those who qualify within a specific situation), reasonable (no percentage has been explicitly set, but must have economic rationality), objective (based on objective assessment parameters that deter possible arbitrariness) and public (can be known by buyers)[51].

Additionally, it is important to highlight that the FNE has entered into settlements with companies involved in several relevant markets (i.e. detergents, ice creams, soft drinks, etc.), by virtue of which the defendants committed to refraining from agreeing to exclusivity discounts, retroactive discounts and, in general, rebates conditioned to the exclusion of actual or potential competitors[52].

III. Predatory Practices and Unfair Competition

A. *Predatory Pricing*

In general, pricing is said to be predatory when a business establishes a below-cost price with the aim of eliminating or disciplining a competitor, with the intention and ability to recoup its losses later.

In the TDLC decision No. 78 of 2008, "*GPS Chile v. Entel PCS*", the Competition Court held that predatory pricing occurs when: (i) the defendant has sufficient market power in the relevant market or markets, so that such a position would have provided a reasonable expectation of recovering short-term losses in the future, and (ii) that the defendant has actually offered its goods or services below cost for a period of time that has enabled it to displace its competitors. Given that the defendant did not have a dominant position in the relevant market, among other reasons, the Competition Court rejected the claim.

Notwithstanding the above, the Supreme Court, reviewing Decision No. 39 of 2006, "*Quimel v. James Hardie*", revoked the judgment of the Competition Court, which had considered that there was no predatory pricing due to the lack of dominant position on the part of the defendant. The Supreme Court considered that, as Article 3, letter c) of the Law establishes that in order to be anticompetitive, predatory practices should be carried out for the purpose of reaching, maintaining or increasing

49 Preventive Commission, decision No. 753 of 1991.

50 The TDLC had two predecessors, the Preventive Commission and the Resolution Commission.

51 Preventive Commission, decision No. 620-1987. Resolutive Commission, decision No. 258 of 1987. TDLC, decision No. 12-2006.

52 FNE's lawsuits: Case No. 249-2013 (FNE v. Unilever), Case No. 230-2011 (Trendy v. Nestle Chile) and Case No. 221-2011 (FNE v. Embotelladora Andina and Coca-Cola Embonor). Please refer to: Descuentos por Fidelidad [Concepto, Efectos y más] | CeCo (centrocompetencia.com)

a dominant position: "*To find a practice to be predatory, it is not necessary for the one who carries out the conduct to have a dominant market position, since one of its objectives is precisely to achieve this condition precisely because of not having it*"[53]. It remains to be seen if this case is still good case law in Chile.

B. *Unfair Competition*

The Unfair Competition Law (Law Number 20,169) indicates in its Article 3 that in general terms, an unfair competition action is any behaviour contrary to good faith or morality that, by unlawful means, aims to divert clientele from a market agent.

1. Conduct

In general terms, the main types of unfair competition conduct sanctioned by Chilean law are the following:

a. Misappropriating Third Party's Reputation

The imitation of trademarks constitutes a conduct that limits or hinders the proper functioning of the market: (i) when it might generate confusion among consumers, either directly, when people buy the imitation product believing they are buying the authentic product, or by association, when people buy the imitation product believing that it is produced by the same company as the authentic product, or (ii) when the imitation involves taking unfair advantage of the reputation or the efforts of others[54].

b. Discrediting Actions

Generally associated with sending letters and advertising aimed at discrediting the capacity or characteristics of a competitor's product or service without a reliable basis.

In general terms, according to the relevant case law, any communication addressed to customers or the general public that is intended to question the quality, authenticity or other characteristics of a competitor's product must be based on accurate background data that is verifiable, reliable and objective[55].

Jurisprudence has allowed the defendant to prove the contrary in some lawsuits filed against acts to discredit the competition[56].

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53 Supreme Court decision. Case No. 3449-2006.

54 Preventive Commission, decision No. 1156. Amended by decision No. 643, of the Resolutive Commission, but regarding the definition of misleading acts, nothing was changed.

55 In this respect, decision No. 1236 of the Preventive Commission ruled on the lawsuit "Laboratorios Recalcine vs, Glaxo Laboratories" and decision No. 10 of 2004 of the TDLC.

56 In this regard, decision No. 816 and 1169 of the Preventive Commission.

c. Comparative and Misleading Advertising

The former antitrust commissions have consistently held that comparative advertising is useful for competition, as it contributes to market transparency. Furthermore, it is beneficial for the consumer, as it reports on the performance of certain products and also, enables a new product to penetrate into the market where there are already established producers of similar goods that have consolidated prestige. However, for such publicity to be in accordance with the competition rules, the publicity must be truthful, objective and demonstrable[57].

The Competition Court has stated that misleading advertising occurs when "*the information contained in the advertisement is false or misleading, it refers to one of the characteristic features of the product or service advertised, and must achieve, or aim to achieve, a significant effect in determining the purchase or rental of goods or services, inducing consumers mistakenly to purchase a product that, in the absence of such advertising, they would not have acquired*"[58].

Unfair Competition Law in its Article 4 letter e), allows comparative advertising, provided that the information on which the comparison is based is truthful and demonstrable, and furthermore in compliance with this Law. It is important to note that notwithstanding the above, Article 4 of the Unfair Competition Law indicates a series of non-exhaustive unfair competition practices that businesses must avoid, including any conduct that: (i) improperly takes advantage of the reputation of others, (ii) is perpetrated to confuse its own goods or services with others, or (iii) uses distinctive signs or commercial establishments that can be confused with those of others. This Article also includes: (i) the diffusion of false assertions that lead to errors about the real advantages provided by a good or service, (ii) the undermining of another company's reputation, (iii) the use of expressions aimed at ridiculing another business without any objective reference, and (iv) the abusive exercise of legal actions for the purpose of hindering the operation of another business, among other similar practices described in this Article.

2. Remedies

The Unfair Competition Law establishes several specific remedies, which can be jointly or separately filed with the civil court:

- Injunctive relief to put an end to the infringing act, or a restraining order if it has not yet been put into practice.
- A declaration that the act constitutes unfair competition, if the harm done by the act still exists.
- Removal of the effects of the act, by means of the publication of the condemnatory decision or other appropriate means.

57 Preventive Commission, decision No. 1039 of 1998.

58 TDLC decision, Case No. 58-2007.

- Compensation for damages caused by the act, in accordance with the general law on damages applicable in Chile.

3. Applicable Law

In Chile, acts of unfair competition can be punished either by the Competition Law or by the Unfair Competition Law.

Article 3 letter c) of the Competition Law punishes unfair competition conduct whose purpose is to reach, maintain or increase a dominant position. The Competition Court may review this conduct.

In 2007, the Unfair Competition Law was enacted, seeking to create a new and diverse legislation from DL 211, aimed at dealing with unfair competition practices under the jurisdiction of civil courts. Notwithstanding the above, considering that Article 3 letter c) of the Competition Law was left untouched, unfair competition practices whose purpose is to reach, maintain or increase a dominant position remained under the jurisdiction of the Competition Court. The Unfair Competition Law sets forth some specific rules regarding this matter. Its Article 1 indicates that conduct can be qualified as an unfair competition practice according to the Unfair Competition Law, although it can also be judged by the Competition Court when it is pertinent to do so. Therefore, a defendant who enjoys a dominant position may force a lawsuit at the civil courts for unfair competition and an antitrust lawsuit for the same conduct at the TDLC.

IV. Interlocking Directorates and Common Officers

According to Article 3 letter d) of the Law, no person may, at the same time, serve as a director or relevant officer in any two firms that are competitors.

This prohibition only applies if the corporate group of each of the companies involved in the interlocking achieved annual revenues that exceeded 100,000 *Unidades de Fomento*[59] (approximately US $4 million) over the prior calendar year.

Provided that this condition is met, this situation will be considered an infringement only when after 90 days from the end of the calendar year in which the referred threshold was exceeded, the interlocking still remains in place.

In 2021, the FNE filed two suits for interlocking against some Board´s member of[60]: (i) *Banco de Chile, Banco Consorcio*, and

59 According to the Internal Revenue Service web page, https://www.sii.cl/valores_y_fechas/uf/uf2023.htm "Unidad de Fomento" for November 2024 is value in 37,972 Chilean Pesos (approximately US $40,76 on November 2024).

60 On October 2024, the FNE signed an extrajudicial agreement with Mr. Manfred Paulmann, for a case of interlocking. He was member of the board of directors at Cencosud at the same time as a relevant executive at Asesorías Alpa, two competing companies in the convenience stores market. The agreement forces Paulmann and the companies under investigation to make payments for the benefit of the tax authorities amounting to a total of $1,200 million Chilean Pesos, of which Paulmann will assume $50 million; Asesorías Alpa, $280 million; and Cencosud, $870 million, and to adopt a series of measures to safeguard free competition in the market and ensure that the conduct is ended. This agreement must be approved by the TDLC.

Banco *Falabella*, and (ii) *Banco Consorcio* and *Larraín Vial*. Both actions arose from an *ex officio* investigation initiated by the FNE in September 2019, on the structural links existing in the financial and banking industry[61]. In case (i), the FNE claimed that the individual involved was member of the board of directors at the same time holding a significant executive position in competing companies. In case (ii), Juan José Hurtado served as a director in two competing companies. Both cases are still waiting for the sentence of the TDLC.

MERGER CONTROL

As mentioned above, one the fundamental amendments introduced to DL 211 was the implementation of an obligatory merger filing system under the FNE administration.

In general terms, the mechanism follows main international standards in the matter, establishing a filing procedure before the FNE, with a possibility of appealing before the TDLC in specific cases, which will be detailed below.

OBLIGATORY MERGER NOTIFICATION SYSTEM

The merger regime establishes two requirements under which it is understood to be obligatory to file a merger before the FNE, prior to its materialization.

I. Fulfilment of the Concept of Concentration between Entities

Article 47 considers concentration between entities as any situation, act or convention, or a set of these, that causes two or more entities not forming part of the same economic group and formerly independent of each other, to cease to be independent in any scope of their activities, in any of the following ways:

- By merging, in any form of corporate structure the merging parties may have or in any form the resulting merging entity takes after the merger.
- When one or more of them acquires, directly or indirectly, rights that enable, individually or together, the exercise of decisive influence on another entity.
- By associating by any means in order to form an independent, separate entity, in order to function permanently.
- When one or more of them acquires control over the assets of a third entity by any means.

61 FNE lawsuit, Rol No.2582-19. Los debates en torno a los requerimientos de la FNE por casos de interlocking | CeCo (centrocompetencia.com)

For these purposes, DL11 considers an entity to be any economic agent or part of an economic agent, whatever the form of legal organization or even if this is lacking, that offers or demands goods or services. Furthermore, the Law considers an entity to be any sort of tangible or intangible assets, or both, that enable products or services to be offered or demanded.

II. Fulfilment of Thresholds

A second requirement, in addition to the one above, is that the concentration operation must produce effects in Chile, and fulfil the following conditions:

- Total sales reached in Chile by the entities that plan to concentrate during the last commercial term before the notification are similar or superior to the amount established in the threshold determined by the National Economic Prosecutor in the corresponding administrative resolution.

- That separately, in Chile, at least two of the entities that plan to concentrate, have had sales during the last commercial term before the notification, for an amount similar or superior to the one established in the threshold determined by the National Economic Prosecutor in the corresponding administrative resolution.

On 25 March 2019, the FNE issued *Resolución Exenta* No. 157[62], by which the authority established the corresponding thresholds: i) joint sales: 2,500,000 UF (approximately US $98,7 million); and ii) separate sales: 450,000 UF (almost US $17,7 million)[63].

This obligation to jointly file the concentration before the FNE is applicable in respect to all the parties in the operation. Third parties may not notify the FNE in regard to a certain merger.

According to Article 48, those concentrations that do not fulfil the threshold requirements, may make a notification voluntarily by the entities that plan to concentrate, under the same procedure described below.

III. The Notification before the FNE Suspends the Materialization of the Operation

Article 49 establishes that once an operation is filed, it is understood to be suspended. Therefore, parties may not proceed to its materialization until it is given full clearance by the FNE or the TDLC, depending on the particular procedure it followed.

IV. Notification Procedure before the FNE

Following international merger control standards, the new regime comprises a Two-Phase investigation before the FNE, as detailed below.

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62 Please refer to: https://www.fne.gob.cl/wp-content/uploads/2019/03/Resoluci%C3%B3n-exenta-157.pdf

63 The resolution indicates that the threshold must be calculated with the value of the last report of the "UF" of the last year, this is 36,789 Chilean Pesos on December 2023. These values we have to use for November 2024.

A. *Filing Completion before the FNE*

Once the notification has been filed to the FNE, the authority will have 10 working days to determine if the file is complete, meaning that it complies with all the requirements of DL 211 and the Regulation ("*Reglamento*").

Once these 10 working days have elapsed, the following four scenarios may occur:

- If the notification is complete, the FNE will initiate the investigation (Phase I) and will communicate the administrative resolution to the interested parties. If the FNE does not communicate this resolution, the investigation will be initiate fully-fledged.
- If the notification is not complete, the FNE will give the notifying parties the opportunity to correct the errors or omissions in the filing, within a term of 10 working days. This amended version will be a new version of the notification, for all legal purposes.
- If the notification is not complete and it is not corrected in 10 working days, it is considered not filed.
- If the FNE does not communicate the completion of the notification within the term of 10 working days, it is legally assumed that the investigation entered to Phase I, as from the day following the end of this term.

B. *Phase I*

Within 30 working days from resolution that opens the investigation, the FNE may do one of the following:

- Approve the operation, without remedies, if the FNE understands that the operation does not substantially restrict competition.
- Approve the operation, with certain remedies, if the FNE understands that under their application the operation does not substantially restricts competition.
- Extend the investigation up to a maximum of 90 additional working days, if the FNE considers that with or without the remedies offered by the party, the operation could still restrict competition.

Once this term has elapsed without a decision by the FNE, it is understood that this operation has been approved under the conditions proposed by the applicant party.

The publication of the administrative act that declares the extension of the investigation, according to the last option described above, enables any interested third party, including suppliers, competitors, clients or consumers, to submit any documentation and allegations within the following 20 working days.

C. *Phase II*

During Phase II, the administrative docket is public, notwithstanding the possibility for the FNE to order that certain parts of the same should remain confidential.

Within the term of 90 working days, the FNE may do one of the following:

- Approve the operation, without remedies, if the FNE understands that the operation does not substantially restrict competition.
- Approve the operation, under certain remedies, if the FNE understands that under their application the operation substantially restricts competition.
- Reject the operation, if the FNE concludes that the operation substantially reduces competition.

Once again, once the term mentioned above has elapsed without a decision by the FNE, it is understood that this operation has been approved under the conditions proposed by the applicant party.

V. Appeals

Against the resolution that rejects the operation, the notifying parties may submit an appeal ("*Recurso de Revisión Especial*") before the TDLC within 10 days.

VI. Revision of the Appeals by the TDLC

Once an appeal is submitted, the TDLC will set a date for a public hearing, from the date of reception of the administrative docket by the Competition Court. In this public hearing, the filing parties, the FNE and the third parties that participated in the administrative investigation, may give their final oral statements. After the public hearing, the TDLC has 60 days to come to its decision, which could follow one of the alternatives below:

- Approve the operation without remedies.
- Approve the operation with the last remedies proposed by the FNE in the administrative investigation.
- Approve the operation with other remedies set by the Competition Court.
- If the TDLC upholds the FNE decision of prohibited the operation, the parties can only submit an appeal when the TDLC establishes further remedies to those lastly proposed by the parties to the FNE.

VII. Specific Conduct against Merger Control

An important issue addressed by the recently instituted regime refers to the legal establishment of strict liability situations in Article 3 bis of DL 211 by which the TDLC can impose the sanctions detailed in article 26 of DL 211 (as explained above):

- Infringement of the obligation to file a merger according to the rules analysed above.
- Infringement of the prohibition to materialize the transaction once the merger has been filed before the FNE.
- Infringement of the remedies established in an approved merger.
- Materialization of a transaction that has been blocked by the FNE, TDLC or Supreme Court.
- Filing a merger submitting false information.

If an entity acts in any of the aforementioned manners, the FNE may initiate a contentious procedure in order to prosecute the infringer before the TDLC. As mentioned above, since 2017, there have been two cases of interlocking, two for providing false information, and one for gun jumping.

VIII. Obligation to inform about minority shareholding participation

Although not directly related to merger control, as an additional measure in order to map out concentration in the different markets in Chile, the DL 211 included the obligation to inform the FNE of any acquisition by a company or by any entity within the same group of companies, of a direct or indirect holding of more than 10% of the capital of a competitor (acquisition of a non-controlling shareholding in a competitor).

This event is to be informed to the FNE within 60 days from the acquisition of the holding. This obligation only applies if both the acquiring company (or its corporate group) and the target company reached annual revenues that exceeded 100,000 *Unidades de Fomento* (approximately US $4 million) over the prior calendar year. The FNE has published a form in order to comply with this obligation[64].

On 2020, the FNE filed a suit against *Sociedad de Inversiones Los Orientales Limitada*, because the company breached its obligation to notify its participation of more than 10% (15.98%) in the ownership of *Plásticos Eroflex S.A.*, despite complying with the sales established by law. The company and the FNE achieved a conciliation agreement and paid a penalty of over US $100,000 for tax benefit[65].

64 Available at: https://www.fne.gob.cl/fne-habilita-nuevo-formulario-on-line-para-informar-participacion-en-empresas-competidoras/

65 Please refer to: FNE acuerda el pago de $ 100 millones a beneficio fiscal con empresa que no notificó su participación en la propiedad de un competidor

IX. Faculty of investigation ex post

The FNE has the possibility to initiate an investigation up to one year after a merger has been materialized. One case is the FNE's action against the maritime transport company *Navimag Carga S.A.* for monopolizing the *Puerto Montt-Chacabuco* maritime route through the acquisition of the Coyhaique vessel from *Naviera GyT S.A.* (the only cargo ship competing on that route). According to the FNE, this acquisition would have restricted free competition by increasing incentives to unilaterally raise prices or reduce the available supply on the route[66].

66 Please refer to: Requerimiento FNE contra Navimag y la pregunta por el control ex post de fusiones | CeCo (centrocompetencia.com).