CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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CONTRIBUTION FROM CHILE

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ORGANISATION AND FUNCTIONS OF ENTITIES IN CHARGE OF THE DEFENSE OF FREEDOM OF COMPETITION IN ECONOMIC ACTIVITIES

1. General Aspects

Decree Law No. 211 of 1973, with its subsequent amendments, created diverse organisations in charge of the prevention, correction and repression of commercial practices that might harm freedom of competition in economic activities.

These agencies are:

1.1. The Economic National Prosecutor’s Office.
1.2. The Resolutory Commission
1.3. The Central Preventive Commission, and
1.4. The Regional Preventive Commissions

2. Economic National Prosecutor’s Office

The Economic National Prosecutor’s Office is a regulatory agency, which is autonomous and independent, with its own patrimony and legal status; it is decentralised and related to the Government by means of the supervision of the President of the Republic via the Ministry of the Economy, Development and Reconstruction.

As regards its internal organisation, each regional capital has a Regional Prosecutor who reports to the National Prosecutor and carries out his functions within the jurisdiction of the territory of each respective region.

The Prosecution Office has been structured like a juridical and technical team, so its members can act together with the Resolutory and Preventive Commissions. At present it has a permanent staff spread out along the country, which includes lawyers, engineers and economists.

The public authority of the Office is related to the regulation and control of economic activities, from the point of view of competition in the development of these activities.

In general, its areas of competence relate to two main duties:

2.1. It provides services of a juridical and economic nature related to the protection of freedom of competition in economic activities, in which it investigates anticompetitive activities of economic agents and market structures and proposes to the Preventive or Resolutory Commissions, whichever the case may be, the measures to be taken to prevent, correct and/or penalise attacks against freedom of competition and abuses of a dominant position or monopolistic practices, resulting from the accusations and inquiries made by authorities or private individuals, without prejudice to the normal duties of the Prosecution Office in accordance with its legal powers.
In this area, the Prosecution Office investigates markets and reports to the corresponding Commissions, or requires them to take the corrective or penalising measures that correspond in each case, in accordance with their legal faculties.

Consequently, the Prosecution Office carries out the following basic and permanent functions:

- It carries out investigations into attempts against freedom of competition and other economic crimes in accordance with the law. In this sense, it can act by virtue of its authority, by accusation, or by inquiries made by authorities, companies and the general public.

- It informs and advises the Resolutory and Preventive Commissions in the cases they are trying, and enforces the fulfilment of their rulings.

- It co-ordinates the work of the Central and Regional Resolutory and Preventive Commissions, and of the 12 Regional Prosecution Offices, in addition to representing public economic interest before the Supreme Court, before other Ordinary Courts of Law and the Resolutory Commission.

In those cases in which the Prosecutor brings charges before the Competition Tribunal, known as Resolutory Commission, he acts as prosecutor defending economic public order, with all the powers conferred to him by law.

2.2. It is also important to describe the work carried out by the Public Prosecutor in relation to advisory and technical and administrative support to the Preventive and Resolutory Commissions respectively, as the law has not provided these commissions with their own administrative infrastructure. The Prosecution Office provides these services in accordance with the express legal mandate in this area, without prejudice to the faculties of the Prosecution Office regarding the protection of the rulings and decisions of these Organisations.

In the exercise of these advisory functions to the Resolutory Commission, which are different from those of his role as accusatory party in representation of the general interest, the Prosecutor acts as a specialised collaborator of this Court, to which he provides technical assistance in the administration of justice.

In the exercise of his powers, the Economic Prosecutor is absolutely independent from the authorities or courts of law before whom he acts, and can defend the interests he is protecting in the way he deems legal, in accordance with his own appreciation, and in accordance with the express terms of the law.

As can be seen, the role of the Prosecutor is different and separate from that of the Commissions, all of which fulfil their functions with complete autonomy, which in no way contradicts the due interdependence that exists in the exercise of their respective functions, as can be seen from the fact that that Prosecutor’s actions can put into motion the administrative activity of the Preventive Commissions, or the jurisdictional activities of the Resolutory Commission; at the same time the Preventive Commissions can ask the Prosecution Office to investigate acts against freedom of competition or those which could constitute an abuse of a dominant position, and the Resolutory Commission on its part, can order the National Prosecutor to ask the State Attorney’s Office to exercise penal action in connection with crimes established by law.

In short, according to the established legal system, the Prosecutor investigates and proposes to the Commissions determined measures to protect freedom of competition in the markets, while the
Commissions give a definite ruling regarding these or other measures they deem legal, owing to the fact that these Commissions have the power to decide on these matters.

3. **Resolutory Commission**

The Resolutory Commission, presided by a Supreme Court Magistrate, is the special Court of Law in charge of the coercive correction of attempts against freedom of competition and of penalising guilty parties with the fines and other measures established by law. In addition, as established in that legal corpus, it is in charge of supervising the adequate application of the legal terms of Decree Law No. 211 of 1973, and the correct performance of the Commissions, by issuing the pertinent instructions.

The Resolutory Commission has ample powers, the jurisdictional functions of which it exercises by means of procedures ruled by law. It can try cases on its own authority or as a response to a request of the Prosecutor’s Office dealing with any situation considered anticompetitive and can, in view of those requirements, undertake independent investigations, with the ampest of faculties, including the use of law enforcement personnel.

When treating these cases of a litigious nature, it can adopt some or all of the following measures: declare null and void all proceedings, systems, arrangements or agreements considered anticompetitive; it can cancel the legal status of any Corporation or order the dissolution of any juridical person in general (commercial associations, for example); it can also declare that persons involved in these legal proceedings are unable to occupy posts of professional or union representation for periods ranging from one to five years; it can order fines for a maximum of 10,000 tax units (Unidades tributarias), and finally, can order penal actions for the investigation and penalisation, by ordinary courts of justice, of the penal crime of attempting against freedom of competition.

The Resolutory Commission can also demand that public authorities modify the legal or regulatory provisions it considers contrary to freedom of competition, and in certain specific cases, there exist a number of special laws that give the Commission power to inform on the competition conditions of certain markets, especially for the effects of regulating or fixing prices.

In its capacity as maximum organisation within the system, the Resolutory Commission has the directive and correctional jurisdiction over all the Preventive Commissions, and its rulings are subject to the jurisdiction of the Supreme Court, so that all affected parties, the Public Prosecutor included, can file diverse appeals.

4. **The central Preventive Commission**

For the Santiago Metropolitan Region, this Commission, presided by a representative of the Ministry of the Economy, Development and Reconstruction, has the same functions and powers of the Regional Preventive Commissions.

Furthermore, it must deal with all those cases that are national in character or that refer to more than a single Region.

These Preventive Commissions do not have the objective of imperative penalisation or correction of any situation pertaining to freedom of competition in economic activities; their objective is to inform, to issue reports and establish the means to be used so that private individuals and State organisations can face situations that affect freedom of competition in those activities, be it on the request of the Prosecutor or in
reply to requests and claims, or those that the Commissions, under their own authority, consider that are affecting freedom of competition.

Exceptionally, and on the request of the Prosecutor, the Commissions may suspend, over a maximum period of 15 days, the application of agreements that might restrict freedom of competition; they can also fix maximum prices for certain products or services over the same period, while they conclude the investigation. These measures can be renewed for another 15 days.

The functions of these entities are essentially preventive and consultative in nature and their rulings lack the legal mandate of the rulings of the Resolutory Commission.

Contrary to the Resolutory Commission, these Preventive Commissions are administrative bodies that do not exercise jurisdiction.

5. Regional Preventive Commissions

Regional Preventive Commissions and a Regional Economic Prosecution Office have been established for the administrative regions into which the country has been divided. The latter body depends on the Economic National Prosecutors’s Office, headquartered in Santiago, and the Regional Prosecutors must provide technical and administrative support to the work undertaken by the Commissions.

As we have said, the functions of the Regional Preventive Commissions are similar to those of the Central Preventive Commission with regards to their respective jurisdictional territory.
A. General Information Regarding Cases

1. Agreement Regarding Pharmacy Prices

Although this case was settled on May 16th 1995, it is one of the relevant cases that this FNE (Economic National Prosecutor’s Office) has ever seen in the area of cartels. The specific conduct investigated referred to a price agreement reached by four chains of local pharmacies, a behaviour that has led to new investigations on the matter. They were all penalised by the Resolutory Commission, the Chilean Competition Tribunal.

Three of these chains of pharmacies were penalised with fines of about US$ 80 000 each, and the fourth, was penalised with a fine of approximately, US$ 40 000 for the reasons we will give hereunder.

The Economic National Prosecutor’s Office also requested the Resolutory Commission to authorise it to file charges for the crime of monopoly as established in Article 1 of our Law of Defence of Competition, Decree Law No. 211 (or DL 211). The Commission rejected the request and the FNE appealed against this decision in Supreme Court, which did not accept this appeal.

According to Chilean law, the maximum fine applicable is 10 000 tax units. DL 211 does not specify if this corresponds to annual or monthly tax units, so it might be the equivalent of approximately US$ 400 000 or of US$ 4 800 000 if it is interpreted as an annual measure. This maximum fine will be reviewed, owing to the fact that the FNE and the Ministry of the Economy have proposed a project for reforming DL 211, which aims at fixing a fine of 30 000 tax units per annum, which would give a maximum equivalent of US$ 14 400 000.

It is important to inform that this price agreement was reached by the companies fined, after they had been involved in a price war as the result of the arrival to Santiago, the Chilean capital, of a fourth chain of pharmacies that operated in other regions. After this price war, the four chains agreed on certain price levels so as to avoid further damage and loss. The company that had just arrived in Santiago stated that it had been forced into the agreement and it was their executives that provided testimony that gave proof of the agreement. Nonetheless, the Commission did not accept the allegation that the company had been under pressure to join the agreement, but its fine was reduced by fifty per cent because it provided data and elements of proof that showed the existence of the cartel.

The evidence provided by the FNE was basically founded on studies of price performance and statements issued by those executives that had a direct participation in the agreement.

Finally, it is important to point out that in general, the defence of the companies was based on the fact that the main problem was the entrance to a new territory, with very low prices, on the part of the incoming company and that the price uniformity was the result of a normal market situation after a price war between competitors.
2. Collusive Behaviour of Milk Processing Plants

This case is currently being seen by the Resolutory Commission and there is yet to be a final ruling. It was initiated on the basis of a preliminary FNE investigation into the markets in three regions in the South of Chile and the way in which milk processing plants purchased fresh milk from local producers.

Basically, the following were the behaviours that the Prosecutor’s Office detected as being possibly anti-competitive or illegal:

- Distribution of geographic markets: the milk processing plants that purchase fresh milk from producers distributed the market or territory among themselves.
- Refusal to buy: it was proved that plants refused to purchase milk from producers that changed receptor plants, thus restraining the mobility of producers.
- Unilateral fall in purchase price: by abusing their dominant position, the plants have lowered their milk prices, a behaviour that has been influenced by a non-aggression pact between them.
- Price discrimination: the prices paid to different producers have no established parameters, and there exist no criteria for objectively determining the price to be paid to each producer.
- Opacity or lack of transparency in the sample taking process; lack of a reliable independent system of quality verification, a factor that determines the price to be paid for the milk purchased.

These practices were the object of a FNE claim before the Resolutory Commission, which is currently under review. When filing the action, the FNE requested that as a precautionary measure, processing plants should be asked to publish in advance the factors and criteria they would apply to determine the price of the milk provided by the producers. The measure was approved and is currently under application.

In the past few weeks, the Commission has also reviewed the prices that production plants have established this season, and has even temporarily suspended the application of new payment guidelines by production plants that were very similar.

B. General Information Regarding Penalties

DL 211 empowers the Resolutory Committee to apply fines of up to US$ 40 000 or US$ 4 400 000, depending if the tax unit is taken as an annual measure, as we have already explained. This figure is being reviewed on the basis of a new project for reforming Chilean law that has been proposed by the FNE and the Ministry of the Economy, which aims at establishing a fine of 30 000 annual tax units, which would be the equivalent of a maximum sum of US$ 14 4000 000.

Additionally, the Commission can establish other measures, such as rendering void anticompetitive acts or agreements. These penalties are applied by the Competition Tribunal, after formal proceedings that take place before this special court.

Furthermore, DL 211 also contemplates a generic element of crime that consists of a prison sentence that goes from 61 days to five years for individuals or representatives of juridical entities that took part in anticompetitive conducts. These criminal procedures must be initiated by the Economic National Prosecutor (or the Regional Attorney’s Office in the corresponding regions), with the authorisation of the
Commission, and are filed before a special Judge, a Magistrate of the Santiago Court of Appeals. Its decisions can be appealed to the Santiago Court of Appeals.

In both cases the burden of proof lies with the complainant, which is the Office of Public Economic Prosecution, or with the Regional Attorney. There exist no regulations that change this rule.

With regard to criminal sanctions, their rank are in general terms similar to the penalties established for other acts or conducts that infringe legally protected interests such as property, public faith and economic order.