

Unclassified

DAF/COMP/LACF(2016)7

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

21-Mar-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**Session II: Leniency Programmes in Latin America and the Caribbean –  
Recent Experiences and Lessons Learned**

-- Contribution from Chile --

12-13 April 2016, Mexico City, Mexico

*The attached document from Chile (FNE) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.*

Contact: Ms. Lynn Robertson, Global Relations Co-ordinator, Competition Division [Tel: +33 1 45 24 18 77 -- E-mail address: Lynn.ROBERTSON@oecd.org]

**JT03392446**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/LACF(2016)7  
Unclassified

English - Or. English

# LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



## 14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

### Session II: Leniency Programmes in Latin America and the Caribbean – Recent Experiences and Lessons Learned

\*\*\*

#### LENIENCY PROGRAMME IN CHILE

#### -- CONTRIBUTION BY CHILE (FNE) \* --

#### 1. Introduction

1. Chile's competition rules aim to promote and defend free market competition, and are overseen by the Chilean Competition Agency – the Fiscalía Nacional Económica (National Economic Prosecutor's Office, FNE) – and the Competition Tribunal (TDLC).<sup>1</sup>

2. In order to detect and apply fines effectively to concerted practices or agreements between competitors<sup>2</sup>, under Article 39a of DL 211, a benefit may be granted to those engaging in collusive practices that provide the FNE with background information leading to the confirmation of such practices and the identification of those responsible. In return, these economic agents obtain exemption from or a

---

\* This is a contribution from the Chilean Fiscalía Nacional Económica to Session II of the Latin American and Caribbean Competition Forum due to be held in Mexico on 12 and 13 April 2016.

<sup>1</sup> Chile's free competition rules are set out in Statutory Decree (*Decreto con Fuerza de Ley*) No. 1 laying down the consolidated, co-ordinated and standardised text of Decree Law (*Decreto Ley*) No. 211 of 1973, published in the Official Gazette of 7 March 2005 (hereinafter "DL 211").

<sup>2</sup> Article 3, paragraph (a) of DL 211 refers to "*express or implied agreements among competitors, or concerted practices among them, any of which give them market power and consist of fixing sale or purchase prices or other terms of commerce, reducing output, allocating markets or quotas, excluding competitors or affecting the outcomes of tender processes*".

reduction in the fines that could be imposed on them in connection with collusive practices.<sup>3</sup> Article 39a was introduced into DL 211 through a statutory amendment in 2009.

3. In October of the same year, the FNE produced the “Internal Guide Regarding the Benefits of Immunity and Reduction of Fines in Cartel Cases” (hereinafter the “Guide”), in order to establish the criteria and internal procedures it will use to implement the leniency programme provided for by the law. The main objective of the Guide is to give legal certainty to economic agents who wish to benefit from the leniency programme, while seeking to reduce the margins of discretion the law grants to the administrative authority.<sup>4</sup>

4. The FNE has disrupted five cartels using the leniency programme mechanism. More than USD 5 million in fines has been handed down by the Competition Tribunal and approved by the Supreme Court. In addition, the Competition Tribunal imposed fines of more than USD 3 million in one case, the review of which is still pending before the Supreme Court. Finally, there are two cases currently before the Competition Tribunal in which the FNE is requesting fines totalling more than USD 84 million.

5. More than five years after the programme came into force, the FNE decided that the experience it has gained should be reflected in a new version of the Guide to the leniency programme. The FNE has therefore submitted a document outlining these changes for public consultation.<sup>5</sup> The FNE expects that the new Guide will come into effect soon.

6. Meanwhile, in March 2015, the President of the Republic of Chile submitted a government bill to Chile’s National Congress amending the existing free competition rules.<sup>6</sup> Among other aspects, this bill boosts and expands the range of fines that can be imposed on cartels. In the same vein, the bill introduces amendments to the leniency programme. Unless otherwise indicated, this contribution refers exclusively to the leniency programme currently in force in Chile.

## 2. Rules and regulations applicable to the leniency programme

7. In accordance with Article 39a of DL 211, the leniency programme applies to those who are or have engaged in any of the practices contained in Article 3, paragraph (a) of the aforesaid legislation. According to the FNE, any individual or company that may be deemed responsible for collusive practices, regardless of their degree of involvement, may benefit from the programme. This does not preclude the Competition Tribunal, during its examination of the case, from revoking the benefit from parties who were the organisers of the practices by coercing others to participate in them. Thus, the beneficiaries of the

<sup>3</sup> In the case of the practices referred to in Article 3, paragraph (a), the fines applied can be up to 30 000 *Unidades Tributarias Anuales* (Annual Tax Units, UTA), equivalent in February 2016 to approximately USD 23 million, for each economic agent that has engaged in such practices.

<sup>4</sup> Excerpt from the Guide, October 2009. Available at: <http://www.fne.gob.cl/comunicaciones/agenda-fiscal/historico-agenda-fiscal/delacion-compensada/> [date last visited: 9 March 2016].

<sup>5</sup> The first consultation was in November 2014, and the second in October 2015. Texts available at: <http://www.fne.gob.cl/wp-content/uploads/2015/01/Guía-Interna-sobre-Delación-Compensada.pdf> and <http://www.fne.gob.cl/wp-content/uploads/2015/10/Guía-Interna-sobre-Delación-Compensada-segunda-version.pdf> respectively [date last visited: 9 March 2016].

<sup>6</sup> The government bill amending DL 211 (hereinafter, “government bill”) is currently pending before Chile’s National Congress under *Boletín* (bulletin) No 9950-03, available at: [https://www.camara.cl/pley/pley\\_detalle.aspx?prmID=10362](https://www.camara.cl/pley/pley_detalle.aspx?prmID=10362) [date last visited: 9 March 2016].

leniency programme may include competing companies within the cartel, their officers, employees and consultants who have participated in the latter and who are identified in the application.<sup>7</sup>

8. The benefits that can be granted are as follows: immunity or reduction of the fine could be applied to those responsible, if their participation in collusive practices is confirmed. The leniency programme does not provide for benefits relating to possible actions for damages brought before the ordinary courts.

9. DL 211 provides that, in order to benefit from immunity or fine reduction, those engaged in the practices must meet all of the following requirements: (1) providing precise, reliable and verifiable information that represents an effective contribution to constitute sufficient evidence in order to support the claim the FNE should submit before the Competition Tribunal; (2) abstaining from disclosure of the application for these benefits until the FNE has submitted the request to the Competition Tribunal or ordered the records of the information to be filed; (3) terminating their participation in the practices immediately after presenting their application.

10. In order to obtain immunity from the fine, the applicant for leniency must simply be the first among the parties involved in the practices to come forward and co-operate with the FNE, acknowledging the existence of collusive practices and providing information to confirm such practices and identify those responsible.<sup>8</sup> The FNE may then make a submission based on the information contributed by that beneficiary, requesting that the Competition Tribunal does not apply a fine against them. Immunity may be extended to officers, employees and consultants of the party that participated in the practices and are included in the corresponding request, provided they are not, at the time of committing the offence, independent economic agents in the same market.<sup>9</sup>

11. Meanwhile, the reduction benefit is available to those who request it and comply with the same requirements set out for immunity, providing additional information that adds value to the information already in the FNE's possession. In order to obtain a fine reduction, besides complying with the requirements set forth above for obtaining exemption, the applicant must give information additional to that presented by the first person to come forward. In its submission, the FNE may request a fine no higher than 50% of the highest amount requested for the other parties involved in the practices who did not obtain these benefits.<sup>10</sup>

12. If the practices cited in the FNE's submission are confirmed, the Competition Tribunal cannot apply a fine to anyone identified as a beneficiary of immunity or, for anyone identified as a beneficiary of a reduction, set a fine higher than that requested. However, the Competition Tribunal may refuse the benefits to anyone who organised the illegal practices by coercing other parties to participate in them.<sup>11</sup>

---

<sup>7</sup> Cf. page 5 of the Guide.

<sup>8</sup> Article 39a, paragraph 3 of DL 211.

<sup>9</sup> In this regard, page 5 of the Guide states that, in the case of companies, all officers, employees and consultants that it identifies in its request will be regarded as beneficiaries, provided that, at the time of committing the offence, they are not acting as independent economic agents in the same market, regardless of whether they still have a hierarchical or service relationship with that company at the time of the request.

<sup>10</sup> Article 39a, paragraph 5 of DL 211.

<sup>11</sup> Article 39a, paragraph 5 of DL 211.

13. The government bill pending before the Chilean Congress introduces some significant changes to the range of penalties applicable to those participating in a cartel, and to the leniency programme. For example, it introduces criminal penalties for “hard-core cartels” and adds immunity for the first party to come forward and a reduction in penalty for the second. It also extends the benefit of immunity to other penalties that may be applied to those involved in a cartel, such as the dissolution of a company.

### 3. Key points covered in the FNE Guide

14. According to the Guide, a standard form available from the FNE website is used to apply for the benefit.<sup>12</sup> The Guide submitted for public consultation also seeks to enable application via telephone or e-mail.<sup>13</sup>

15. For the purposes of determining the order of applications submitted, the FNE has set up a system whereby the applicant knows their position in relation to other applications submitted for the case in question, in order to determine the benefits available (“Application Marker”).<sup>14</sup> A planning meeting is then held, in which the applicant is informed of their Application Marker, and how the applicant should provide precise, reliable and verifiable information to substantiate their request for benefits, in accordance with the requirements set out in Article 39a of DL 211.

16. With regard to when a party can obtain an Application Marker, the Guide explains that these can be requested whether or not the FNE has launched an investigation in the relevant market for the same facts described in the application, and whether or not the FNE has requested authorisation or actually exercised any of the powers of entry, search, seizure or interception provided for in DL 211. In any case, these benefits cannot be granted once the FNE has made the corresponding submission before the Competition Tribunal.<sup>15, 16, 17</sup>

---

<sup>12</sup> This electronic form contains the following required fields: (i) ID of the Applicant, indicating their full name, unique tax ID or passport number and contact e-mail address, and those of its representatives, if any; (ii) general description of the collusive practices; (iii) express declaration of intention to initiate the benefits procedure under Article 39a; (iv) commitment not to disclose the Application Marker (*Indicador de Postulación*) request until the FNE has formally made the submission or ordered the information to be filed.

<sup>13</sup> Cf. the document produced by the FNE and submitted for consultation, pages 5 and 7.

<sup>14</sup> In this regard, the document produced by the FNE and submitted for consultation states that the leniency programme procedure begins with the granting of an Application Marker (also simply called “Marker”), where a party requests that their position be reserved for a specific case (which corresponds to the “Application Marker”). Through the Application Marker, the requester becomes an applicant and is informed about their precise position in the procedure and of when they must submit their application for benefits together with their supporting information. Once the information submitted by the applicant has been reviewed, the FNE can grant the conditional benefit of leniency, provided the applicant meets the conditions set out in the Guide. If the applicant complies with the conditions for granting Conditional Benefit, this will become final and definitive once the submission by the FNE has been made (“Definitive Benefit”). The Definitive Benefit may consist of immunity from a fine or a fine reduction, depending on whether they are first or second to come forward.

<sup>15</sup> To afford greater legal certainty to economic agents who wish to benefit from the leniency programme, the Guide includes, by way of example, the type of background information the FNE regards as precise, reliable and verifiable.

<sup>16</sup> Requests for fine reduction are assessed only once the notice of conformity issued by the National Economic Prosecutor’s Office, definitively granting the benefit (“Notice of Conformity”) to the first to come forward, has been served.

17. The Guide sets a deadline of 90 consecutive days from notification of the Application Marker for holding a meeting in which the applicant submits background information (“Information Delivery Meeting”).<sup>18</sup>

18. Once the Information Delivery Meeting has taken place, the National Economic Prosecutor’s Office must consider, within 30 working days, whether the information submitted complies with Article 39a of DL 211, namely (i) that there is acknowledgement that one of the practices provided for in paragraph (a) of Article 3 of DL 211<sup>19</sup> has taken place; (ii) that precise, reliable and verifiable information has been provided, amounting to an effective contribution to confirm collusion and identify those responsible<sup>20</sup>; (iii) that the applicant has agreed not to disclose the request for these benefits until the FNE has made a submission or ordered the records to be filed; (iv) that the applicant has declared that they terminated their participation in the practices immediately after having formally requested the benefits; and (v) that the applicant has declared that they were not the organiser of the collusive practices by coercing others to participate in them.

19. In the event that the Prosecutor’s Office determines that the applicant has contributed qualifying information that complies with the criteria set out in Article 39a, it will submit a well-founded Notice of Conformity notifying the benefit to be requested in favour of the Applicant if a submission is made before the Competition Tribunal, and under what conditions.

20. However, if the FNE determines that the applicant has not contributed qualifying information, it may grant it an additional period of 30 consecutive days to gather background information, provided there is no other applicant. Once the new information has been received, the Prosecutor’s Office will assess it within 10 working days, and if it determines that qualifying information has been contributed, in compliance with the Article 39a criteria, it will issue the corresponding Notice of Compliance. In all other cases, the Prosecutor’s Office will issue a Notice of Non-conformity, indicating that one of the requirements set out in Article 39a of the law has not been met. In this case, the FNE will return all the information the applicant has provided as soon as possible, and will delete any copies of it.

---

<sup>17</sup> The document prepared by the FNE and submitted for consultation establishes that, while there is a valid and current Application Marker, no other person involved in the same offence may take another applicant’s position in order to obtain first- or second-person leniency. In the event that a new applicant comes forward for the same offence, the FNE will grant a new Application Marker, according to the date and time of its submission. The FNE will process applications based on the date of the Application Marker, starting with the first submission and so on and, if they have been submitted directly, according to the date of submission of such Benefits Requests. The request submitted first takes priority, whether it is an Application Marker Request or a Benefits Request.

<sup>18</sup> The document produced by the FNE and submitted for consultation proposes, in place of the Background Information Delivery Meeting, that the requester deliver this information in the “Benefits Request”. In this regard, interestingly, in an effort to update the Guide and incorporate best practice, the FNE has added a detailed account of the procedure for submission by the applicant of devices for storing such data, such as desktops and laptops, pendrives and other storage devices, telephone equipment and technological devices, and access to e-mail accounts used by, *inter alia*, officers, employees and/or consultants of the applicant or third parties who have been directly or indirectly involved in the collusive practices.

<sup>19</sup> The Guide also specifies that recognition of the corresponding benefit should be recorded in the relevant submission before the Competition Tribunal.

<sup>20</sup> The Guide states that information is regarded as precise, reliable and verifiable, and representing an effective contribution that constitutes sufficient evidence to support a submission before the Competition Tribunal when it has the ability to confirm the existence of collusion or where it enables the Prosecutor’s Office to justify the use of any of the powers specified in paragraph (n) of Article 39 of the law.

21. The general confidentiality obligation set out in DL 211 for FNE officers will apply to background information provided within the framework of the leniency programme. The existence of applications, the identity of applicants, the market involved and the information provided are known only to the National Economic Prosecutor's Office and the team appointed by the latter to process the leniency request until the corresponding Notice of Compliance is issued. In any case, even after the FNE presents such information in a submission before the Competition Tribunal, it is possible to maintain the confidentiality of certain information, which may be submitted or disclosed only in the manner and under the conditions set out by DL 211.<sup>21, 22</sup>

#### 4. FNE experience of the leniency programme

22. To date, there are five cases that have been brought by the FNE before the Competition Tribunal based on information provided by parties involved in collusive practices who have been granted the benefits of immunity and fine reduction.

23. The first of these corresponds to the FNE submission regarding a collusive agreement in the refrigeration compressors market, submitted on 29 July 2010, in which the FNE requested immunity from a fine for Tecumseh do Brasil Ltda. and a fine of 15 000 UTA<sup>23</sup> for Whirlpool SA. The Competition Tribunal applied a fine of 10 500 UTA only to the latter company, which ultimately had to pay 5 000 UTA after the amount of the fine was reduced by the Supreme Court.<sup>24</sup>

24. A second experience in connection with the leniency programme was the submission regarding pricing agreements and distribution of bus frequencies on the Santiago-Curacaví and Santiago-Los Vásquez route, submitted by the FNE on 1 June 2011. The FNE requested immunity from a fine for Atevil Mecánica Diesel SA ("Atevil") and fines of 5 000 UTA for Servicios Pullman Bus Costa S.A. ("Pullman"), and of 2 000 UTA for Alejandro Cabello Reyes ("ACR"), another firm in the case that participated in the agreement. The Competition Tribunal confirmed the practices and applied a fine of 1 500 UTA to Pullman, a fine of 50 UTA to ACR, and fines of 100 UTA and 80 UTA to Mr. Pedro Farías Soto and Mr. Paul Fritz Von Breitenbach respectively. The Supreme Court upheld the fines applied by the Competition Tribunal.<sup>25, 26</sup>

<sup>21</sup> Cf. Article 22, paragraph 7, and Article 39a, paragraph 2 of DL 211.

<sup>22</sup> The Constitutional Court recently handed down a ruling in this respect, concerning a jurisdictional dispute between the Competition Tribunal and the *Metropolitana Sur* regional public prosecutor. Ruling of 8 January 2006, docket number 2934-15-CCO, Constitutional Court, available at: <http://www.fne.gob.cl/2016/01/08/tribunal-constitucional-establece-que-dl-n-211-norma-entrega-de-antecedentes-confidenciales-o-reservados-de-causa-tramitada-ante-el-tdlc/#more-74094> [date last visited: 9 March 2016].

<sup>23</sup> For the purposes of calculating fines, 1 UTA corresponds to 542 160 Chilean pesos; approximately USD 765.40.

<sup>24</sup> Competition Tribunal ruling of 14 June 2012 and of the Supreme Court of 24 September 2013.

<sup>25</sup> Competition Tribunal ruling of 15 January 2014 and of the Supreme Court of 20 April 2015.

<sup>26</sup> Interestingly, the Supreme Court ruling rejects the appeal filed by the FNE requesting an increase in the fine applied to ACR, stating that "although the sum is not commensurate with the severity of the practices and the obtaining of economic benefits throughout the period of collusion, as stated by the claimant, it offers reasonable compensation in view of having acknowledged the facts during the process, particularly in responding to the submission, which contributed to Atevil's acceptance of the facts, resulting in the evidence sought by the prosecutor." Recital Thirty-One.

25. On 7 July 2014, the FNE then submitted a request concerning a collusive agreement in the supply of asphalt in public and private works, requesting immunity from a fine for Enx S.A., and fines of 5 000 UTA for Asfaltos Chilenos S.A. (ACH), 5 000 UTA for Química Latinoamericana S.A. (QL) and 1 500 UTA for Dynal Industrial S.A. (Dynal). The Competition Tribunal regarded the information submitted by the FNE as sufficient and ordered the companies to pay fines of 1 630 UTA (ACH), 1 790 UTA (QL) and 718 UTA (Dynal).<sup>27</sup>

26. Another interesting case is the submission made by the FNE on 27 January 2015, alleging collusive practices in the vehicle shipping or “car carrier” market to Chile from Europe, America and Asia. This is the first case in which the FNE has made a submission with more than one leniency beneficiary. Specifically, the FNE requested immunity from a fine for Compañía Sudamericana de Vapores S.A., and a fine reduction for Nippon Yusen Kabushiki Kaisha, requesting a fine of 15 000 UTA for the latter. It also requested fines of 30 000 UTA for Eukor Car Carriers Inc. and 15 000 UTA for Compañía Chilena de Navegación Interoceánica S.A., Kawasaki Kisen Kaisha Ltd. and Mitsui O.S.K. Lines Ltd. respectively. The case is pending decision by the Competition Tribunal.

27. Similarly, the FNE recently made a submission concerning collusive practices in the market involving the production, marketing and distribution of paper products, making this the second case in which the FNE has requested immunity and fine reduction benefits. Specifically, the FNE requested immunity from a fine for CMPC Tissue S.A. and a fine reduction for SCA Chile S.A., amounting to 20 000 UTA. The case is pending decision by the Competition Tribunal.

---

<sup>27</sup> Competition Tribunal ruling of 23 December 2015. The appeals filed by these companies are pending a decision by the Supreme Court.