

Unclassified**English - Or. English****13 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by Chile**

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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

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Chile

1. Brief description of the Chilean Competition System

1. The relevant competition authorities in Chile are the National Economic Prosecutor's Office ("FNE") and the Competition Tribunal ("TDLC"), both responsible for defending and promoting competition in all the Chilean markets. The FNE is the national competition agency that conducts the investigations of antitrust violations. The TDLC is a specialized and independent court that adjudicates competition matters. The decisions of the TDLC are reviewed by the Supreme Court.

2. The Chilean competition enforcement system is mostly an adversarial system, whereby the FNE is in charge of investigating competition law violations and initiating legal proceedings to challenge conduct that harms competition. Hence, the FNE does not have the power to issue final judgements. The only exception to this rule is the FNE's recent mandate to assess mergers among companies with effects in Chile and issue a decision, clearing –with or without remedies- or rejecting the merger (Law No. 20.945 enacted in August 2016). The decisions whereby the FNE rejects a merger can be challenged before the TDLC and, eventually, before the Supreme Court.

3. The adjudication power resides within the TDLC, an independent court, which receives the cases submitted by the FNE or private parties or public institutions acting as plaintiffs. Judgments issued by the TDLC can be challenged before the Supreme Court, who has a variety of jurisdictional competences, as the court of last appeal in Chile (can review the merits and legality of the judgment or decision).

4. During an investigation, the FNE has broad powers to examine competition law infringements and is entitled to request specific information from parties affected or not by the investigation and from public bodies. The TDLC does not interfere in the investigation except to decide on very specific matters, such as the decision to grant a request for intrusive measures made by the FNE in certain cartel cases or the decision to allow a private party not to respond to a request for information, among others.

2. Access to the competition agency's file and protection of confidential information during the investigation

2.1. Access to the competition agency's file during the investigation

2.1.1. Right to access the FNE's file

5. In Chile, access to the FNE's investigation file is granted as a matter of law. According to the Chilean Constitution and the Chilean Law on Transparency and Access to Public Information (Law No. 20.285) (hereinafter, "Transparency Law"), all citizens have the right to request and receive information in possession of administrative bodies. Hence, all citizens –irrespective of whether they have a lawfully recognized interest in the case or not- have the right to request access to the FNE's file during an investigation, notwithstanding the FNE's power to determine that certain investigations as a whole and/or aspects of a file are restricted or confidential, provided that specific legal requirements are met. Citizens may exercise their right at any stage of the investigation and even after it has

been closed. If access is granted during the investigation, additional information can be requested subsequently as many times as deemed necessary.

6. Secondly, Chile's Competition Law (Decree Law No. 211) recognises the right of individuals or enterprises who have been made the subject of an investigation to request access to the file of said investigation. Decree Law No. 211 also entitles the FNE to determine that certain aspects of a file are confidential, provided that specific legal requirements are met. This right can be exercised at any stage of an investigation, until its closure, as many times as deemed necessary. Once the investigation is closed, interested parties can request access to the file in virtue of the Transparency Law.

7. Lastly, Law No. 19.880, that establishes the basic provisions of administrative procedures, recognises the right of interested parties in an administrative procedure –such as the party requesting the FNE to start an investigation- to be informed at any stage of said procedure about its status.

8. In all these cases the body or entity in charge of granting access to the file is the FNE and there are no limitations regarding the use that can be given to this information.

2.1.2. Information that can be accessed by the subject of an investigation and third parties

9. The FNE's file can include information that has been provided by a private party requesting the FNE to start an investigation, the subject or subjects of an investigation, other market players, other private parties and public agencies. Generally, at least part of the information provided to the FNE has a highly sensitive nature, amounting to competitively sensitive business, marketing or technical information that has a key strategic value for an undertaking. As allowed by the law, this type of information is redacted from the copy of the file that is given to an individual or enterprise that has requested access, as we will see below.

10. The subjects of an investigation are granted access to the records provided by them in said investigation and those produced by the FNE, such as requests for information ("RFIs"), records of depositions, documents detailing the reception of information, resolutions issued during the course of the investigation, amongst others. In some cases, they are also granted access to information submitted by other subjects of the investigation, other market agents or other public agencies, always with the precaution of not disclosing competitively sensitive information, personal data and other data or information whose revelation could harm the effectiveness of the investigation of the FNE, as allowed by the law.

11. During an investigation, all leniency-related information is always treated as totally confidential, with no exception whatsoever. Therefore, not even the subject of an investigation may have access to it.

12. Investigations involving cartels, due to their extremely sensitive nature, are declared reserved as allowed by the law. For this reason, in these cases third parties may not have access to the FNE's file.

2.1.3. FNE employees have the duty not to disclose information

13. The Chilean Competition Law establishes an obligation for all FNE employees not to disclose to third parties information, data or records that they have access to through the performance of their duties. Failure to meet this obligation may result in disciplinary

sanctions and criminal sanctions such as suspension of employment, a fine and/or imprisonment.

14. Additionally, Law No. 19.628, that regulates the protection of private life and personal data, also establishes the duty for the FNE to protect personal data. Failure to meet this obligation may result in an order to pay compensation in damages for economic and moral loss.

2.1.4. Possibility to challenge FNE's decisions that deny access to the file or evidence contained therein

15. The procedure to challenge FNE's decisions that deny access to the file or evidence contained therein will depend on who has requested the information and the law under which such request was made.

16. Citizens who have requested information under the Transparency Law are entitled to challenge these decisions before the Transparency Council, which is an autonomous public institution, whose function is to ensure the compliance of transparency and publicity regulations by public agencies, and to guarantee access to said information. Sanctions for unjustified denials of information may be applied to the head of the corresponding administrative body, in this case, the National Economic Prosecutor. These sanctions consist on a fine, amounting to a value between 20 and 50% of his/her salary. Additionally, decisions adopted by the Transparency Council can be challenged before the corresponding Court of Appeal.

17. When the RFI has been made under the Competition Law by the subject of an investigation or by the person requesting the FNE to start an investigation, the FNE's decision that denies access to the file or evidence contained therein may request a reconsideration before the FNE.

2.1.5. Methods through which access to the file is provided

18. Under the Transparency Law, citizens may request that the information be provided either on paper or by electronic means. Information granted under the Chilean Competition Law is always provided through electronic means, specifically, an electronic copy of a non-confidential version of the file.

2.2. Protection of confidential information during the investigation

2.2.1. Types of information that are afforded confidential treatment

19. The Chilean Competition Law grants the National Economic Prosecutor the power to determine, ex officio or at the request of the interested party, that certain aspects of the file be maintained restricted or confidential, provided that the purpose is: (i) to protect the identity of those that have made declarations or provided information under a leniency programme; (ii) to protect formulas, strategies or trade secrets or any other element whose disclosure could significantly affect the competitive performance of those giving the information; or (iii) to safeguard the effectiveness of the investigations of the FNE.

20. Whenever there is a request to access the file, irrespective of whether said request is made by the subject of the investigation, a claimant or a third party, this information is declared confidential and redacted from the copy handed to the party requesting access to a file.

21. Additionally, the Transparency Law lists specific grounds on which information can be declared secret or restricted by an administrative body (such as the FNE) and, hence, a request to access information can be totally or partially denied: (i) when the disclosure, communication or knowledge of the information impedes the administrative body to carry out its public duties properly, particularly if: (a) it interferes with the prevention, investigation or prosecution of a crime or offence, or if it concerns records necessary for legal defences; (b) it consists of records or deliberations previous to issuing a decision, measure or policy (even when the basis of these are public once issued); (c) the request for information is generic, concerns a large number of administrative acts or records, or its fulfilment unduly distracts staff from the execution of their regular labours; (ii) when the disclosure, communication or knowledge of the information affects the rights of the people, particularly regarding security, health, private life or economic or commercial rights; (iii) when the disclosure, communication or knowledge of the information affects the security of the nation, particularly regarding national defence or safeguarding public order or public security; (iv) when the disclosure, communication or knowledge of the information affects national interests, especially regarding public health or international relations, and the economic or commercial interests of the country; (v) when the request for information concerns documents, data or information that a qualified quorum law has declared as reserved or secret, in the cases detailed by article 8 of the Chilean Constitution. This information shall be redacted from the copy handed to the citizen requesting access to the file.

2.2.2. Balancing a party's right to review and respond to evidence that will be used against it with the need to protect confidential information

22. In general, the FNE has deemed necessary for the fulfilment of its mission to protect information gathered from third parties, subjects of the investigation, market players and private parties whenever said information is competitively sensitive.

23. The FNE regards this confidential treatment of the information gathered as crucial for its requests for information to be answered in a complete, timely and reliable manner.

24. A lack of protection of confidential information would discourage cooperation and thus affect the effectiveness of the investigations of the FNE.

2.2.3. Procedure to request confidential treatment of material submitted to the FNE

25. Providers of information can explicitly request confidential treatment for material submitted to the FNE in the following cases: (i) to protect the identity of those that have made declarations or provided information under a leniency programme; (ii) to protect formulas, strategies or trade secrets or any other element whose disclosure could significantly affect the competitive performance of those giving the information; or (iii) to safeguard the effectiveness of the investigations of the FNE. The body that decides whether to provide confidential treatment is the FNE. If it decides to provide confidential treatment, the information will be redacted from the copy of the file to which access has been requested. The party affected by the decision not to provide confidential treatment may request a reconsideration before the FNE.

26. Additionally, the procedure for requesting access to a file or information under the Transparency Law requires that the administrative body (in this case the FNE) notifies third parties whose rights could be affected by the delivery of the information, and they have the right to oppose said delivery. If a third party requests that certain information be treated as

confidential, the FNE generally complies with said request and redacts said information from the corresponding copy of the file. This duty to notify third parties whose rights could be affected does not apply to requests for access to the file or information made under the Chilean Competition Law.

27. As mentioned in section A.3, FNE employees cannot disclose information, data or records that they have had access to through the performance of their duties. Failure to comply with this obligation carries criminal disciplinary sanctions.

2.2.4. Protection of information obtained by the FNE through a leniency programme

28. During the investigation, all information related to the identity of the leniency applicant and information provided by the leniency applicant is treated as strictly confidential.

29. According to the Chilean Competition Law, the FNE's staff shall maintain strict confidentiality regarding all information, data or documentation that they may have access to in connection with the leniency application, which may only be used in fulfilling the FNE's duties and the filing of actions before the TDLC or the courts of justice. The foregoing does not prevent the FNE from the possibility of obtaining a waiver from the applicant in order to disclose said information to another agency of the State or any foreign or international authority.

30. To protect the efficiency of its investigations, the FNE shall keep confidentiality regarding the existence of the leniency benefit request. Such confidentiality will cease when a complaint is submitted by the FNE before the TDLC, in which case the identity of those who have made statements or provided background information in the framework of the leniency benefit request will be protected as any other information that may affect the competitive development of its holder.

31. If any national or foreign court or authority requests access to any type of information provided by the applicant within the context of the application for any of the leniency benefits, the FNE shall seek to protect the confidentiality of said information using all available legal means.

32. Regarding international cartels, the FNE may request that the leniency applicant sign a waiver regarding one or more jurisdictions in which it has requested leniency, or executed collaboration agreements regarding the same collusive conduct, in order to exempt said agencies from the confidentiality obligation with regards to the FNE in connection with such requests or negotiations, and provided that they refer to the conduct described in the application filed before the FNE.

2.2.5. Method through which confidential information is protected

33. Confidential information is protected by the creation of non-confidential versions of the documents, in which confidential information is redacted. This applies in the following situations: (i) requests to access the file or information contained therein, (ii) presentations before the TDLC, and (iii) preparation of a public file in phase II of merger control.

2.2.6. Sharing of confidential information with foreign agencies or courts and domestic agencies and government and legislative bodies

34. The FNE has not signed any international cooperation agreement that allows the sharing of confidential information with foreign agencies.

35. Whenever the TDLC or another domestic court has requested a copy of a file of an open investigation, the FNE has complied with this obligation by sending a non-confidential version.

3. Access to the case file and protection of confidential information during the procedure before the Chilean Competition Tribunal

3.1. Access to the information provided during the Competition Trial

3.1.1. Access to the competition agency's file during the Competition Trial

36. As was said in I., processes before the TDLC could have the FNE as a party or not. Nonetheless, within a judicial process before the TDLC, parties are entitled to request access to the FNE's investigation file, provided that it is related to the trial. In this case, the FNE must present all the documents¹ and files related to said investigation, including witness or executive depositions. Depending on the case, the file could still be open (for example, in cases between private parties in which there is a related investigation) or could already be closed, which is what happens in every case brought by the FNE before the TDLC.

3.1.2. Access to the TDLC's file

37. According to the constitutional and procedural law, the TDLC's files are always public, hence, access must always be granted. However, these files may contain information that has been declared confidential, in which case parties will be given access to a "public version" of these documents, as mentioned below.

3.2. Protection of confidential information during the Competition Trial

3.2.1. Protection of confidential information contained in the agency's file

38. If the agency's file contains information that was declared confidential during the investigation, the FNE shall request the TDLC to maintain said confidentiality and the Tribunal is obligated to do so if the following legal requirements are fulfilled: (i) there is an administrative act that specifies that the information was declared confidential during the investigation, and (ii) the purpose of the declaration is: (a) to protect the identity of those that have made depositions or provided information under a leniency programme; (b) to protect formulas, strategies or trade secrets or any other element whose disclosure could significantly affect the competitive performance of those giving the information; or (c) to safeguard the effectiveness of the investigations of the FNE.

¹ The Word "document" is used in a general way and includes excel archives, transcription of witnesses and executives depositions and in general, all the evidence and files delivered by investigated companies and other enterprise that are required to hand over determined information.

39. Notwithstanding the above, the FNE could ask to the TDLC to declare the confidentiality of additional information whenever its disclosure could significantly affect the competitive development of the owner of the information.

40. If confidentiality is granted by the TDLC, the FNE is obligated to present a “public version” of the classified document, in which the information declared confidential is redacted. Judicial Regulation No. 16/2017 –a general instruction issued by the TDLC– establishes the requirements that a “public version” should meet and the parties’ rights in order to contest the information redacted from the public version. The purpose of that regulation is to grant access to the defendant of an action of the FNE or the parties of a trial to all the non-confidential evidence that could be used against them within the TDLC’s adversarial process.

41. When the FNE’s investigation file is presented to the Tribunal, any party of the specific case in which it was accompanied can use it to prove what they are alleging in said case. In addition, as the documents presented at the Tribunal are public to everyone –with the confidential exemption mentioned before– anyone can use that information to support other cases or in damages actions.

3.2.2. Protection of confidential information contained in other type of document

42. Any party of a competition trial that submits documents could request that certain information contained in it be declared confidential. In that case, the TDLC may order that said information is declared reserved, that is, not disclosed to third parties outside the process, or that it is declared confidential even with respect to the other parties, provided that this information contains formulas, strategies or trade secrets or any other element whose disclosure could significantly affect the competitive development of its owner.

43. A party requesting that a certain document be declared reserved or confidential must comply with the requirements stated in the Judicial Regulation No. 16/2017, indicating (i) the nature of the information that should not be disclosed, such as costs, volumes of purchase, among others; (ii) the identification of the owner of the information, unless the protection of this aspect is the basis of the request; (iii) the specific section of the document that contains the reserved or confidential information; and (iv) the legal, economic or factual arguments for which its disclosure could significantly affect the competitive development of its owner and, consequently, would justify the need to keep it confidential or confidential.