

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

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Chile --

16 December 2014

This document reproduces a written contribution from Chile submitted for Item III of the 120th meeting of the Working Party No. 3 on Co-operation and Enforcement on 16 December 2014.

*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. Chilean Competition Act and the 2009 Guidelines.

1. Law No. 20.361 of 2009 amended the Chilean Competition Act¹, incorporating a new article 39 bis, which provides the benefit of total or partial immunity from fines for anyone having infringed the cartel provision contained in letter a) of article 3 of the Competition Act. According to the article, in order to obtain the benefits of immunity or a reduction of fines, the following must be satisfied:

1. That the applicant has recognized the execution of collusive conduct;
2. That the applicant has delivered accurate, truthful and verifiable evidence that effectively contributes to verification of the collusion and the identification of the other responsible parties;
3. That the applicant has agreed to not disclose the existence of the application until the FNE has brought the case before the Competition Tribunal or has closed the matter;
4. That the applicant has terminated its involvement in the conduct immediately after having formally applied for the benefits;
5. That the applicant has declared that it neither organized the collusive conduct nor coerced others into entering it.

2. The Fiscalía Nacional Económica (“the FNE”), in fulfilment of its legal mandate of enforcing the Competition Act to defend competition, and within the scope of its jurisdiction, published in October 2009 the “Guidelines on Benefits of Immunity and Reduction of Fines in Collusion Cases” (the “2009 Guidelines”) establishing the criteria and internal procedures it is to employ when enforcing the provisions of article 39 bis of the Competition Act. Amendments to the Guidelines are currently under public consultation².

3. This submission is structured according to the provision contained in the 2009 Guidelines. However, any relevant and possible amendment will be duly noted

2. The marker system under the FNE’s Guidelines.

4. The 2009 Guidelines provide for a marker system. According to the Guidelines, the marker reserves the leniency applicant a place in the queue during the leniency procedure. It is granted to the leniency applicant in the first meeting that takes place between him and the FNE’s officers in charge of the leniency process. In order to obtain a marker, an applicant must initiate the leniency process by completing an electronic application form available on the FNE’s Web Site. The revisions currently under public consultation suggest the possibility of initiating the leniency process also by phone.

5. According to the 2009 Guidelines, the marker is granted once the identity of the applicant is verified, provided there is an available marker, since it is not possible to get one once the FNE has filed a complaint before the Competition Tribunal. The FNE does not have discretion as to the granting of a marker. However, the marker may be revoked if the applicant does not complete its application during the period of time granted for such purpose.

¹ DFL N°1 of 2005, of the Ministry of Economy, Development and Tourism, which sets the revised, coordinated and systemized text of the Decree Law N° 211 of 1973.

² The text of the new Guidelines are published for public consultation in www.fne.gob.cl.

6. The revisions to the Guidelines currently under discussion will allow the FNE to refuse a marker in certain scenarios, for example, if the applicant does not acknowledge the existence of collusive behaviour in its application or if it is not possible to bring proceedings against such conduct because of the statute of limitation.

7. The first applicant may be eligible for full immunity from fines. Subsequent applicants may only get a reduction of 50% of applicable fines. Therefore, at least for the first applicant, the marker creates an incentive to cooperate with the agency during the process. For subsequent applicants, the system helps informing them their relative position in the process, available benefits and helps to manage expectations as to whether they can opt to full immunity further during the process if the preceding application fails.

8. The FNE has had a good experience with its marker system, and is not considering making mayor amendments to it. The amendments that the FNE is currently considering are related with the procedure in order to obtain the marker, rather than with the substance of it.

3. Granting of Leniency and Fine Reduction Benefits.

9. According to the 2009 Leniency Guidelines, there is no conditional offer of leniency. Once the leniency application is submitted, the FNE will summon the applicant to a meeting where the marker will be provided. The Guidelines provide for subsequent meetings and deadlines to provide accurate, truthful and verifiable evidence as required by article 39 bis of Chilean Competition Act. Once the applicant provides sufficient evidence to support its application, the FNE will have 30 working days to assess if the evidence submitted by the applicant fulfils the requirements prescribed by article 39 bis. If the FNE finds that the evidence submitted meets such requirement, it will issue a reasoned decision, indicating whether the applicant is eligible for immunity or fine reduction, were it to file a complaint before the Competition Tribunal.

10. According to law, the FNE should indicate at the time of filing a complaint before Competition Tribunal which of the defendants fulfilled the requirements to obtain full immunity from fines, or fine reduction. According to article 39 bis of the Chilean Competition Act, the applicants should comply with the following in order to be granted the benefit:

1. Recognition of the execution of collusive conduct;
2. Deliver accurate, truthful and verifiable evidence that effectively contributes to verification of the conduct and the identification of the other responsible parties;
3. Commit to not disclosing the application until the FNE has brought the case before the Competition Tribunal or has closed the matter;
4. End its involvement in the conduct immediately after having formally applied for the benefits;
5. The applicant should not be the organizer of the cartel or have coerced others into entering into it.

11. Revisions to the 2009 consider replacing the reasoned decision that the FNE currently issues asserting that the applicant has fulfilled the requirements to obtain full immunity or fine reduction, for the granting of conditional benefits as long as there is an open investigation. While the investigation is still open, that is to say, before filing action before the Competition Tribunal or otherwise closing the matter, the applicant shall continue cooperating with the FNE. Therefore, the granting of the definitive benefit will be pending until the FNE files action before the Competition Tribunal. In any case, according to the amendments currently under discussion revocation of the conditional benefit should be done with due cause.