# Competition Law in Chile: Overview

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A Q&A guide to competition law in Chile.

The Q&A provides a high-level overview of the antitrust and competition law rules for restraints of trade and dominance, merger control and the legal approach to joint ventures.

The section on restraints of trade and dominance covers the regulatory framework applicable to horizontal and vertical restraints, monopolistic behaviour and abuses of dominance; the regulatory authorities; exemptions and exclusions; penalties; third-party claims; and appeals.

The section on merger control covers the relevant rules for acquisitions; notification requirements; the timelines and rules regarding publicity and confidentiality; the substantive test; remedies, penalties; third-party claims; and appeals.

## Regulatory Framework

1. What is the competition law framework?

Competition law in Chile is regulated under *Decree Law No. 211/1973* (Decree Law 211). This law has seen various reforms during the past 20 years, including:

- *Law No. 20,945*, which updated Chile's antitrust rules by increasing fines, introducing the criminal offence of collusion, incorporating a mandatory *ex ante* (before the event) regime for control, and introducing a regime for regulating interlocking situations and follow-on damages claims.
- *Law No. 20,361*, which introduced the cartel leniency regime in Chile. See *Question 10, Immunity/Leniency*.
- *Law No. 19,911*, which established the Chile Competition Tribunal (*Tribunal de Defensa de la Libre Competencia*) (TDLC). See *Question 2*.

Article 3 of the Decree Law 211provides that any individual or undertaking that (individually or collectively) enters into any conduct, act or agreement that "impedes, restricts or hinders free competition or that tends to produce such effects" commits a violation and will be subject to sanctions. Such conduct includes (among other things) vertical or horizontal anti-competitive

 

agreements (whether unilateral or co-ordinated), abuse of a dominant position certain conduct related to concentrations (for example, gun-jumping).

Anti-competitive agreements are generically prohibited by Article 3 and sanctioned under Article 26 of Decree Law 211. The *Guide to Analysis of Vertical Constraints* (June 2014) issued by the Chile Antitrust Agency (*Fiscalía Nacional Económica*) (FNE) (see *Question 2*) should also be considered in relation to vertical restraints, particularly in relation to the effects of such conduct.

Abuse of a dominant position is also regulated under Article 3 of Decree Law 211. The specific conduct is set out in Articles 3(b) (exploitative abuse of an economic agent) and 3(c) (predatory practices and unfair competition carried out with the purpose of reaching, maintaining or increasing a dominant position).

Merger control is regulated in Chile under Title IV of Decree Law 211. *Decree No. 41/2021 from the Ministry of Economy, Development and Tourism* also regulates the notification procedure in relation to concentrations.

The FNE has issued specific guidelines, such as the

- *Guidelines of the Assessment of Horizontal Concentrations* (2022).
- *Guidelines on Turnover thresholds (2017).*
- *Jurisdictional Guidelines (2017).*
- *Guidelines on Remedies (2017).*

Finally, notification thresholds are set out in the FNE's *Exempt Resolution No. 157 of 25 March 2019*.

## Regulatory Authority

2. Which authority or authorities regulate competition?

The competition regulations in Chile contemplate two main antitrust authorities:

- **Antitrust Agency (*Fiscalía Nacional Económica*) (FNE).** This is an administrative agency tasked with defending and promoting free competition in Chile. The FNE is regulated in accordance with Title III of Decree Law 211, which provides that the FNE is a decentralised public service that can act independently of any other Chile government service or agency. The FNE is headed by the *National Economic Prosecutor* and is subject to the oversight of the Chilean President through the Ministry of Economy. The FNE's main functions are to:
    - conduct investigations into any facts, actions or agreements that impede, restrict or hinder free competition or have the effect of producing such effects in Chile;

 

- file claims (known as "*requerimientos*") for sanctioning before the TDLC in relation to any conduct that infringes Chile's competition laws;
- carry out merger control investigations and making resolutions on whether to approve (unconditionally or subject to certain remedies) or prohibit economic concentrations; and
- conduct market studies.

The FNE cannot per se impose sanctions or fines. However, it is authorised to make a request for the TDLC to issue sanctions in relation to regulatory violations.

- **Competition Tribunal (*Tribunal de Defensa de la Libre Competencia*) (TDLC).** This is a special and independent court, tasked with preventing, correcting and sanctioning competition infringements in Chile. According to Article 18, Title II of Decree Law 211, the TDLC's main functions are to:
  - sanction violations of Articles 3 and 26 of the Decree Law 211. The TDLC may be notified of such violations through complaints from individuals or may have complaints referred to it from the FNE;
  - make determinations on non-contentious matters regarding facts, acts or contracts that either are already in existence or due to be entered into that may infringe Decree Law 211. The TDLC will make such decisions following a request from a party with a legitimate interest or following a request from the FNE. The purpose of making these determinations is to enable the TDLC to set the necessary conditions that facts, acts or contracts must comply with in order to meet the requirements of Chile's competition regulations; and
  - make determinations in Special Review Appeals (*Recurso de Revisión Especial*). These involve special appeals in the context of merger control (see *Question 21*).

In addition to the two main authorities above, appeal claims (*recurso de reclamación*) against rulings or resolutions from the TDLC (as court of first instance) can be made before the *Chile Supreme Court*. The *recurso de reclamación* differs from the common civil law appeal, as it relates specifically to a challenge against the TDLC's decision in the context of antitrust matters. For details of appeals, see *Question 12* and *Question 21*.

## Restrictive Agreements and Practices

3. What is the basic legal framework governing restrictive agreements and practices?

Restrictive agreements and practices are regulated under Article 3 of Decree Law 211, which penalises any conduct, act or agreement that prevents, restricts, or hinders competition, or which tends to produce such effects. Restrictive agreements and practices that produce anti-competitive effects, or tend to do so, are subject to administrative sanctions, established in Article 26 of Decree Law 211 (see *Question 10*).

Article 3 distinguishes between collusive practices and other anti-competitive conduct as follows:

 

- Agreements or concerted practices involving competitors which involve price-fixing, market allocation, production limitation or bid rigging (hard-core cartels) are considered per se illegal under Article 3(a) of Decree Law 211. These horizontal agreements are subject to both administrative and criminal sanctions (Articles 26 and 62, Decree Law 211). A 2016 amendment to Decree Law 211 provides that individuals involved in cartel behaviour will be subject to criminal sanctions (Law No. 20,945). However, to date, no criminal claims regarding cartel activity have been issued by the FNE.
- Agreements involving competitors setting marketing conditions or excluding existing or potential competitors are only illegal if they confer market power, according to the second part of Article 3(a).
- Vertical restraints are not per se illegal and must be assessed by taking a rule of reason approach. Vertical restraints may result in an abuse of a dominant position, which would be sanctioned specifically under Article 3(b), or as a general anti-competitive infringement under Article 3. Once an assessment has been made, if the conduct is considered to be anti-competitive, it is sanctioned in accordance with Article 26 of the Decree Law 211 (see *Question 10*).

## Monopolies and Abuses of Dominance

4. Are there specific rules that apply to monopolistic or dominant companies?

Article 3(b) of the Decree Law 211 specifically regulates abuses of dominance, which prohibitions actions or behaviours involving abusive exploitation by an economic agent, or a group of economic agents, that have a dominant position in the Chilean market. Such conduct includes:

- Fixing purchase or sale prices.
- Bundling and/or tying strategies.
- Allocating market zones or quotas.
- Exclusionary practices.
- Predatory practices.
- Unfair conduct carried out for the purpose of attaining, maintaining or increasing a dominant position.

Abuses of market power are subject to administrative sanctions and fines under Article 26 of the Decree Law 211. Criminal sanctions do not apply to these types of abuses.

It should also be noted that, if any of the above conduct is sanctioned by the TDLC, the infringing parties may be subject to follow-on actions from those affected by the conduct (such as consumers or competitors). See also *Question 11*.

## 5. How is dominance/monopoly power determined?

There is no legal definition of dominance or market power in the Chilean regulations. However, recent case law from the TDLC has stated that dominance is a behaviour deployed by an economic agent that has substantial market power and which can act independently from other competitors, customers and suppliers because there is no effective competitive pressure that can be exercised against it, which enables the economic agent to set conditions that would not be obtainable without the existence of such high market power (*TDLC Ruling No. 178/2021, Demanda de Envía en contra de Correos de Chile at paragraph 56*).

When analysing whether dominance exists in a specific case, the TDLC considers:

- The relative market share of the undertaking in question and the concentration levels in the relevant market.
- Where there are any barriers to entry and expansion in the relevant market.
- The countervailing power of the undertaking's customers.

(*TDLC Ruling No. 178/2021, Demanda de Envía en contra de Correos de Chile, paragraph 57*.)

## 6. Are there any recognised categories of behavior that may constitute abusive conduct?

Article 3(b) of Decree Law 211 refers to certain types of abuses, including:

- Fixing purchase or sale prices.
- Bundling and/or tying strategies.
- Allocating market zones or quotas.

Abusive conduct may also involve:

- Exploitative abuses (for example, making unilateral modifications to commercial conditions, charging abusive prices, applying arbitrary discrimination in relation to prices, or other relevant competitive variables).
- Exclusionary abuses (for example, refusal to contract, margin-squeezing, predatory pricing, exclusivity agreements, making exclusionary discounts or abusive exercise of legal actions (sham litigation)).
- It is crucial to note that the above conduct will only be considered unlawful if the concerned undertaking deploying them has both a position of dominance and uses its position to abuse its market power. The TDLC has noted that it is both the "structural element" (dominance) and the "behavioral element" (the abuse of such dominance) which

 

is required by Article 3 of Decree Law 211 when dealing with "abusive exploitation" (*TDLC Ruling No. 178/2021, Demanda de Envía en contra de Correos de Chile, paragraph 56*). This was confirmed in *TDLC Ruling No. 174/2020, paragraph 88* and *TDLC Ruling No. 176/2021, paragraph 74*. This is in line with the wording of Article 3 of Decree Law 211, which provides that this type of conduct will be sanctioned when it is carried out with the purpose of achieving, maintaining or increasing a dominant position (that is, when both the behavioral and the structural elements are present).

## Exemptions and Exclusions

7. Are there any exemptions from the competition laws? If so, what are the criteria for individual exemption or block exemptions?

Anti-competitive infringements other than hard-core cartels are not per se unlawful and can be justified under the rule of reason. However, as a general rule, there are no exemptions to the sanctioning of cartels, which are treated as per se unlawful.

Under Article 5 of *Law Decree 3,059*, Chilean shipping companies can participate in shipping freight conferences, pooling agreements and consortia that regulate and rationalise services and these companies will not be subject to the Decree Law 211 rules for these purposes.

8. Is it possible to obtain guidance from the authority as to whether an agreement or practice is likely to restrict competition?

It is not possible to obtain informal guidance in relation to whether an agreement or practice could restrict competition. According to Decree Law 211, neither the FNE nor any other authority has the power to review and/or authorise, on a mandatory basis and prior to their execution, collaboration agreements between market competitors (see FNE's *Public Statement Regarding Collaboration Agreements Between Competitors*).

Therefore, the only possible way for an undertaking to obtain guidance would be for it to follow the formal consultation procedure and gain the formal opinion of the TDLC.

 

9. Is any conduct excluded from the scope of the competition laws?

## Exclusions

No types of agreements or practices are excluded from the scope of Article 3 of the Decree Law 211 (except for the exemption provided to Chilean shipping companies under Article 5 of Law Decree 3,059 (see *Question 7*)).

## Statutes of Limitation

There is a general three-year limitation period for competition infringements. The three-year period is counted from the execution of the anti-competitive conduct.

However, an exception applies to illicit horizontal agreements or cartels under Article 3(a) of Decree Law 211, which are subject to a five-year limitation period. In this case, the limitation period does not start to run while the effects on the market arising from the illicit agreement remain.

The limitation period is interrupted once the undertaking is notified of an accusation of a violation from the FNE, or when a third party makes a formal complaint before the TDLC.

Under Chile law, there are grounds upon which the limitation period can be suspended.

## Penalties

10. What penalties or sanctions are available for breaching the competition laws?

## Orders

Under the Decree Law 211, the TDLC or the Supreme Court can make an order for the:

- Modification or termination of any actions, contracts, agreements, schemes or arrangements that violate the provisions of the Decree Law 211 (Article 26(a)).
- Modification or dissolution of companies, corporations and other legal persons involved in anti-competitive actions, contracts, agreements, schemes or arrangements (Article 26(b)). At the time of writing, only two undertakings have been dissolved by the competition authorities in the context of a cartel case: one case by the TDLC (Case C-236-2011) and the other by the Supreme Court (Case C-265-2013).

In the case of cartels, the TDLC or the Supreme Court may, for a period of up to five years from the time the final judgment becomes enforceable, ban the offender from:

 

- Contracting with state administration bodies autonomous bodies or institutions.
- Contracting with bodies, companies or services to which the state makes contributions.
- Contracting with the Chilean national congress and judiciary.
- Being awarded any concession granted by the state.

(Article 26(d), Decree Law 211.)

These are all administrative sanctions.

The Decree Law 211 also contemplates criminal sanctions for those who participated in the agreement or concerted practice (see below, *Personal Liability*).

## Fines and Monetary Remedies

The TDLC (or for appeal claims, the Supreme Court) can impose administrative fines on undertakings, their directors or administrators, or anyone who had participated in the anti-competitive conduct, of up to either:

- 30% of the undertaking's sales (in the line of goods or services associated with the infringement) during the period of the infringement.
- Twice the amount of the economic benefit gained by the violation.

If it is not possible to determine the sales and the economic benefit obtained, the TDLC or the Supreme Court may impose fines up to the equivalent to 60,000 Chilean annual tax units (that is, accounting units mainly used for tax and penalty purposes) (about CLP45.5 billion). When determining the amount of fine to be imposed, the following factors will be considered (among others):

- The size of the economic benefit obtained.
- The severity of the conduct.
- The deterrent effect of the fine (the term "deterrent effect" is specifically expressed in Decree Law 211 to discourage future breaches).
- The extent to which the offending individual or undertaking repeated their violating conduct.
- The economic capacity of the offending individual or undertaking.
- Whether the offending individual or undertaking co-operated with the FNE either or before or during its investigation.

If the offending individual or undertaking is sanctioned with a fine and does not make payment within ten business days of the ruling becoming final, the TDLC can impose an arrest of up to 15 days, or a proportional fine, and can repeat these measures to obtain compliance with the obligation.

If the conduct is sanctioned by the TDLC, the individual or undertaking may also be subject to follow-on damages claims from third parties such as consumers or market competitors (see *Question 11*).

## Personal Liability

 

Administrative fines can be imposed on:

- The concerned undertaking.
- The undertaking's directors or administrators.
- Any individual that was involved in carrying out the anti-competitive conduct.

According to Title V of Decree Law 211, cartels can also give rise to criminal sanctions for individuals found in violation of Chile's competition laws. These can include:

- Imprisonment of three to ten years. To proceed with the declaration of criminal liability on the individuals responsible for organising or executing a hard-core cartel, the National Economic Prosecutor must first file a criminal complaint against them in exercise of their designated power under Article 39(r) of Decree Law 211.
- Disqualification from acting as a manager or director for a period of seven to ten years in relation to a:
    - public stock company (*sociedad anónima abierta*);
    - company subject to special rules;
    - state company or a company in which the state has a shareholding; or
    - trade or professional association.

Individuals found to be personally liable may also be subject to follow-on damages claims from third parties (see *Question 11*).

## Immunity/Leniency

Chile's leniency regime allows applicants to obtain full administrative immunity (for the first applicant) or reduced administrative sanctions (for the second applicant) for those who, having participated in a cartel, provide evidence to the FNE that leads to proof of the illicit conduct and the identities of those who perpetrated it. The procedure for obtaining leniency in Chile is set out in the *Internal Guidelines on Leniency in Cartel Cases*.

To be eligible for leniency, the informants must:

- Provide the FNE with accurate, truthful and verifiable information that represents an effective contribution of sufficient evidence to support a claim by the FNE before the TDLC.
- Not disclose any information regarding their request for leniency until the FNE has issued the claim or ordered the filing of the investigative records.
- immediately terminate their participation in the violating conduct.

The first applicant for leniency can also be exempted from criminal and administrative liability. The second applicant may obtain a reduction of one degree in the established criminal penalty and a reduction of up to 50% of the fine if it provides information that is additional to that already provided by the first informant. However, any fine reduction requested by the FNE in relation to a second informant cannot exceed 50% of the fine that would otherwise have been requested.

 

After receiving the applicant's request for leniency, the FNE will indicate to them their position (marker) among the other applicants requesting the benefit. The FNE will then initiates an internal fact-finding process in relation to the conduct. The benefit of leniency only becomes definitive once the FNE files the claim before the TDLC (Article 39(5) bis).

### Impact on Agreements

The TDLC and the Supreme Court can decide to modify or terminate agreements that are contrary to the provisions of Chile's antitrust regulations (see above, *Orders*).

### Third Party Damages Claims

11. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or abuse of dominance? Are collective/class actions possible?

### Follow-on/Standalone Actions

Since the 2016 amendment of Decree Law 211, follow-on actions can be brought by third parties in relation to any damage suffered due to an undertaking's anti-competitive practices, following an infringement decision by the TDLC or the Supreme Court (prior to the 2016 amendment, any such actions had to be review by the courts).

Stand-alone damages actions based on an infringement of the Decree Law 211 are not possible, given that a condemnatory judgment regarding antitrust breaching is required to file the damage claim (Article 30, Decree Law 211).

It is also possible for the Chile National Consumer Service (*Servicio Nacional del Consumidor*) (SERNAC) and other customers associations to file class actions on behalf of affected consumers when their general or collective interest has been affected by a competition infringement (see below, *Class/Collective Actions*).

### Procedures or Rules

Follow-on damages actions for competition law violations must be filed before the TDLC and are subject to a short and concentrated contentious procedure. Stand-alone damages actions are not possible in Chile.

In deciding its final ruling (that is, whether any damages are due and their amount), the TDLC bases its verdict on the facts as proven in the previous condemnatory ruling, meaning the TDLC's previous antitrust ruling will also be binding for the damage claim. The limitation period for bringing an action arising from an anti-competitive infringement is four years from the date on which the final competition judgment became enforceable.

### Class/Collective Actions

If anti-competitive conduct affects the collective or general interest of consumers, a follow-on class damages action can be brought by:

 

- SERNAC.
- A consumer association constituted at least six months before the filing of the action.
- A group of no less than 50 individual consumers sharing the same interest.
- According to Article 30 of Decree Law 211, in these cases, special procedural rules apply based on the consumer protection regulation, established in Article 51 et seq. of *Law No. 19,496*. This special procedural regulation was incorporated by the 2016 amendment to Decree Law 211 (Law No. 20,945).

## Appeals

12. Is there a right of appeal against any decision of the authority? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

### Rights of Appeal and Procedure

According to Article 27 of Decree Law 211, only a final judgment from the TDLC to impose or deny any of the measures referred to in Article 26 of the Decree Law 211 (see *Question 10*) (known as the *recurso de reclamación*) can be subject to appeal before the Supreme Court. This appeal can be filed by the FNE or by any of the parties that participated in the proceedings before the TDLC within ten working days of the notification of the judgment.

It can take some time for the TDLC or the Supreme Court to deliver its rulings. For example, in a recent case involving health insurance companies, the Supreme Court accepted a *Recurso de Queja* (that is, an extraordinary appeal seeking to correct faults from the TDLC judges who ruled on the case), which took about seven months from submission (*Supreme Court, Case C-91,429-2022, 27 March 2023*).

### Third Party Rights of Appeal

In a contentious procedure, only the FNE and the parties can file an appeal. In a public consultation (that is, a non-contentious procedure), any third party with a legitimate interest that has participated in the procedure (for example, that has provided relevant information, within the deadline established by the TDLC) can file an appeal.

# Merger Control

 

13. What merger control rules apply to mergers and acquisitions in your jurisdiction?

The current regulatory framework for merger control in Chile comprises:

- Title IV of Decree Law 211, which sets out the general legal framework for merger control.
- Decree No. 41/2021 of the Ministry of Economy, Development and Tourism, which introduced the procedure for notifying economic concentrations.
- FNE's Exempt Resolution No. 157/2019, which establishes the relevant turnover thresholds.
- The various guidelines issued by the FNE.

See *Question 1*.

14. What are the relevant jurisdictional triggering events?

Chile operates a mandatory merger control regime under which transactions that meet certain conditions are subject to administrative review from the FNE.

Only transactions that can be deemed as "concentrations" will fall within the Chilean merger control regulations. Article 47 of Decree Law 211 broadly defines a concentration to be any fact, act, or agreement, that results in two or more previously independent economic agents that were not part of the same business group to cease their independence in relation to any part of their activities, by any of the following means:

- Any legal merger.
- Any acquisition of rights that confers decisive influence (control) over another economic agent's administration.
- Any association between undertakings for the creation of a new independent economic agent (full-function joint venture). See *Question 23*.
- The acquisition of control over another economic agent's assets.
- Therefore, if the transaction does not lead to a lasting ceasing of independence between two or more previously independent economic agents, it would not constitute a concentration under Chilean regulation.
- However, if the concentration involves an acquisition of rights that confers the acquirer with decisive influence over an economic agent's administration, the loss of independence for that undertaking would constitute a change of control (Article 47(b), Decree Law 211). To clarify, any act that amounts to a change to the control structure of an undertaking would also amount to an economic concentration (for example, a change from the sole control of an undertaking to joint control of an undertaking (or vice versa)).

 

- The Decree Law 211 does not provide a specific definition of "control." However, the FNE's Jurisdictional Guidelines provide that control should be understood as the ability to decisively influence an economic agent's competitive strategy and/or behaviour, which implies (among other things), the ability decisively influence an undertaking's composition, strategic or business decision-making or, in general, its competitive development in the market. Furthermore, the possibility of exercising control can exist on a *de jure* (legal) or a de facto (practical) basis, either directly or indirectly, and can take the form of either sole or joint control.

Acquisitions of non-controlling shareholdings (for example, acquisitions of minority stakes) are not subject to merger control but may eventually trigger a potential post-closing reporting obligation if the transaction involves acquiring the shares of an undertaking that is a competing company. Specifically, Article 4 bis of Decree Law 211 establishes that a mandatory post-closing reporting obligation will be triggered when then minority shareholding being acquired exceeds 10% (or more) when the acquiring entity meets certain jurisdictional thresholds for the last financial year. In these cases, the acquirer entity must report the transaction to the FNE within 60 business days following its implementation.

For details of the latest jurisdictional thresholds see, *Merger Control Quick Compare Chart: Chile*.

To compare jurisdictions, see the *Merger Control Quick Compare Chart*.

For details of the latest thresholds from the Chilean competition authority, see *www.fne.gob.cl/servicios/notificaciones-de-operaciones-de-concentracion/*

## Notification

15. What are the notification requirements for mergers? Are they mandatory or voluntary?

Notifications must be made to the FNE prior to the implementation of the concentration.

The parties to the concentration must make a notification if the transaction exceeds the relevant turnover thresholds. Pursuant to Decree Law 211, a transaction that amounts to a concentration must be notified to the FNE if it has its effects in Chile and the parties met or exceeded both of the relevant turnover thresholds in Chile for the previous financial year (voluntary notification to the FNE is also possible). See *Question 14*.

Voluntary filings are sometimes recommended when a transaction could raise competition concerns even though the parties to such transaction did not met/exceeded the turnover thresholds. In cases where transactions have not been voluntarily notified and could raise antitrust concerns, the FNE may, within a term of one year from the date of implementation of the transaction, initiate an investigation in accordance with the general competition rules.

Notification must be made using the appropriate form. Following the enactment of Decree No. 41/2021 of the Ministry of Economy, the FNE has published a single *merger notification form* online, which includes the forms for the various types of notifications. These forms are the:

- Ordinary notification form.

 

- Simplified notification form, which requires less information than the ordinary notification form.
- Non-overlap simplified notification form. This allows the parties to submit less information than required in the simplified procedure.

The parties are not required to submit a draft filing prior to formal notification, but can opt to do so as part of their pre-notification contact with the FNE.

There is no fast-track procedure for making a notification. However, if the parties to the transaction do not overlap with regards to the relevant market, it is permissible for the parties to provide substantially less information (although this does not mean that the FNE's deadlines to clear the transaction are reduced).

## Procedure and Timetable

16. What are the procedures and timetable?

## Pre-notification

Prior to making a formal notification and initiating the specific merger control procedure, it is possible for the parties to engage in pre-notification discussions with the FNE. This is an informal and voluntary stage which was introduced in June 2021 through the *Guidelines on Pre-Notifications of Concentrations*. This stage may be useful for:

- Clarifying which information should be provided when making a formal notification (which helps to avoid the provision unnecessary information).
- Determining the viability of making a notification using the simplified procedure (see below).
- Obtain answers to any questions the parties might have prior to making a formal notification.

## Formal Notification Procedure

When the parties make a formal notification to the FNE, the procedure and timetable for both the regular and simplified notifications is as follows:

- **Initial filing/completeness stage.** Once the concentration is notified by the merging parties, the FNE has ten business days (counted from date of filing) to determine whether the notification is complete (that is, has been completed according to the requirements set out in Decree No. 41/2021) or whether further information is required. In the latter case, the FNE issues a "notice of incompleteness" (which should each be addressed by the notifying parties within ten business days) until the FNE is satisfied that the notification is complete. The FNE then has a further ten business days to assess each additional supplement submitted by the parties.

 

- **Initial mandatory review stage (Phase I).** Once the notification is deemed complete by the FNE, it then issues a resolution to initiate a merger control investigation (commencing the period for the Phase I investigation). The Phase investigation is subject to a statutory term of up to 30 business days during which the FNE can clear the transaction at any time. The statutory term can also be suspended for up to ten business days for each time the parties submit commitments (remedies), or for up to an additional 30 business days (though only once during Phase I) by agreement between the FNE and the parties. At the end of Phase I, the FNE can then take any of the following actions:
    - unconditionally clear the concentration;
    - approve the concentration subject to remedies (provided the parties have offered these remedies during Phase I); or
    - extend the investigation to Phase II.

- **In-depth review stage (Phase II).** If the FNE concludes during Phase I that the notification concentration could "substantially reduce competition" it will proceed its investigation to Phase II. This period is initiated by the FNE making a resolution to open Phase II (which will also outline the main legal and economic arguments justifying its decision). Phase II has a statutory term of up to 90 business days. As with Phase I, the FNE can clear the transaction at any point prior to the 60-day deadline. The 60-day period can also be suspended for up to an additional 15 business days each time the parties submit commitments (remedies). A further suspension of up to 60 business days can be agreed once between the FNE and the parties. Following Phase II, the FNE can then take any of the following actions:
    - unconditionally clear the concentration;
    - approve the concentration subject to remedies; or
    - prohibit the concentration (if it concludes that transaction would lead to a substantial reduction of competition).

    The parties do have the right, however, to challenge prohibition decisions before the TDLC and, ultimately, before the Supreme Court (see *Question 21*).

For an overview of the notification process, see *Chile Merger Notification Flowchart.*

## Publicity and Confidentiality

> 17. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

## Publicity

Merger investigations are kept confidential with regards to its pre-notification contact through until the beginning of Phase I, when the FNE publishes a resolution that it intends to initiate an investigation. In its resolution, the FNE will include (among other things):

 

- A brief summary of the transaction.
- An indication of the parties involved.

Details of the FNE's investigative docket itself are kept confidential during Phase I. However, if the FNE extends its investigation into Phase II, its resolution/report will include further information about the transaction and the investigative docket becomes public. This means that third parties will be able to request access to the non-confidential versions (redacted versions) of all documents provided by the parties and third-parties, as well as access to the FNE's resolutions and other administrative actions registered in the docket.

Once the transaction is cleared or prohibited, the FNE issues both a resolution and a report containing their assessment. These documents do not contain confidential information, and the parties are allowed to submit comments on confidentiality before they are published.

### Automatic Confidentiality

All documents provided by the parties are automatically kept confidential during the pre-notification period and the Phase I investigation.

### Confidentiality on Request

When the file becomes public after the Phase II decision, the parties can request that certain information be kept confidential, in which case they must provide redacted public versions of the file.

### Substantive Test

18. What is the substantive test?

The merger control regime in Chile applies a test of whether the concentration would "substantially reduce competition." According to the Horizontal Merger Guidelines, when determining whether a transaction would substantially lessen competition, the FNE makes an analysis based on information provided by the parties or other information gathered during the review process. Depending on the specific transaction, the FNE may also supplement its qualitative assessment with quantitative economic tools. When conducting its reviews, the FNE focuses on the following aspects (as a minimum):

- The rationale of the concentration.
- The affect the concentration would have on the relevant market(s) (in relation to both the market for the relevant product as well as on the geographic market).
- The resultant concentration levels in the market(s).
- The potential effects of the concentration on competition.

 

- The entry and expansion conditions in the affected relevant market(s) (through an analysis of any potential barriers to entry or expansion).
- The existence of counter-arguments to potential competition concerns (for example, whether there are any expected efficiencies, customers' countervailing buyer power and so on).

## Merger Remedies

19. What are the types of remedies that can be required as conditions of merger clearance?

If the FNE raises competition concerns during its review which are not fully addressed by the expected efficiencies, counter arguments or the characteristics of the affected relevant market(s), the parties can offer remedies to obtain a conditional clearance. Remedies can be offered by the parties at any stage of the FNE's review.

The FNE will analyse whether the remedies offered are feasible and sufficient to properly address the competition concerns.

Remedies cannot be imposed by the FNE. However, the FNE can discuss the remedies offered once they have been formally presented by the parties.

According to the Guidelines on Remedies, there are three main types of remedies that can be offered by the parties:

- **Structural remedies.** These generally require the parties to make divestments. The remedies offered by the parties could involve, for example:
  - agreeing to sell certain assets to a suitable purchaser;
  - agreeing to remove links between the parties and competitors (for example, selling any minority shareholdings in third parties).
- **Quasi-structural remedies.** These remedies can be offered to address the structure of the market that will be affected by the concentration. These remedies might involve, for example, granting access to certain assets or inputs, or licensing obligations.
- **Behavioural commitments.** These are intended to affect the parties' relationships with their affiliates, competitors and/or third parties active in the market. Behavioural commitments may include, for example, restricting the parties' behaviour in the affected market(s) by establishing certain conditions that must be complied with in order to mitigate identified competition risks.

For horizontal mergers, the FNE tends to prefer structural remedies, as it considers these to be the most suitable to address competition concerns in these types of concentrations. However, the remedy to be applied will always depend on the identified risks and requires a case-by-case assessment.

 

## Penalties

20. What are the penalties for failing to comply with the merger control rules?

### Failure to Notify Correctly

Implementation of a concentration operation in breach of the duty to notify is regulated under Article 3(a) bis of Decree Law 211. If the parties fail to notify at all, the FNE can impose fines of 20 annual tax units (about CLP15 million) on the parties for each day of delay on filing the notification.

If the parties notify the transaction by submitting false information, the FNE can file a legal action with the TDLC for the imposition of fines of up to 60,000 annual tax units (about CLP45.5 billion) and/or other measures (see also *Question 10*).

In the case of intentional submission of false information, or where the parties conceal information/documents from the FNE during its investigation, the responsible individuals can be subject to imprisonment (ranging from 61 days to three years).

If the FNE requests information and the individuals who are obliged to respond do not provide an answer or respond partially, they can be subject to a daily fine of up to two annual tax units (about CLP1.5 million) for each day of delay.

If fines are not paid, the TDLC or the FNE can impose precautionary or compulsory measures.

### Implementation Before Approval or After Prohibition (Gun-Jumping)

The implementation of a concentration prior to obtaining authorisation from the FNE (gun-jumping) is regulated under Article 3 (bis) of Decree Law 211. If the concentration has been notified but implementation is carried out prior to approval, the TDLC can impose any of the general sanctions provided for under Article 26 of Decree Law 211.

The general sanctions include:

- Modification or termination of anti-competitive agreement.
- Dissolution or modification of any legal entity involved in the violation.
- Administrative fines. These can be either:
    - up to 30% of the offending undertaking's turnover in relation to the product line associated with the infringement for the period of the infringement; or
    - double of the economic benefit obtained from the infringement.

    If neither of the above fines are practicable, the TDLC can impose administrative fines of up to 60,000 annual tax units (about CLP45.5 billion).

 

### Failure to Observe

If an undertaking fails to observe a decision of the regulator (including failure to implement any remedial undertakings), the FNE can file a legal action with the TDLC for the imposition of fines and/or other measures under the general sanctions regime (see above).

## Appeals

21. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

### Rights of Appeal

It is possible for a decision from the FNE to be challenged by the parties. For merger cases this requires the parties to file a Special Review Appeal to the TDLC. However, so far, there have been only two cases in Chile where a prohibition imposed by the FNE has been the subject of an appeal by the TDLC (*Case Recurso de Revisión Especial de Ideal S.A. y otro en contra de la Resolución de la FNE, No. RRE-1-2018; Case Recurso de Revisión Especial de Nexus Chile SpA y otro contra la resolución de la FNE, No. RRE-2-2022*).

In principle, it is not possible for a TDLC decision to be subject to a further appeal. However, if the TDLC's decision requires the parties to make commitments that they did not propose to the FNE during its investigation, it is possible for the TDLC's decision to be appealed on this basis to the Supreme Court. It should be noted, however, that no such appeal concerning merger control has been made in Chile at the time of writing.

### Procedure

If an appeal is to be made to the TDLC, it must be made by the parties within ten days of receiving notice of the prohibition resolution. Once the appeal is filed, the TDLC will contact the parties, the FNE, and those who have participated in the investigation to a public hearing, which will be held 60 days after the TDLC receives the FNE's investigation file.

In the two cases where an appeal has been filed, on average, the TDLC has taken (following the FNE's prohibition decision) around 190 calendar days (about six months) to issue its ruling.

I have moved the discussion here as I believe it relates to cartel/dominance rulings from the Supreme Court rather than merger control.

### Third Party Rights of Appeal

Only the notifying parties have the right to appeal.

 

22. Has the regulatory authority issued guidelines or policy on its approach in analysing mergers in a specific industry?

There are no guidelines or policies in the context of merger control regarding specific industries.

## Joint Ventures

23. How are joint ventures analysed under competition law?

Chilean merger control regulations do not provide a specific definition of the term "joint venture." However, Article 47(c) of Decree Law 211 provides that the association of two or more independent economic agents, under any modality, that creates an independent entity that performs its functions on a lasting basis will be considered a concentration (full-function joint venture).

Joint ventures must certain criteria to be notifiable, which are:

- It must create a new economic entity.
- It must be distinct from its parent companies and must be functionally autonomous.
- It must perform its activities in the market on a lasting basis.

(Decree Law 211; Guidelines on Jurisdiction.)

Functional autonomy or independence includes both legal and economic dimensions. Therefore, the joint venture will be:

- Legally independent if it can assume obligations and act autonomously from its parent companies.
- Economically independent if it can operate its business separately and autonomously from its parent companies, with sufficient human, financial and operational resources.

Autonomy is generally considered to involve operation in the market beyond a specific auxiliary function for its parent companies and commercialising with third parties. However, the FNE understands that a temporal dependence regarding sales or services provided to its parent companies during an entity's start-up period (the emancipation period) will not generally be considered autonomy. In principle, the FNE considers a three-year term as a reasonable period for the emancipation period. Another relevant factor for determining autonomy concerns the amount of revenue from the parent companies in proportion

 

to the joint venture's revenue. If more than 50% of the joint ventures sales are directed to third parties (independently of the parent), this could be an indication of economic independence.

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- Advising Kimberly Clark on its defense in an accusation for alleged collusion with other relevant players in the Chilean diapers market.
- Advising Cencosud on its defense regarding a lawsuit submitted by the National Economic Prosecutor (FNE) against Cencosud and two other supermarkets, for alleged collusion in fixing the resale price of chicken in the grocery store market.
- Advising Masisa and Masisa Componentes on its defense against a lawsuit filed by Silcosil, a competitor of Masisa, before the Antitrust Court (TDLC).
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- Advising Nestlé on the notification procedure before the FNE concerning its acquisition of exclusive control over the boutique chocolaterie La Fête Chocolat.

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