

Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

FNE, Chile

The following template is submitted by the National Economic Prosecutor's Office ("FNE") pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures ("CAP").

I. Introduction

The National Economic Prosecutor's Office ("FNE") is the national competition authority. Alongside the Competition Tribunal ("TDLC"), the FNE is responsible for defending and promoting competition in Chilean markets.

The Chilean competition enforcement system is mostly adversarial. The FNE is responsible for investigating and prosecuting anticompetitive conduct but does not have adjudicatory powers. The only exception to this rule is the FNE's recent mandate to clear -with or without remedies- or reject certain mergers with effects in Chile (Law N° 20.945 enacted in August 2016).

The adjudication power resides within the TDLC, a specialised and independent court that tries cases submitted by the FNE or other private or public plaintiffs. The FNE may join a private party's claim and vice versa.

Judgments issued by the TDLC can be challenged before the Supreme Court, the court of last appeal in Chile.

The Chilean Competition Act (Decree Law N° 211) provides the legal framework for the protection of competition.

According to the Chilean Competition Act, the FNE is independent from any other public authority. The head of the agency can only be removed by cause, with the favourable opinion of the Supreme Court.

More information about the FNE can be found on the [FNE website](#).

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

Under the Chilean Competition Act, the nationality, residence, or origin of a Person being investigated is irrelevant to the application of laws, procedural rules and policies. Moreover, these factors are not taken into consideration by the FNE when deciding to investigate or prosecute unlawful conduct.

The procedural rules of the Chilean legal system afford Persons of another jurisdiction treatment no less favourable than Persons of its own jurisdiction in like circumstances. In this regard, article 19 N° 3 of the Constitution of Chile guarantees that all persons shall enjoy the equal protection of the laws in the exercise of their rights.

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

In Chile, investigations and enforcement proceedings are governed by the Chilean Competition Act, which has been duly published and is available in Spanish at the [FNE's website](#).

Additionally, the FNE has published [several internal guidelines and regulations](#) governing its investigative and prosecutorial powers. Regarding investigations, the FNE has published guidelines on leniency in cartel cases, vertical restraints and merger control procedure; a guide to conduct investigations; and a code of ethics, applicable to staff members of the FNE. In relation to enforcement proceedings, the FNE has published guidelines related to the method of setting the amount of a fine requested before the TDLC and the filing of criminal claims for cartels, among others.

The following guidelines are available in English: [Internal Guidelines on Leniency in Cartel Cases](#), [Guidelines on Jurisdiction \(for merger review\)](#), [Guidelines on Remedies](#).

The FNE has also published a [database which allows users to access relevant written submissions filed by the FNE before the TDLC or the Supreme Court](#) (i.e. complaints, requests to initiate non-contentious proceedings, reports, appeals, settlement agreements) and a [database that contains documents related to the FNE's investigations](#), such as those

related to merger control procedures, decisions to open or close an investigation, out-of-court settlements reached with the subject of an investigation, among others.

Furthermore, the [website of the TDLC](#) guarantees online access to case files and all the laws and regulations applicable to the Competition Tribunal's procedures. This website also has a case database containing published decisions and case summaries related to cartels, abusive practices and merger controls. For the time being, this information is only available in Spanish.

d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

(i) The FNE is required by law to give notice to any Person that is the subject of an investigation. The FNE can exceptionally ask the TDLC for a judicial authorization not to give notice to the subject of an investigation. This authorization can only be given for a limited period of time. According to section II of the [FNE's Guide to Conduct Investigations](#), this notice must be given in writing, within 5 working days after the decision to open an investigation, or from the moment when there are indications that a given person may have participated in an illegal conduct once an investigation is open. This notice must contain a reference to: (i) the fact that an investigation has been opened (or that the addressee of the notice has become a suspect in an ongoing investigation), (ii) the economic activities, markets and/or industries under investigation, (iii) the name of the FNE member in charge of the investigation, (iv) the provisions that enable the FNE to conduct the investigation – including the provision allegedly violated.

(ii) Subjects of an investigation are entitled to request access to the file of the corresponding investigation. This right can be exercised at any stage of an investigation, even after its closure, as many times as deemed necessary. However, the FNE may determine that certain aspects of a file are confidential, provided that specific legal requirements are met. Additionally, subjects of an investigation have the right to be represented by legal counsel of their choosing during the investigation and the right to present documents of any nature at any stage of the investigation. The merger review process provides ample opportunities for the notifying parties to provide information, ask for information during the process and request the investigative proceedings they consider pertinent. Companies that have notified a

merger may also demand from the FNE information about the investigation and about the FNE's preliminary views about the merger under scrutiny. The notifying parties also have the right to offer the FNE the remedies that they consider adequate to mitigate the risks the FNE has identified.

- (iii) Under the Chilean Competition Act, the FNE may request information that it deems necessary for an investigation from individuals, enterprises and public entities. According to section X of the FNE's Guide to Conduct Investigations, these requests must be made in writing and sent by registered mail. The deadline for a Person to respond to a request cannot be less than 10 days, save for qualified circumstances which must be identified in the request. In duly justified cases, Persons may request a deadline extension.

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

Section III of the FNE's Guide to Conduct Investigations states that investigations must be conducted within a reasonable time period, taking into account: (i) the nature of the investigation, (ii) the merit of the procedure, (iii) the extension or complexity of the specific case, considering the number of Persons being investigated and the market that is being analysed, (iv) the lack of cooperation from subjects of an investigation or third parties and, in particular, delays or refusals to respond requests for information or if there were doubts regarding the quality, integrity and accuracy of the information that has been submitted in an investigation, and (v) any other circumstance that could affect the exercise of the powers of the FNE and the fulfilment of its objectives in the specific case.

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

- (i) Identification and treatment of confidential information is mostly regulated by law. The Chilean Competition Act grants the FNE the power to declare an investigation confidential, giving notice to the TDLC. Only parties have access to the files of a confidential investigation – and the FNE is not required to reveal to third parties even the existence of this kind of investigations. Cartel investigations are generally confidential. The FNE is also entitled to determine, ex officio or at the request of the interested party, that certain documents of the file be maintained restricted or confidential, provided that the purpose is: (i) to protect the identity of those that have been interviewed by the FNE 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 the person or entity to whom the information belongs or (iii) to safeguard the effectiveness of the investigations of the FNE. Additionally, the [Transparency Law](#) (Law N° 20.285) lists specific grounds on which information can be declared secret or restricted by an administrative body (such as the FNE). Confidential information is protected by the creation of non-confidential versions of the documents, in which confidential information is redacted.

- (ii) The Chilean Competition Act establishes an obligation for all FNE employees not to disclose to third parties information, data or records that they have access to in the performance of their duties. Failure to meet this obligation may result in disciplinary and criminal sanctions, such as suspension of employment, a fine and/or imprisonment.
- (iii) 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. 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. A lack of protection of confidential information would discourage cooperation and thus affect the effectiveness of the investigations of the FNE. This is why, during an enforcement proceeding, the FNE will request that sensitive documents be declared confidential. However, in this case, the FNE must present a confidential copy of the document, which can only be reviewed by the TDLC, and a non-confidential version, in which confidential information is redacted, which can be reviewed by the parties. The TDLC can lift a confidentiality order ex officio or at the request of the FNE or another party. This will normally be the case when the document is crucial to issue a judgment or when the cause for confidentiality disappears.

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

Article 12 of [Law N° 19.880](#), that establishes the basic provisions of administrative procedures, states that public administration officials and employees must refrain from intervening in an investigation and/or proceeding in which they have material, personal or financial conflicts of interest. The specific grounds that determine the existence of a conflict of interest are listed therein. Failure to comply with this obligation carries administrative sanctions.

In 2010 the FNE issued [Internal Regulation N° 236](#), that further specifies the grounds, procedure and application of this principle to officials and employees of the FNE.

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental*

entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.

- ii. *Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. *Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

(i)	The FNE does not have the power to impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws. This power resides within the TDLC. However, subjects of an investigation have a right to access the FNE's case file during an investigation. Furthermore, in all enforcement proceedings initiated by the FNE, the agency always submits a full copy of the corresponding case file.
(iii)	Persons subject to an investigation are entitled to present any kind of documents and views regarding substantive and procedural issues via counsel in accordance with applicable law. In this regard, article 17 f) of Law N° 19.880 guarantees that all persons, in their relations with public administrative bodies, have the right to be heard by the corresponding administrative body and present evidence at any stage of an administrative procedure. Additionally, this norm states that public administrative bodies, to issue a decision, must take into consideration these allegations and the evidence that has been submitted by the affected parties.

i) Representation by Counsel and Privilege

- i. *No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. *Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. *Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

(i)	Article 19 N° 3 of the Constitution of Chile, article 10 of Law N° 19.880 and provision 39 of the FNE's Guide to Conduct Investigations, guarantee the right of Persons to be represented by qualified legal counsel of their choosing during any investigation conducted by the FNE. However, we note that the FNE does not have adjudicatory powers, save for 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 N° 20.945 enacted in August 2016).
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- (ii) At any time during an investigation Persons are entitled to present views regarding substantive and procedural issues via counsel in accordance with applicable law.
- (iii) The procedural rules of the Chilean legal system recognize privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice.

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

The FNE does not have the power to issue final judgments. 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 N° 20.945 enacted in August 2016). This merger control procedure is extensively regulated in the Chilean Competition Act, which expressly states that the FNE's decisions must be public and set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. In relation to administrative decisions, the FNE publishes all its decisions to close an investigation. In the Chilean competition system, the adjudication power resides within the TDLC and the Chilean Competition Act states that all final decisions issued by the TDLC must be public and set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

The FNE does not have the power to impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws. This power resides within the TDLC.

In merger proceedings, the FNE can either: (i) clear a merger without remedies, (ii) clear it with the remedies offered by the parties, or (iii) block the transaction. The FNE is not entitled to design remedies. Only the FNE's decision to block a merger can be reviewed by the TDLC. The TDLC can (i) approve the merger without remedies, (ii) approve the transaction subject to the last remedies offered by the parties to the FNE, (iii) approve it subject to remedies designed by the TDLC, or (iv) back the FNE's decision to block the Merger. Only if the TDLC

approves the merger subject to remedies not offered by the parties to the FNE, both the parties and the FNE have a right to appeal the decision before the Supreme Court.

Judgments issued by the TDLC can be challenged before the Supreme Court, the court of last appeal in Chile. The Supreme Court has consistently conducted a full review of the merits of the case. This full review is applied to questions of fact and law.