

# **COMPETITION ENFORCEMENT AGENCIES**

## HANDBOOK 2019

Published in association with:

Atsumi & Sakai

Bowmans

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ELIG Gürkaynak Attorneys-at-Law

Lapidot, Melchior, Abramovich & Co

Morrison & Foerster LLP

SRS Advogados

Van Bael & Bellis



# Competition Enforcement Agencies Handbook 2019

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A Global Competition Review Special Report

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This article was first published in May 2019

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ISBN: 978-1-83862-222-0

Printed and distributed by Encompass Print Solutions  
Tel: 0844 248 0112

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*Global Competition Review's* 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

The information listed is correct as of April 2019.

### **Global Competition Review**

London

April 2019

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## Questions and answers

**How long is the head of agency's term of office?**

The national economic prosecutor is a lawyer appointed by the President of Chile from a list of candidates chosen in a senior public sector contest for a period of four years, with the possibility of reappointment for another term. He or she can only be removed after approval by the Supreme Court of Justice based on incapacity, or manifest negligence in the performance of his or her duties.

**When is he or she due for reappointment?**

In 2018, the President of Chile appointed the national economic prosecutor for a four-year term. He can be reappointed by the next government in 2022.

**Which posts within the organisation are political appointments?**

There are no political appointments within the organisation other than the designation of the head of the agency, in the manner described.

**What is the agency's annual budget?**

The annual budget for 2018 was 6.9 billion Chilean pesos and for 2019 7.2 billion Chilean pesos.

**How many staff are employed by the agency?**

There are currently 108 people employed by the agency.

**To whom does the head of the agency report?**

The National Economic Prosecutor (FNE) is an independent body and, as such, does not report to any specific authority, though it is under the administrative supervision of the President through the Ministry of Economy, which also reviews the agency's annual budget.

**Do any industry-specific regulators have competition powers?**

The only authorities in charge of competition enforcement are the FNE and the Competition Tribunal (TDLC). The FNE is the agency in charge of prosecuting competition infringements and the TDLC is the jurisdictional body responsible for correcting and imposing sanctions. Nonetheless, industry-specific regulators have duties to foster competition principles across the sector they oversee (such as gas, electricity, telecommunications, financial, pension fund management, compulsory health insurance, water and sewage services, sea, land and air ports, and transportation services in extreme zones).

**If so, how do these relate to your agency's role?**

Not applicable.



**May politicians overrule or disregard the authority's decisions? If they have ever exercised this right, describe the most recent example.**

No, the decisions of the FNE to prosecute or file a case cannot be overruled by any other authority and the FNE is mandated to act independently from any authority or court. The rulings of the TDLC, which is responsible for deciding upon competition cases brought before it, may only be reviewed by the Supreme Court of Justice through a formal appeal.

**Does the law allow non-competition aims to be considered when your agency takes decisions?**

No, the law only considers competition aims in the decision-making process. The FNE reviews cases strictly on the basis of competition and the TDLC – which is part of the judiciary – must ground its decisions on facts and well-founded legal and economic analysis, as explicitly required in the competition statute.

**Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?**

The FNE can open and file cases and also settle with the involved parties, but does not have the authority to impose sanctions in competition cases. It can only bring the cases before the TDLC. The decisions made by the TDLC may only be reviewed by the Supreme Court of Justice.

However, Law No. 20.945, passed in 2016, replaced the voluntary merger control regulation by a mandatory one, entering into force in June 2017. As a result of this amendment, notification of certain mergers to the FNE is obligatory, if the operation exceeds specific thresholds. The 2016 legal reform established a two-phase review procedure conducted by the FNE, subject to fixed legal terms: a Phase I for the review and clearance of unproblematic mergers and a Phase II for the assessment of concentrations requiring an in-depth review due to their complexity or likelihood of anticompetitive effects. The FNE has the power to clear mergers, accept remedies proposed by the parties, or to block transactions. Of these, a decision to block a merger may be appealed before the TDLC, though there is no right of appeal in other cases.

**Has the authority ever blocked a proposed merger? If yes, please provide the most recent instances.**

The FNE blocked two mergers: *Ideal/Nutrabien*, which was later reversed upon review by the Competition Tribunal, and *Santander/Servipag*, in which the notifying parties ultimately decided against the materialisation of the merger.

**Has the authority ever imposed conditions on a proposed merger? If yes, please provide the most recent instances.**

The FNE approved five mergers subject to remedies: *Bayer/Monsanto*, *AT&T/Time Warner*, *Linde/Praxair*, *Aza/Matco* and *CDF/Turner*.

**Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.**

The FNE led three Phase II investigations in 2018.

**Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.**

Yes, in several cases.

In 2016, the FNE filed a complaint against three supermarket chains, including Walmart (based in the United States) for having executed an anticompetitive agreement or concerted practice in the fresh chicken meat market. The case was recently decided by the Competition Tribunal, imposing fines totalling over 8 million Chilean pesos.

In 2017, the FNE filed a complaint against Fresenius SE and Baxter, companies based on Germany and the United States respectively, for engaging in anticompetitive conduct in the market of sodium chloride saline solutions. The proceedings are ongoing.

**Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?**

The 2009 amendments to the Competition Act introduced a leniency programme. The procedure for applying for leniency, as well as the relevant contact details, can be found in the FNE's webpage where the application can also be made.

**Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?**

The 2016 amendments to the Competition Act introduced criminal sanctions for cartel activity. In order to prosecute cartels in ordinary criminal courts, first there must be a condemnatory ruling issued by the TDLC. The FNE is the only institution entitled by law to file criminal cartel complaints before ordinary criminal courts. Once the FNE has filed the complaint, the investigation of this criminal offence is directed by the Public Prosecutor's Office. It should be noted that, at present, criminal enforcement has not been applied.

**Are there any plans to reform the competition law?**

As the last amendment was made in 2016, it is unlikely that there will be more reforms in the near future.

**When did the last review of the law occur?**

In 2016, Law No. 20.945 amended the Competition Act. The most important aspects of this amendment were the:

- increases in the applicable fines and the introduction of new administrative sanctions against cartels;
- designation of hardcore cartels as a criminal offence, and as per se illegal;
- establishment of a mandatory merger control regime;
- explicit recognition of the power of the FNE to conduct market studies and to request information from private undertakings, for such purposes;
- introduction of the concept of interlocking as a breach of competition law;
- introduction of a requirement to inform the FNE about the acquisition of minority interests in competitors that exceed 10 per cent;
- strengthening of the leniency policy;
- empowerment of the Competition Tribunal to determine damages compensation arising from anticompetitive infringements (private enforcement); and
- imposition of administrative sanctions for infringements against the duty to collaborate with the FNE during its investigations, and the new power to the FNE to propose to the President of the Republic, through the corresponding Ministry, the modification or elimination of legal or regulatory precepts that are found to restrict competition in the markets or the drafting of new

legal or regulatory precepts that would contribute to increase competition in the markets.

**Do you have a separate economics team? If so, please give details.**

No, in each division of the FNE there are economists and lawyers working jointly.

**Has the authority conducted a dawn raid?**

Yes, we have had several cases in the past that have included dawn raids, including *Poultry Meat Producers Cartel* in 2010, *Supermarket Chains Collusive Agreement* in 2011, *Injectable Generic Medicine Products Producers* in 2013 and *Tissue Paper Products* in 2015.

More recent dawn raids concern ongoing cases that we cannot discuss at this point.

**Has the authority imposed penalties on officers or directors of companies for offences committed by the company? If yes, please provide the most recent instances.**

The FNE has prosecuted officers or directors of companies regularly, as it is legally entitled to do so. Indeed in 2013, the Competition Tribunal sentenced the chief executive of the Chilean Advertising Agencies' Trade Association, as well as other members of the board directly involved in boycotting several bidding processes.

**What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?**

Economic agents who plan to enact an act or convention must notify the FNE if two requirements are met. First, the act or convention must qualify as a concentration operation. The criteria that guide the actions of the FNE in this matter are established in the Competition Guide.

Second, the concentration operation must be equal or exceed the joint and individual sales thresholds referred to in article 48 of DL 211 and that were determined, in compliance with the legal mandate, by Exempt Resolution No. 667 dated 24 November 2016 (Res 667).

Consequently, if the thresholds determined in Res 667 are exceeded, the concentration operation should be notified to the FNE, establishing sanctions for those who violate the duty of notification established in article 48 of DL 211. If the thresholds are not exceeded, the concentration operation could be notified voluntarily.

**Are there any restrictions on investments that involve less than a majority stake in the business?**

The new merger regulation places emphasis on the loss of independence of economics agents. In this regard, notification is mandatory in situations, among others, where there is an acquisition of interests that allows one player to have decisive influence over the management of a competitor, regardless of whether it holds a majority or a minority stake in the business.

In addition, the 2016 amendments to Competition Act established the obligation for companies to inform the FNE of any minority interests in competitors that exceed 10 per cent, even if those interests are not sufficient to exert control over the competitor. For this purpose, the FNE has developed a form, which was subject to public consultation. This document is available at [www.fne.gob.cl/wp-content/uploads/2016/12/Formulario-Participaciones-minoritarias-v1.9.pdf](http://www.fne.gob.cl/wp-content/uploads/2016/12/Formulario-Participaciones-minoritarias-v1.9.pdf).

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ISBN 978-1-83862-222-0