

## **THE NATIONAL ECONOMIC PROSECUTOR'S OFFICE AND THE ANTITRUST COURT PROVIDE FOR EXCEPTIONAL OPERATING MEASURES.**

Recently, both the National Economic Prosecutor's Office (FNE) and the Court for the Defense of Free Competition (TDLC) have adopted various decisions that provide for the special functioning of these bodies, in response to the health emergency that the Chile is currently experiencing.

All measures are aimed at reducing or avoiding the personal contact and travel of the parties and officials involved in the various processes, taking into account the recommendations and requirements for social distancing in the fight against the coronavirus. To this end, virtual media have been set up to undertake the various functions of the FNE and the TDLC and their interactions with the citizens.

The most important measures that have been taken are listed below:

### **1. Measures adopted by the FNE.**

The FNE issued a resolution<sup>1</sup> containing the measures provided for in relation to the current state of emergency. The resolution includes a series of instructions and recommendations that the parties should consider in their interactions with the FNE, both in the context of the generality of the investigations, and in relation to the notification and analysis of merger transactions. All the measures will last as long as the emergency motivating them continues as decided by the FNE itself. In early April, the FNE also issued a public statement, concerning cooperation among competitors during the state of emergency.

#### a) Investigations

##### **Power of attorney.**

In order to avoid the notarial procedures that imply having a power of attorney to act before the FNE, the FNE has provided that, alternatively, the powers of attorney may be considered valid even if it does not comply with the usual formalities of the law. As a first alternative, powers of attorney granted with an electronic signature are acceptable. If this is not possible, the attorney must send an email to the FNE lawyer in charge of the investigation, indicating his or her designation and acceptance of the power of attorney, and attaching the email where the power of attorney is granted,<sup>2</sup> together with a copy of the grantor's identification card. However, once it is possible to grant a power of attorney that complies with the legal formalities, it must be submitted to the FNE, while ratifying everything already done by the attorney on behalf of the grantor.

##### **Communications.**

Instead of the usual form of communication (official letters sent by certified mail), communications from the FNE in the context of an investigation will be made through electronically signed official letters and sent by email. Exceptionally, certified mail will be used, if no email is available or other circumstances require it. In addition, it will also be possible to disregard the official letter and communicate directly by email, in the case of urgent situations or simple bureaucracies.

In turn, the answers provided by the parties to the FNE's requests can be made by email. To do so, the

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<sup>1</sup> APPROVES EXCEPTIONAL MEASURES IN PROCEEDINGS BEFORE THE NATIONAL ECONOMIC PROSECUTOR'S OFFICE, IN RESPECT OF THE CORONAVIRUS OUTBREAK (COVID-19), [https://www.fne.gob.cl/wp-content/uploads/2020/03/OK-Res-ex-aprueba-medidas-en-procedimientos-FNE-188\\_FINAL.pdf](https://www.fne.gob.cl/wp-content/uploads/2020/03/OK-Res-ex-aprueba-medidas-en-procedimientos-FNE-188_FINAL.pdf).

<sup>2</sup> This designation should include the full name, profession or trade, address and identification card of the grantor, together with the indication that she or he does not have an electronic signature.

response should be sent to [oficinadepartes@fne.gob.cl](mailto:oficinadepartes@fne.gob.cl), with a copy to the email of the lawyer in charge of the respective investigation. In some cases, the files included in the response may be made available through a data transfer system or, if not possible, delivered at the FNE premises in an electronic storage device between 9:30 and 13:00 hours.

**Declarations.**

These will be done remotely, using digital media such as Zoom or Skype, or by telephone or other similar means. The specific mean will be defined in the communication where the declaration is ordered. After the declaration, the declarant must ratify it by email, which must include a copy of her/his identification card.

b) Merger transactions

**Suggestion not to notify new operations.**

First of all, the FNE suggests that all agents who are considering notifying a new transaction should not do so, except for those whose notification is urgent and essential. According to the FNE, ruling out the risks to competition of a merger in the current context would be very difficult to achieve during the Phase I investigation.

Furthermore, it should be borne in mind that all measures taken in connection with investigations (as shown above) apply equally to merger transactions, insofar as they do not conflict with the specific measures set out below.

**Notifications.**

These can be done in person, by delivering the information to the FNE premises (as usual), but only between 9:30 and 13:00 hours, or remotely, by sending the notification and attaching the documents in emails addressed to [oficinadepartes@fne.gob.cl](mailto:oficinadepartes@fne.gob.cl). In the event that several emails are sent, it will be the date of the reply confirming receipt of the last one that will set the date of the submission. The deadlines that apply to electronic submissions will run until midnight on the last day of the deadline.

If the parties have difficulties in sending the notification and its attachments by email, they may send several emails, compress the files or send links where those are available to the FNE.

**Other presentations.**

The provisions on notifications will also apply to supplements to the notifications, responses (from the notifying parties and third parties) to RFIs, and proposals for mitigation measures.

**Powers of attorney granted abroad.**

Without prejudice to what has already been said about the granting of powers of attorney in relation to investigations (which also applies), the FNE will accept the representation without a power of attorney in respect of foreign agents, if documents with simple signatures or the legalizations that it has been possible to obtain are provided.

**Exemption to submit certain information and pre-notification.**

The FNE will take particular account of the current situation in the requests that the notifying parties may make for exemption from providing information that is not available to them. The parties are invited to explore this possibility at the pre-notification stage. Pre-notifications may be made electronically via [prenotificaciones@fne.gob.cl](mailto:prenotificaciones@fne.gob.cl), and in addition to the usual concerns, queries may be made regarding the current context relating to COVID-19 and its effects on proposed transactions.

**UPDATE:**

*In view of the quarantine in force in the borough where the FNE operates, the FNE has determined that, as of March 30th, it will only operate virtually, so that its premises will remain closed. Submissions should be made by email to [oficinadepartes@fne.gob.cl](mailto:oficinadepartes@fne.gob.cl) and the FNE can be contacted at its phone number (+56 227535600) and institutional email, [contactenos@fne.gob.cl](mailto:contactenos@fne.gob.cl).*

c) Cooperation among competitors

On April 3, the FNE issued a public statement<sup>3</sup> regarding cooperation among competitors during the health crisis. Thus, the FNE seeks to address the questions of private and public bodies about this topic. This declaration was preceded by the similar statements made by antitrust authorities from different jurisdictions.

In its statement, the FNE argues that cooperation agreements among competitors are not always illegal, unlike cartels. According to the FNE, cooperation agreements would be lawful if:

- i. The agreements generate efficiencies;
- ii. These efficiencies outweigh the risks associated with such agreements;
- iii. There is no less risky way to achieve the same efficiencies; and
- iv. Steps are taken to restrict contact between competitors to the minimum possible extent

Notwithstanding this, the FNE insists that it will hardly prosecute those who take advantage of the crisis context to collude or engage in other anti-competitive behavior.

## 2. Measures adopted by the TDLC

The TDLC has provided for measures, both by means of an *auto acordado* and through protocols that regulate the operation of the court itself and the actions of the parties in the proceedings before that court.

a) Auto acordado N°20/2020

This resolution<sup>4</sup> provides that the TDLC may meet at a distance, by means of videoconference or other media, exceptionally and when there are circumstances that prevent the development of its functions at its premises or that threaten or disrupt its normal operation. That is, it is applicable not only for the current health emergency, but also for any future event that has similar effects. In each case, the Plenary of the TDLC must decide when this exceptional way of meeting is effective and this should be announced in a visible place at the courthouse and on its website.

The TDLC is currently meeting in this mode and has indicated that it will give priority to ruling on urgent matters.

b) Operating protocols

In view of the quarantine, which will be in force in the borough where the TDLC has its premises, a protocol dated March 26<sup>5</sup> has provided for its operation to be completely virtual while the quarantine is maintained. As a result of this:

- There will be no attention to the public at the courthouse;
- All questions should be sent by email to [mjproblete@tdlc.cl](mailto:mjproblete@tdlc.cl), with a copy to [asoto@tdlc.cl](mailto:asoto@tdlc.cl) and [oficinadepartes@tdlc.cl](mailto:oficinadepartes@tdlc.cl);
- All submissions must be made virtually by email, to the emails already indicated;
- However, if someone can and should make a written presentation, it must be left in the mailbox of the TDLC and an email must be sent to the emails indicated, giving an account of the presentation by mailbox and the reasons for the possible urgency.

The measures in this protocol do not preclude those that were provided for in an earlier protocol, dated 17 March, insofar as they are compatible.<sup>6</sup>

<sup>3</sup> <https://www.fne.gob.cl/wp-content/uploads/2020/04/Declaraci%C3%B3n-P%C3%ABlica-FNE-030420.pdf>.

<sup>4</sup> [https://www.tdlc.cl/nuevo\\_tdlc/wp-content/uploads/2020/03/AA-N20-2020.pdf](https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/2020/03/AA-N20-2020.pdf).

<sup>5</sup> [https://www.tdlc.cl/nuevo\\_tdlc/wp-content/uploads/2020/03/MEDIDAS-TDLC-CUARENTENA-TOTAL-SANTIAGO-CENTRO-26.03.pdf](https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/2020/03/MEDIDAS-TDLC-CUARENTENA-TOTAL-SANTIAGO-CENTRO-26.03.pdf).

<sup>6</sup> [https://www.tdlc.cl/nuevo\\_tdlc/wp-content/uploads/2020/03/Protocolotrabajo.pdf](https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/2020/03/Protocolotrabajo.pdf).

c) Agreement regarding Law No. 21,226

Following the publication of Law No. 21,226<sup>7</sup>, the TDLC adopted a new agreement on April 2, which provided for the following:

- i. Suspend the evidentiary terms that were in force or that began to run during the state of constitutional emergency;
- ii. Reschedule the evidentiary hearings, when their evidentiary terms have already expired, for dates subsequent to the end of the state of constitutional emergency;
- iii. Remotely holding the hearings that may take place during the state of constitutional emergency;
- iv. With respect to the cases followed during the state of constitutional emergency, the TDLC will resolve the matters that are easy to handle and those whose decision cannot cause defenselessness of the parties or interveners; and
- v. Personal notifications and proceedings that require the presence of a party during the period of a state of constitutional emergency will be conducted by electronic means through the Clerk's Office.

d) Auto acordado N°21/2020

On April 7, the TDLC issued a new *auto acordado*<sup>8</sup> motivated by the health emergency. This time, the TDLC determined that the facts, acts or agreements that are subject to the review of the TDLC will not be suspended while the state of catastrophe caused by COVID-19 lasts.

This will apply especially to acts or agreements that generate or seek to generate efficiencies greater than the anti-competitive risks and that relate to goods or services that are indispensable to maintaining the supply chain, the continuity of transportation services, the delivery of medical supplies or medicines, and other activities that may also be indispensable. Both the efficiencies and the connection to these indispensable goods and services must be justified by the parties, who must provide the necessary background along with their review request.

With respect to acts or agreements already in execution, the opposition from third parties, by means of a lawsuit, may render the procedure contentious, in which case their execution must be suspended. With respect to future acts or agreements, the TDLC may provide that they cannot be implemented if there is opposition from third parties under the terms already stated. In both cases, the TDLC must hear the parties before making a decision.

The provisions of this ruling may also be applied to other qualified cases - other than the current health emergency - determined by the TDLC itself. Its application, in any case, will not limit the final decision that the TDLC takes in each proceeding.

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<sup>7</sup> It establishes a legal regime of exception for judicial processes, in hearings and legal proceedings, and for the deadlines and exercise of the actions it indicates, due to the impact of the COVID-19 disease in Chile.

<sup>8</sup> *Auto Acordado* No. 21/2020 on extraordinary inquiries made pursuant to Article 18 No. 2 of Decree Law No. 211, [https://www.tdlc.cl/nuevo\\_tdlc/wp-content/uploads/2020/04/Auto-Acordado-21-2020.pdf](https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/2020/04/Auto-Acordado-21-2020.pdf).