



The Legal 500 Country Comparative Guides

Chile

CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Chile.

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CHILE CARTELS



1. What is the relevant legislative framework?

Chilean competition law is regulated by Decree-Law No. 211 of 1973 (the Chilean Competition Act or DL 211). Since 2004, the authorities in charge of the protection and promotion of competition in Chile have been the Chilean Competition Authority (FNE), and the Chilean Competition Tribunal (TDLC)..

Additionally, and according to the provisions of the DL 211 (Article 27), any final judgment of the TDLC that imposes any of the sanctions contemplated in the Law may be appealed to the Supreme Court. Hence, the Supreme Court can also review and resolve cases related to the defense of competition.

In Chile, cartels are sanctioned both administratively and criminally. On the one hand, they are prohibited under Article 3, letter a) of the Competition Act, in the following terms: "The following, among others, shall be considered as facts, acts or agreements that prevent, restrict or hinder free competition or that tend to produce such effects: a) agreements and concerted practices among competitors, and which consist of fixing sale or purchase prices, limiting output, assignment of market zones or quotas, affecting the outcome of tender processes, as well as agreements and concerted practices that, conferring market power to the competitors, consist of the determination of marketing terms and conditions, or the exclusion of current or potential competitors".

On the other, the criminal prohibition of collusion is established in Article 62 of DL 211.

2. To establish an infringement, does there need to have been an effect on the market?

Law No. 20.945 of 2016 introduced the so-called per se rule for hardcore cartels in Chilean competition law. This rule is included in letter a) of the second subsection of Article 3 of DL 211, which establishes the infringement of

collusion, and applies to agreements between direct competitors to eliminate competition in essential variables such as price, production, territorial coverage, and market share.

As a result of this legal reform, hardcore cartels in Chile are always considered illegal, regardless of the size or position of the companies involved or whether it had an anticompetitive effect on the market.

3. Does the law apply to conduct that occurs outside the jurisdiction?

The antitrust regulation in Chile lacks a clear legal rule to determine the jurisdiction of the TDLC in cases where actions or agreements leading to violations of DL 211 occurred outside Chile. However, there is a broad consensus in Chilean doctrine and jurisprudence that anticompetitive behaviour, even if carried out abroad, can still be subject to Chilean jurisdiction if it has an impact on Chilean territory or has the potential to affect the domestic market.

This stance is reinforced by the second paragraph of article 21 of DL 211, which was introduced by Law No. 20,945 in 2016. This provision enables notification of foreign companies, their subsidiaries, or agencies established in Chile, of potential violations of free competition, requiring them to comply with Chilean antitrust regulations.

4. Which authorities can investigate cartels?

The FNE is responsible for administrative investigation of cartel behaviour, overseeing leniency applications, and representing the public's interest when bringing a cartel claim before the TDLC. After the TDLC has determined the existence of a cartel, the FNE may file a criminal complaint for collusion before the appropriate criminal court. However, the criminal enforcement of collusion falls under the responsibility of the Criminal Prosecutor Office (Ministerio Público), and prosecution is carried out

before ordinary Criminal Courts.

Despite the above, the FNE does not hold a monopoly over the action, as individuals, economic agents, or consumer associations may also initiate legal proceedings for such conduct.

5. What are the key steps in a cartel investigation?

A cartel investigation initiated by the FNE can be triggered by various factors, including a leniency application, the FNE's own market intelligence, or a complaint filed by a third party. The FNE does not have a specific deadline to conduct its own investigations.

If the FNE receives a complaint from a third party, it has the authority to request relevant information and call upon witnesses with knowledge of the alleged act within a 60-day timeframe. Afterward, the FNE will have four months from receiving the complaint to conduct an admissibility examination. If the complaint is deemed admissible, the FNE will initiate an investigation and report it to any affected parties.

At this stage of the investigation, it is common for the FNE to use its intrusive powers to gather evidence and establish the existence of a collusive agreement. Then, the investigated conduct will either be dismissed or lead to filing a lawsuit or claim before the TDLC. The ruling of the TDLC is subject to appeal before the SC.

Finally, once the TDLC has ruled that there was a collusive agreement, and the FNE has submitted a claim, the Criminal Prosecutor's Office will begin with a criminal investigation which may then be brought before a Criminal Court.

6. What are the key investigative powers that are available to the relevant authorities?

In a collusion investigation, companies suspected of infringing the antitrust regulations and third parties are subject to the broad powers of the FNE to request information, documents, and other materials, besides summon anyone with potential knowledge of an anti-competitive infringement to testify as a witness.

The FNE, with the help of the police, can enter public or private premises and, if necessary, force entry and break into; search and seize all kinds of objects and documents that permit proving the existence of the violation; authorize the interception of all types of communications; and order any company that supplies

communication services to provide copies and records of communications transmitted or received by them.

Also, according to article 39 of DL 211, the FNE may additionally instruct that there will be no notice of the initiation of an investigation to the affected party, with the authorization of the TDLC; request that certain parts of the investigative file should be kept reserved or confidential; require the TDLC to exercise any of its authorities and adopt preventive measures on the investigations that the FNE is developing; agree with other public services and State agencies the electronic transfer of information, which does not have the character of secret or reserved according to the law, among others.

Additionally, the investigative powers of the competent criminal prosecutor when conducting a criminal investigation of collusion include instructing investigative actions to the police; requesting the Criminal Court for authorization to lift bank secrecy; protecting witnesses and victims and requesting protection measures; requesting preventive measures against the defendant to ensure its attendance before the Criminal Court, etc.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The TDLC made a significant ruling in March 2021 regarding the scope of attorney-client privilege, specifically whether communications between a company's executives and its in-house counsel are protected. The decision was that only communications with outside counsel are subject to protection, while those with in-house counsel are not (TDLC, Rol C-386-2019).

In a similar vein, in April 2023, the TDLC affirmed the attorney-client privilege between a client and its external lawyer, extending to all information related to the assignment that the lawyer possesses (TDLC, Rol C-453-22).

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

A party interested in obtaining any of the Benefits of the leniency program must file a Benefit Request. To be eligible for the benefit, the individual involved in the

conduct must be the first party to contribute information to the FNE from among parties responsible for the accused conduct and meet the following requirements:

- a. Provide accurate, truthful, and verifiable information that effectively contributes to establishing sufficient supporting evidence for filing a complaint before the Competition Court.
- b. Keep the application for benefits confidential until the FNE files the complaint or orders the case to be closed, unless the FNE explicitly authorizes disclosure.
- c. Immediately cease any participation in the conduct after submitting the application for benefits.

The applicant is required to provide a complete and detailed description of the conduct that is the subject of the benefit request, including information on the industry or market in which the conduct occurred. The applicant must also provide any supporting documents related to the conduct and the parties involved and must identify all legal persons within their business group and any individuals they wish to include in the benefit request.

Furthermore, if the FNE decides to file a criminal complaint, individuals who have received leniency are obligated to provide the Criminal Prosecutor's Office with the same information and documents that were previously provided to the FNE. Additionally, leniency beneficiaries are required to appear before the criminal court when requested by the Public Prosecutor to ratify any statements made during the leniency process. Failure to comply without reasonable justification can result in severe consequences, such as the revocation of the leniency reward and the possibility of facing criminal charges.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

The FNE offers leniency to the first two applicants, with the first one receiving complete immunity from both administrative and criminal liability, while the second applicant receives (i) a reduction of up to 50% of the fine that would have been otherwise requested; (ii) a reduction by one degree of the penalty for the crime of collusion; and (iii) the applicant will not be required to comply with the mandatory year of effective imprisonment.

10. Are markers available and, if so, in what circumstances?

Yes. To begin the leniency process, an applicant must submit a "marker request," which includes their full name, contact information, identification of the entity being represented, a Chilean domicile, and a general description of the conduct and affected market. Once submitted, the FNE will issue a "marker" which guarantees the applicant's place in the roster of applications and sets a deadline for the formal application and supporting information to be filed, known as the "benefit request".

If the benefit request meets legal requirements, the FNE will provisionally grant the requested benefit by issuing an official letter with requirements for obtaining the definitive benefit. The provisional benefit becomes definitive when the applicant fulfils these requirements and the FNE files a complaint before the TDLC.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

For an applicant to obtain the benefits of the leniency program, they have to provide precise, truthful, and demonstrable information about the collusive conduct during the investigation. This duty of providing information also comprehends remaining at the FNE's disposal to promptly respond to any requests for information or explanations that could clarify facts and add evidence, and a general obligation to cooperate truthfully, opportunely, and continuously with the FNE.

Besides, if the FNE decides to file a criminal complaint, individuals who have received leniency are obligated to provide the Criminal Prosecutor's Office with the same information and documents that were previously provided to the FNE, and are required to appear before the criminal court to ratify any statements made during the leniency process.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Immunity is extended only with respect to those for current/former employees and directors who have been incorporated by the First Applicant as "beneficiaries" of the leniency and comply with the requirements indicated in point 3.1 above.

13. Is there an 'amnesty plus' programme?

Yes, it benefits applicants that report a second act of collusion to the FNE, even if they are not eligible for the exemption benefit because they are not the first applicant in the first notified infringement. If the company meets the requirements to obtain the reduction benefit for the first conduct and the exemption benefit for the second conduct, the FNE will grant them the maximum reduction for the first conduct and exemption from liability for the second conduct. This means that the company will not be fined or held criminally liable for the second conduct, and will also receive a reduced fine for the first conduct. This is designed to encourage companies to come forward with information about multiple collusive activities and to ensure that all anticompetitive behaviour is brought to light and punished.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

Article 39(ñ) of DL 211 grants the FNE the power to negotiate agreements with the parties being investigated. The Competition Act and FNE's guidelines do not regulate the details of this procedure. Typically, the undertaking being scrutinized during an investigation proposes commitments to the FNE to reach an extrajudicial agreement.

Once an extrajudicial agreement is reached between the FNE and the undertaking, it must be presented to the TDLC. The TDLC will hold a hearing where it will listen to the FNE, the undertakings involved, and any other relevant parties. Within 15 working days, the TDLC must approve or reject the agreement without the option to modify it. Any party who disagrees with the TDLC's decision can only appeal through a petition for reconsideration before the TDLC.

Also, Article 22 of the Competition Act allows the Court to call the parties to conciliation. If it does not consider it pertinent or if such procedure has failed, it will receive the case for trial for a fatal and common term of 20 working days. Once a conciliation has been agreed upon, the Court will pronounce on it and give its approval, provided that it does not infringe competition.

While the Competition Act does not forbid the use of extrajudicial agreements or conciliation to address coordinated conduct, the FNE has refrained from utilizing these tools to bring investigations or trials related to collusive agreements or concerted practices to a close.

This decision has been made on public policy grounds, such as the promotion of the leniency program and the criminal prosecution of cartels.

15. What are the key pros and cons for a party that is considering entering into settlement?

Settlement agreements have both advantages and disadvantages. The advantages include the possibility of reducing fines and a shorter decision-making process. Settlements can also provide reputational benefits and greater certainty regarding the level of the fine. Since it is not a regulated process, parties and the FNE have greater flexibility in negotiation.

However, there are also potential drawbacks. All procedures handled before the TDLC are public, so once the extrajudicial agreement is submitted to the TDLC, the information related to the judicial procedure becomes available to the public. Additionally, entering into a settlement agreement may require admission of infringement, which could impact future damages claims by third parties. Finally, settling may have implications for other ongoing investigations, including possible increased scrutiny by the FNE or third parties.

Finally, the a settlement agreement has to be approved by the TDLC and does not constitute a ruling on the legality of the underlying conduct, and does not limit the rights of third parties, who are still entitled to pursue any claims they may have related to the conduct in question. Therefore, third parties' interests remain safeguarded, and the settlement agreement does not affect their rights regarding the conduct that led to the settlement.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

The FNE engages in close cooperation with sector regulators and law enforcement agencies at the national level for competition law matters. Similarly, at the international level, it collaborates with other competition authorities in the Americas, including the US; and the European Commission, facilitating mutual assistance and information exchange. In addition, the FNE actively participates in organizations like the OECD and the International Competition Network.

In the case of international cartels, the FNE may ask the applicant of a leniency benefit to sign a waiver regarding one or more jurisdictions in which it has sought

clemency or leniency, or entered into cooperation agreements related to the same collusive conduct. This waiver would release such agencies from the obligation of confidentiality with respect to the FNE in relation to these requests or negotiations, as long as they pertain to the conduct described in the application filed with the FNE.

17. What are the potential civil and criminal sanctions if cartel activity is established?

While both companies and individuals can be liable for the administrative offence, only individuals can be punished criminally. Administrative sanctions include fines, modification or termination of contracts, the dissolution of companies or other forms of organizations, and administrative debarment. Criminal sanctions include prison sentences from 3 to 10 years and director disqualification.

In addition, the TDLC may also impose the prohibition to contract with bodies of the administration of the State, with autonomous agencies or with institutions, agencies, companies or services in which the State makes contributions, with the National Congress and the Judiciary, as well as the prohibition to be awarded any concession granted by the State, for a term of five years from the date the final judgment becomes enforceable.

Once the TDLC issues a final decision finding that a collusive agreement or concerted practice did in fact take place, it is also possible to file a damages claim with the same TDLC. This claim would seek compensation for any harm caused by the cartel's behavior. Additionally, a class action for civil damages could be pursued under the Consumer Protection Act if the cartel's actions affected consumers' collective or diffuse interests.

No cartels have been criminally prosecuted yet. This is mainly because the amendment of the Competition Act that reinstated the criminal cartel offence is very recent.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

Under the Competition Act, fines can be applied to infringers of up to an amount equivalent to 30% of the sales of the products or services associated with the infringement during the relevant period, or up to twice

the economic benefit obtained from the infringement. In cases where it is not possible to determine the sales or economic benefit obtained, fines of up to a sum equivalent to sixty thousand UTA may be imposed.

For the determination of fines, the TDLC must consider: the economic benefit obtained from the infringement, if any; the seriousness of the conduct; the deterrent effect; the quality of the recidivist for having been previously convicted for anticompetitive violations during the last ten years, the economic capacity of the infringer and the collaboration provided by the infringer to the FNE before or during the investigation.

Regarding domestic cartels, in 2015, the SC upheld the collusion judgment of the TDLC against Agrosuper, APA, Ariztía, and Don Pollo for collusion in the price of chicken sales, condemning them to pay US\$58 million. The collusive behaviour was maintained for at least ten years.

Regarding international cartels, in 2019, the TDLC accepted the injunction filed by the FNE against the Chilean shipping companies CSAV and CMC (formerly CCNI), the Korean company Eukor and the Japanese companies K-Line, MOL and NYK, for having colluded in a series of contracting processes for the maritime transportation of automobiles, carried out by the manufacturers or consignees of different brands, for their commercialization in the Chilean market. The sentence was later confirmed by the Supreme Court in 2020, with fines totaling US\$30,5 million

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Article 26 of DL 211 establishes that a parent company can be held responsible for a cartel carried out by its subsidiary, provided that the parent company has benefited from the cartel and has participated in it in some way. The FNE's Internal Guidelines for the Application of Fines clarify that the term "offender" mentioned in Article 26 includes all entities that belong to the same economic agent. This means that if an entity, whether a parent or subsidiary, is part of the same economic unit and shares a decision-making center, then responsibility for any illegal acts committed by one of them may be imputed to the others. In other words, if a parent company and its subsidiary are part of the same economic group and have a common decision-making center, then the parent company may also be held accountable for any cartel activities carried out by the subsidiary.

20. Are private actions and/or class actions available for infringement of the cartel rules?

After the TDLC issues a final decision, a damages claim can be filed with the same TDLC using an abbreviated procedure (Article 30 of DL 211). If a cartel's actions sanctioned by the TDLC affected consumers' collective or diffuse interests, a class action for civil damages could be pursued under the Consumer Protection Act. This involves filing collective damages claim before the TDLC (Article 51 of the Consumer Protection Act).

21. What type of damages can be recovered by claimants and how are they quantified?

Consumers can bring compensation actions for damages caused by collusion under Article 30 of DL 211, which can be brought by anyone injured by an unlawful act against the market. Purchasers, competitors, and consumers collectively may seek damages. Compensation for damages follows the general rules of private law, including compensation for pecuniary and non-pecuniary damages, such as consequential damages, loss of profits, and moral damages.

The quantification of damages is determined on a case-by-case basis, with the principle of integral reparation of the damage and the compensatory function of civil liability applied in Chile. However, proving the existence, nature, and amount of damages can be difficult due to evidentiary challenges. Thus, the Court may use one or more methodologies in each case that it considers appropriate for the respective analysis.

22. On what grounds can a decision of the relevant authority be appealed?

It is possible to appeal a final ruling made by the TDLC before the SC when it imposes any of the measures listed in Article 26 of DL 211, or when it absolves the application of such measures. This is an appeal of a broad nature, meaning that it can review both factual and legal arguments.

23. What is the process for filing an appeal?

The final decision of the TDLC can only be appealed to the SC, and this can be done within 10 days by either the FNE or any of the parties involved.

Filing an appeal does not automatically suspend the enforcement of the TDLC's decision, except for fines. It is possible for a party to request a suspension of the judgment's effects, either in part or in whole, and the SC may grant this if there are valid grounds for doing so (Article 27 of DL 211).

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

There are currently two cartel cases being processed by the TDLC in Chile. The first case involves the securities transportation market, where the FNE has filed a lawsuit against global operators Brink's, Prosegur, Loomis, and six of their executives. They are accused of fixing prices between 2017 and 2018. The investigation was initiated by an executive's whistleblowing, and the FNE has requested fines of \$63 million.

If the TDLC approves the applications filed by the FNE, it could lead to the possibility of the FNE exercising a criminal action for the first time. This action would be reviewed in the criminal court, and if responsibilities are determined, the perpetrators could face penalties ranging from minor imprisonment to major imprisonment, as well as temporary absolute disqualification from holding certain positions.

The second case involves the gaming casinos market and is still in the investigation phase. The FNE is investigating Dreams, Enjoy, and Marina del Sol for a possible agreement to avoid competing in bidding processes, which would reduce their economic contributions to local governments. The details of the investigation are confidential.

This was an interesting case since, at the same time, the firms Dreams and Enjoy had submitted a merger notification to the FNE to form the largest operator in the casino industry. The merger was expected to be finalized in the middle of the year, but in April of 2023, both companies decided not to proceed with it due to some "suspensive conditions" that were still pending for its approval.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

The cartel case involving securities transportation

companies is significant because it is the first case to arise from an executive's whistleblowing since the reinstatement of the prison sentence for collusion under Law No. 20.945.

Also, the National Economic Prosecutor's Office (FNE) is preparing to release an updated version of its "Guide to Free Competition Compliance Programs," published in 2012 and still in effect. The FNE conducted a public consultation process over the past year to gather feedback from the private sector on this topic. The updated guide aims to adapt the standards for compliance with competition regulations based on the latest developments in the field.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes,

procedural changes, upcoming decisions, etc.)?

Chile is currently in the process of searching for a new FNE Prosecutor. The selection process is expected to be completed in the next few months, and the new Prosecutor will serve a term of four years. The FNE Prosecutor plays a crucial role in enforcing Chile's competition laws and investigating potential antitrust violations, so the selection process is being closely watched by businesses and legal experts alike.

In 2023, the Supreme Court may review appeals against the TDLC's decisions. One of the most significant cases to be reviewed is the "fire cartel" case, where two companies were penalized for colluding and manipulating public and private bids for the supply of aircraft used to combat and extinguish forest fires.

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