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THE GUIDE TO CORPORATE COMPLIANCE

SECOND EDITION

Editors
Andrew M Levine, Reynaldo Manzanarez Radilla,
Valeria Plastino and Fabio Selhorst

The Guide to Corporate Compliance

Second Edition

Editors

Andrew M Levine, Reynaldo Manzanarez Radilla, Valeria Plastino and Fabio Selhorst

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Publisher's Note

Latin Lawyer and LACCA are delighted to publish the second edition of *The Guide to Corporate Compliance*.

Edited by Andrew M Levine, a litigation partner at Debevoise & Plimpton LLP, Reynaldo Manzanarez Radilla, a corporate attorney and compliance professional at Incode Technologies Inc, Valeria Plastino, vice president, general counsel and regional compliance officer at Lumen Technologies, and Fabio Selhorst, general counsel, chief integrity officer and chief communications officer at Hapvida, this new guide brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all practitioners.

We are delighted to have worked with so many leading individuals to produce *The Guide to Corporate Compliance*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Infrastructure and Energy Investment* and *The Guide to Corporate Crisis Management*, as well as our jurisdictional references and our new tool providing overviews of regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Contents

Part 4

Legislative and Regulatory Pressure Points

CHAPTER 19

Navigating Competition Rules From a Chile Perspective

Lorena Pavic, José Pardo and Benjamín Torres[1]

How compliance with competition law shapes business activity

As in many Latin America jurisdictions, competition regulation has become one of the most relevant legal issues to be considered when doing business in Chile, especially so since the enactment of the current competition legislation in 2004, by means of Law No. 19911.[2] The subsequent emergence of several cartel cases – which have been emblematic of the local situation both from a legal and media standpoint – intensified this process.[3]

Recent legal reforms on competition in Chile

In recent years, the evolution of the Chilean legal framework on competition has responded to major reforms, which have significantly raised the standards and requirements for companies regarding a wide range of competition topics. These

1 Lorena Pavic is a partner and José Pardo and Benjamín Torres are associates at Carey y Cía.

2 Law No. 19911 created the Tribunal for the Defence of Free Competition (Tribunal de Defensa de la Libre Competencia [TDLC]) to replace the Competition Commission and the Consultative Commissions. Under the current system, the National Economic Prosecutor's Office (Fiscalía Nacional Económica [FNE]) or private parties file claims or lawsuits to the TDLC for adjudication and decision. See OECD (2010), 'Chile – Accession Report on Competition Law and Policy' <www.oecd.org/daf/competition/sectors/47950954.pdf>.

3 The first of these cases occurred in December 2008, when the FNE filed a competition claim against three pharmacy chains for having agreed to raise the prices of more than 200 medications between November 2007 and March 2008. Case C 184-2008 of the TDLC, FNE's claim against Farmacias Ahumada SA and others.

include exclusionary and exploitative conduct, vertical restraints, commercial policies, membership of trade associations, merger control, interlocking regulation and cartel enforcement, among others.[4]

The most recent reform to Chilean competition law, Decree-Law No. 211 (DL 211), was introduced by Law No. 20945 in 2016. This amendment strengthened the competition authorities' powers to align local regulation with international standards, especially following recommendations by the Organisation for Economic Co-operation and Development regarding Chilean competition policy.[5] The following are the main amendments that have had a significant effect on the competitive performance of undertakings active in the Chilean market:

- the introduction of a per se rule with respect to hardcore cartels (i.e., anticompetitive agreements on prices, output restrictions, allocation of territories, customers or market shares, and bid rigging), independently of the parties' market power, the intent of the infringer or the anticompetitive effects of the conduct;[6]
- the recriminalisation of cartels, by the establishment of a penal sanction of up to 10 years' imprisonment. In the event that alternative sanctions may apply, they can only be requested after the convicted person has been imprisoned for at least a year;[7]
- an increase in the amounts of fines, introducing a flexible maximum up to double the illegal gains obtained (the economic benefit) or up to 30 per cent of the offender's sales during the corresponding period in which the infringement was executed;[8]
- the establishment of additional penalties for cartels, such as absolute temporal disqualification to act as a director or manager in certain types of corporations and companies, and a ban for up to five years on entering into any type of agreement with state bodies (e.g., to be a supplier to the state), or being awarded any public concession;

4 The most important legal reforms were introduced by Law No. 20361 in 2009 and Law No. 20945 in 2016.

5 'Chile – Accession Report on Competition Law and Policy' (footnote 2, above); OECD, 'Assessment of Merger Control in Chile', Report by the OECD Secretariat (2014) <http://www.oecd.org/daf/competition/chile-merger-control-2014-en.pdf>.

6 This follows the European regulation regarding restrictions by object, Article 101(1) of the Treaty on the Functioning of the European Union.

7 Criminal sanctions to cartels were in force until Law No. 19911 was enacted in 2003; however, they were never actually applied.

8 This replaced the former fixed maximum amount, up to 30,000 tax units (approximately 18 billion Chilean pesos) for collusion and 20,000 tax units (approximately 18 billion Chilean pesos) for all other infringements.

- strengthening the leniency programme by the introduction of a criminal liability exemption for the crime of collusion;[9]
- the establishment of a mandatory ex ante control for concentrations whose parties equal or surpass certain turnover thresholds;[10]
- the establishment of the interlocking directorate (i.e., the simultaneous participation of persons in relevant executive positions or as board members in two or more competing companies) as anticompetitive conduct under certain circumstances, and the obligation to report to the National Economic Prosecutor's Office (FNE) the acquisition of a minority stake in a competing company that fulfils certain requirements; and
- the introduction of new powers for the FNE, such as the exclusive initiative of the National Economic Prosecutor for filing criminal lawsuits for collusion crimes, the setting of the turnover thresholds for mandatory merger control and the power to perform market studies, among others. Additionally, those hindering FNE's inquiries shall be subject to imprisonment if they conceal information or supply false information in the context of an inquiry, and to fines in the event that the parties under inquiry do not answer, or do so partially with no justification.

Recent legal reforms on competition in Latin America

Many Latin American jurisdictions have responded by strengthening their competition policies and institutions. For example, in 2018 a new Legislative Decree was introduced in Peru, which included the incorporation of rewards for useful information to detect, investigate and sanction cartels.[11] In addition, Peru's Competition Authority, Indecopi, issued guidelines for public officials in 2018 for combating collusion in public procurement.[12] In June 2020, Indecopi published it Guidelines on Antitrust Compliance Programmes, which seeks to prevent the risks of engaging in anticompetitive conducts. These Guidelines establish the possibility for offending agents to access a reduction benefit of between 5 per cent and 10 per cent of the value of the fine, if the offender has implemented a

9 Decree-Law No. 211 [DL 211], Article 63.

10 So far, the FNE has analysed approximately 116 concentrations under the mandatory merger control.

11 Supreme-Decree No. 030-2019, Article 26.

12 'Guide to Combating Collusion in Public Procurement' (2018) <https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas/>.

compliance programme prior to the offence, and complies with certain requirements, such as the fact that senior management has not participated in the commission of the offence, and the offence is promptly reported to Indecopi, among others.[13]

More recently, in December 2020, the Peruvian Congress published Law No. 31112, establishing merger control in Peru, and replacing the prior Emergency Decree No. 013-2019. Later, in March 2021, the Merger Control Law Regulations was officially published, expected to enter into force in early April 2021. Previously, the law established mandatory pre-notification and clearance requirements only for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission or distribution. The new merger control regime will apply to concentrations occurring in all fields of economic activities.

In Argentina, a new Competition Law was enacted in 2018, which created a National Competition Authority to replace the Comisión Nacional de Defensa de la Competencia. This Law also instituted a new *ex ante* merger control regime that come into force in August 2020, a leniency programme and increased fines for anticompetitive conduct, among other measures.[14]

Peru and Argentina are not the only jurisdictions that have made radical institutional changes. In 2013, Mexico also introduced a new competition authority, the Federal Economic Competition Commission (Cofece).[15] In turn, Panama established the Authority for the Protection of the Consumer and Defence of Competition (Acodeco)[16] in 2015.[17] Furthermore, Mexico introduced a Federal Telecommunications Institute, which is exclusively responsible for the broadcasting and telecommunications markets.[18]

In respect of Colombia and Brazil, even though they have not recently effected any significant reforms, being young competition systems, future modifications can surely be expected.

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13 https://www.indecopi.gob.pe/documents/51771/2962929/Gu%C3%ADa+de+Programa+de+Cumplimiento/.

14 Greco, Esteban M; Quesada, Lucía; Volujewicz, Federico A, 'Argentina: Competition Authority', *The Antitrust Review of the Americas* 2019 <https://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2019/1173674/argentina-competition-authority>.

15 Comisión Federal de Competencia Económica. Legal and Regulatory Framework (in Spanish) <https://www.cofece.mx/publicaciones/marco-juridico-y-normativo/>.

16 Autoridad de Protección al Consumidor y Defensa de la Competencia.

17 Available via http://www.acodeco.gob.pa/acodeco/view.php?arbol=2&sec=1&pagi=0.

18 Instituto Federal de Telecomunicaciones <http://www.ift.org.mx/sites/default/files/contenidogeneral/conocenos/Modificacion_EOIFT_130718.pdf>.

Growing competition standards for doing business

All these major reforms in Latin America demonstrate how standards for competition are rising significantly. They pose a challenge for companies, as decisions from Latin American authorities can sometimes be more difficult to predict. Penalties have increased, demands on firms have grown progressively stricter and authorities have become more active and have greater enforcement powers. In Chile, the FNE's growth in terms of experience and consolidation has been manifested in a greater level of success in its actions against cartels, both before the Competition Tribunal (TDLC) and the Supreme Court. In fact, the last rejected FNE claim regarding a cartel case was filed in 2009.[19] The FNE has obtained convictions in the 18 claims filed since then.

This evolution occurs in a regulatory environment in which the legal and institutional frameworks are rather new. This means that the criteria to be applied by the authorities are often still uncertain.[20] Authorities may be overzealous in their investigations, applying an excessively conservative standard and in some cases requesting excessive information from the involved parties (e.g., during the process of notification of concentrations). For example, in Chile there are only a few rulings on unilateral conduct, the merger control regime is still quite new, and the first and only case of concerted practices as a hub-and-spoke cartel was sentenced by the Supreme Court in April 2020.[21] This last case is especially relevant from the compliance standpoint. One of the most relevant aspects of the TDLC ruling was the recognition of the role of compliance programmes as potential tools for mitigating and even exempting liability. However, the Supreme Court disagreed with the TDLC, establishing that compliance programmes do not constitute exemptions of responsibility, even though the court agreed with the TDLC regarding the possibility that a complete, real and serious programme can be considered when determining the amount of the fine.

The result of all the foregoing is that companies are having difficulties in adapting to changes and new standards. Doing business in Latin America can be complex from a regulatory point of view, so it is vital that undertakings, especially

19 Case C 197-2009 of the TDLC, FNE's claim against Abercrombie & Kent SA and others.

20 For example, there are only a few rulings of the TDLC on the standards and requirements for unilateral conduct. Indeed, currently the standards for many forms of unilateral conduct are only established by the FNE in the context of the closing of its investigations.

21 Case C 304-2016 of the TDLC, FNE's claim against Cencosud SA and others.

those agents with a relevant market power that participate in risky or complex markets, understand current legislation and compliance standards, and stay up to date with changes as they happen.[22]

Undertakings without full knowledge of competition regulation are at risk of illicit anticompetitive conduct, with the consequent risk of severe sanctions or, on the other hand, inhibit conduct that is actually licit, constraining the competitiveness and success of that conduct.[23] Because of this, competition law compliance and a functioning compliance programme are essential. Executives and employees, especially those in executive and commercial positions, must be properly trained, as this type of measure can help to avoid competition risks and to conduct business legally, with the intent of ensuring that the commercial success of the company is accompanied by a low exposure to competition risks.[24]

Considering the above, issues such as use of the right sources for business intelligence, the risks of accessing commercially sensitive information from competitors, the potential exclusionary effects of certain designs of commercial policies, the necessary safeguards when participating in trade associations, the *ex ante* assessment of concentrations, among other things, are now some of the main priorities in day-to-day business.

Anticompetition risks and requirements in Chile and Latin America

Legal exposure to competition infringements in Chile

Companies active in Chile are at risk of different types of anticompetitive conduct. Article 3 of DL 211 provides, generically, that whoever carries out or enters into, individually or collectively, any conduct, act or agreement that 'impedes, restricts or hinders free competition or that tends to produce such effects', will be sanctioned with the measures contemplated therein. This includes, among other things, vertical and horizontal anticompetitive agreements (both unilateral and coordinated), different forms of abuse of dominance and some conduct related to concentrations.

22 In this regard, and for the effectiveness of a competition compliance programme, the FNE requires companies to always keep an updated analysis of the current and potential competition risks applied to the specific entity and its different business areas or divisions.

23 This happens especially regarding more complex forms of anticompetitive conduct and in those cases where there are unclear standards, such as some cases of abuse of dominance.

24 The training on competition compliance for executives and employees is one of the important requirements requested by both the FNE's Guidelines and the TDLC.

Risks of being involved in anticompetitive conduct in Chile are related to a wide range of severe sanctions that can be imposed by the TDLC both on undertakings – either public or private – and on individuals. The sanctions of general application include:

- the modification or termination of agreements, contracts or arrangements against competition;
- the modification or dissolution of the company, corporation or other legal entity involved in anticompetitive infringements;[25] and
- fines of up to 30 per cent of the offender's sales of the respective product or service line of business during the period in which the infringement was executed, or up to twice the economic benefit received as a result of the infringement. If is not possible to determine either the sales or the economic benefit, the TDLC may impose fines up to a maximum amount equivalent to 60,000 tax units (approximately 36 billion Chilean pesos).[26]

Additionally, in the case of anticompetitive horizontal agreements, the TDLC can impose a ban on contracting, under any title, with state bodies or companies, and on being awarded any concession granted by the state, for a maximum of five years from the date the TDLC's decision becomes final and binding.[27]

Finally, in the case of gun jumping, the TDLC can impose fines up to 20 tax units (approximately 12 million Chilean pesos) for each day of delay from the closing of the operation.[28]

Legal exposure to competition infringements in Latin America

Other Latin American jurisdictions differ in certain ways from the Chilean competition regulation, although most countries have ranges of fines and jail sentences. In Colombia, for example, criminal sanctions apply only to bid rigging.[29] The Colombian Criminal Code establishes in these cases fines of up to 1,000 legal minimum wage (approximately 880 million Colombian pesos) and between six and 12 years' imprisonment.

25 Only one entity has been dissolved by the competition authorities so far. Case C 236-2011 of the TDLC, FNE's claim against Agrosuper SA and others.

26 DL 211, Article 26, Paragraphs (a), (b) and (c).

27 DL 211, Article 26(d).

28 id., at Article 26(e).

29 Law No. 1474, Article 410A.

In contrast, and similarly to Chile, in Brazil only cartels are considered federal crimes, for which individuals may be prosecuted and sanctioned not only with fines, but also with imprisonment for between two to five years. Brazil's antitrust authority (the Administrative Council for Economic Defence (CADE))[30] has signed a series of cooperation agreements with criminal prosecutors' offices from a number of states, to make criminal prosecutions more effective.

Beyond Brazil and Chile, individuals in Mexico may also be prosecuted for entering, ordering or executing any contract or arrangement between competitors with certain anticompetitive purposes, facing between five and 10 years' imprisonment.

Safeguards to mitigate competition risks

Regarding recommendations in the context of competition law breaches, first and foremost – as the most serious competition infringement – companies should implement safeguards and measures to avoid any kind of collusive behaviour, certainly including hardcore cartels and any type of concerted practices, including those related to the sharing of commercially sensitive information between competitors, either directly or through third parties (e.g., customers or suppliers).

The previous safeguards are especially important in the context of markets subject to additional factors that could facilitate collusion, such as those characterised by high levels of market concentration, symmetric market shares, product homogeneity, little innovation, price and costs transparency, stability of demand and little entry or exit of competitors, among others.[31]

Regarding collusive behaviour, undertakings should have internal mechanisms to identify and prevent anticompetitive behaviour, for deterring illegal conduct, first, and if applicable, making it possible to apply for leniency. This is the purpose of the existence of leniency programmes. In this respect, a reliable and effective compliance commitment demands full disclosure of background information to the authorities in the event of identifying a cartel.[32]

30 Conselho Administrativo de Defesa Econômica.

31 See Ivaldi, Marc; Bruno, Jullien; Rey, Patrick; Seabright, Paul; Tirole, Jean (2003), 'The Economics of Tacit Collusion', Final Report for DG Competition, European Commission <https://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf>.

32 DL 211, Article 39 bis.

Collusive conduct is the most serious competition infringement. In Chile, the Supreme Court imposed fines in cartel cases of more than US$45 million in total in January 2020,[33] and in December 2019, the FNE filed an antitrust claim for collusion against companies active in the market of feed and nutrition for salmon, requesting fines totalling US$70 million.[34]

In Brazil, in 2018, CADE initiated 35 new cartel investigations and issued final rulings on 20 cartel cases, imposing approximately US$180 million in fines.[35]

In turn, in Colombia in 2017, the antitrust authority imposed fines of approximately US$68 million on Argos, Cemex and Holcim, and on senior managers of these companies, for participation in a cement price-fixing cartel.

In May 2017, Cofece imposed its highest cartel fine to date (approximately 1.1 billion Mexican pesos) on providers of pension-fund administration services for collusion to set limits on the transfer of savings accounts from one fund to another.[36]

Leniency programmes have been established in Latin American countries such as Argentina, Brazil, Chile, Mexico and Peru. These five countries, which form the Latin American Strategic Alliance on Competition, signed a joint statement – the Paris Letter[37] – in late 2018 on shared principles that would guide the implementation of their respective leniency regimes, with the objective of tightening the relationship between their competition authorities.[38]

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33 'Corte Suprema condena a laboratorios Sanderson y Fresenius por colusión en licitaciones públicas de medicamentos con multa total de US$15 millones', FNE (January 2020) <https://www.fne.gob.cl/corte-suprema-condena-a-laboratorios-sanderson-y-fresenius-por-colusion-en-licitaciones-publicas-de-medicamentos-con-multa-total-de-us-15-millones>; see also https://www.fne.gob.cl/corte-suprema-condena-a-cmpc-y-sca-por-colusion-en-el-mercado-del-papel-tissue.

34 'FNE acusa colusión de empresas productoras de alimentos para salmón y pide multas de US$ 70 millones al TDLC', FNE (December 2019) <https://www.fne.gob.cl/fne-acusa-colusion-de-empresas-productoras-de-alimentos-para-salmon-y-pide-multas-de-us-70-millones-al-tdlc>.

35 'CADE's General Superintendence recommends condemnation of companies for cartel in the national sea salt market', Administration Council for Economic Defence [CADE] (March 2017) <http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-recommends-condemnation-of-companies-for-cartel-in-the-national-sea-salt-market>.

36 <https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-025-2017.pdf>.

37 Alianza Estratégica Latinoamericana en Materia de Libre Competencia, Carta de Paris <www.cade.gov.br/noticias/cade-e-agencias-antitruste-do-chile-argentina-mexico-e-peru-assinam-declaracao-conjunta-com-melhores-praticas-sobre-leniencia/20181130-carta-de-paris-suscrita.pdf>.

38 'Competition Agencies from Brazil, Chile, Mexico and Peru Strengthen the Latin American Strategic Alliance for Competition', Cofece (2018) <https://www.cofece.mx/wp-content/uploads/2018/09/COFECE-037-2018-English.pdf>.

Further, there have been recent jurisdictional changes that have added leniency programmes to competition regimes. For example, in Argentina, new amendments have been introduced by Law No. 27442 in the context of a new presumption of illegality of hardcore cartels, including the creation of a leniency programme for cartel cases, which offers full immunity to the first firm that confesses to having participated in a cartel, a fine reduction of between 20 per cent and 50 per cent for the second agent, and an extra benefit for those who, not having obtained full immunity in a leniency procedure, disclose or recognise a cartel in a different market.

Second, with respect to unilateral conduct, dominant undertakings have a special duty of care in what relates to not restricting competition by deteriorating market conditions, exploiting customers or suppliers or by generating foreclosure effects. To determine the appropriate safeguards, it is necessary to analyse not only the market share of the respective company but also to attend to other features of the market, such as the presence of potential natural or regulatory barriers to entry.

In this sense, dominant undertakings should constantly review their commercial policy and their in-force agreements with suppliers and customers, with consideration of the specific market conditions. The aim is to avoid being involved in anticompetitive conduct through vertical restraints such as exclusivity agreements, tying, resale price restrictions, discounts and rebates, among other things.

Third, the mandatory merger control regime requires companies to notify concentrations that equal or exceed the set turnover thresholds. In Chile, this happens under an administrative procedure before the FNE.[39] This proceeding involves a standstill obligation to the parties of the transaction, which prohibits the implementation of the operation before it is cleared by the FNE.[40] This translates into the following requirements:

- Companies must notify to the FNE all transactions that meet the substantive requirements to be considered as a concentration operation and equal or surpass the jurisdictional turnover thresholds, before their closing, subject to the risk of incurring an infringement of failure to notify.[41]
- The notifying parties cannot implement the transaction before the FNE's clearance, which may consider a variety of actions that constitute early implementation of the concentration (gun jumping).[42]

39 DL 211, Title IV.

40 id., at Article 49.

41 id., at Article 48. There have been no FNE claims regarding failure to notify conduct thus far.

42 id., at Article 49. There has been only one gun-jumping case brought to the TDLC, regarding early implementation of a transaction. The concentration was approved by the FNE after

- Notifying parties must comply with the remedies in the case of conditional approvals.
- Companies are not allowed to effect the transaction in the case of a prohibition ruling.

Recently, the head of the FNE, Ricardo Riesco, announced the publication of new Merger Control Notification Regulations, new Guidelines on horizontal concentrations and a new pre-notification instructive.[43]

Concerning merger control legislation, Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, Uruguay and, most recently,[44] Peru, among others, have merger control regimes. Previously, Peru only had mandatory filings for transactions in the electricity sector that met the jurisdictional thresholds, which has now been expanded to include all concentration operations. The new regime comes into force in August 2020.

In April 2021, Ecuador established a new 'fast-track' merger control procedure as a result of the covid-19 crisis.[45] Comprising a 25-day analysis of the concentration, it allowed the competition authority to reduce their procedure timing by 20 per cent compared with the previous year.

Most of these merger control jurisdictions are modelled on a mandatory filing if the operation surpasses certain jurisdictional thresholds, usually based on individual or combined turnovers, though some of them, such as Argentina, Colombia, Costa Rica and Mexico, also include a *de minimis* asset threshold.

In this context, in the past few years, Latin American authorities have issued different documents and guidelines, making advances in areas of competition law not previously explored by other authorities in the region. A good example is the 'Guidelines for the Analysis of Previous Consummation of Merger Transactions' published in Brazil by CADE, which details concepts, procedures and penalties for gun jumping, serving as a reference for the rest of the region.[46]

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its closure, and it was finally settled before the TDLC between the FNE and the notifying parties. Case C 346-18 of the TDLC, FNE's claim against Minerva SA and others.

43 https://centrocompetencia.com/riesco-repasa-estadisticas-de-fusiones-y-anuncia-formulario-super-simplificado/.

44 Supreme-Decree No. 030-2019 (Peru), Article 26.

45 SCPM, Resolution No. SCPM-DS-2020-019, https://res.cloudinary.com/gcr-usa/image/upload/v1587675683/RESOLUCI%C3%93N-SCPM-DS-2020-19_1_xr5ntg.pdf.

46 'Guidelines for the Analysis of Previous Consummation of Merger Transactions', CADE (2016) <www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf>.

Finally, in respect of Chile, during FNE's investigative procedures, companies must be extremely cautious about the submission of information to the authority. The last amendment to DL 211 introduced several sanctions (including fines and imprisonment) to punish (1) the submission of false information in the context of the notification of concentrations,[47] (2) the concealment of information or the submission of false information in the context of an FNE request for information,[48] and (3) parties under inquiry that do not answer or do so only partially with no justification.[49]

Possible connections between anticompetition and other compliance risks

Several types of anticompetitive conduct relate closely to other compliance risks. In many cases, other types of responsibilities may be the consequence of the same facts, such as corporate responsibility, or harm to other groups of individuals may also give rise to penalties, such as consumers or employees. Competition law may also include different types of penalties other than those of an economic nature.

Competition compliance and criminal responsibility

One of the main risks associated with anticompetitive conduct is that derived from criminal responsibility established in the law. In Chile, collusion was punished with imprisonment until 2003, when Law No. 19911 came into force and removed this type of penalty; however, in 2016, it was reincorporated into DL 211 by the amendment introduced by Law No. 20945.[50]

Currently, Article 62 of DL 211 establishes imprisonment sanctions, ranging from three years and one day up to 10 years for those who participate in crimes of collusion. The Law also establishes that, in the event that alternative sanctions may apply, they can only be requested after the convicted person has been imprisoned for at least a year.[51] So far, this sanction has not been applied because there have been no cases regarding events that occurred after the amendment came into force.

47 DL 211, Article 3 *bis*(e).

48 id., at Article 39(h).

49 id.

50 id., at Article 62.

51 Currently, one of the main discussions in Chile is to whether increase the period of one year to access alternative penalties, as to further discourage collusive conduct as well as incentivise the leniency programme. The government recently announced that it will present a bill to increase the effective imprisonment.

As mentioned, the FNE has the exclusive initiative for filing criminal lawsuits for collusion crimes.[52] In this regard, the FNE recently published its 'Internal Guidelines for Filing Criminal Lawsuits in Collusion Cases', to pre-set objective requirements and criteria in this matter.[53]

Competition compliance and consumer protection

As well as criminal responsibility, anticompetitive conduct may affect consumers, who may be entitled to compensation. Article 30 of DL 211 establishes that, once the TDLC has issued a final and binding judgment, later actions may be prosecuted either through a compensation action before the TDLC, or through the procedure for collective actions before a civil court.

Competition compliance and personal responsibility of board members

Another of the main risks alongside those of competition relates to the responsibility of board members within a company. In Chile, Law No. 18046 of Corporations (LSA) sets forth the right of board members to be provided with sufficient, true and timely information about the essential data of the company, as well as the legal obligation of executing their charge with the due diligence that the duty of being properly informed implies. In fact, in Article 78 of the LSA, it is established that for board members to execute an adequate administration, it is their duty to compile sufficient information for it. Regarding this, the Superintendency of Securities and Insurance (SVS)[54] has sanctioned board members for not executing their right to be informed, owing to the fiduciary nature of their position.

There have been cases in which this standard has resulted in civil responsibilities for board members and other senior executives. In the FASA cartel case, the SVS penalised the president, executives and board members of Farmacias Ahumada during the investigated time period with a fine of 300 UF (6.2 million Chilean pesos at the time) to each one, for not having duly exercised their legal right to be informed, and in a timely manner, as they should have done by virtue of the background information they had, both public and internal, in relation to a cartel case in which the company was involved.[55]

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52 id., at Article 64.

53 'Guía Interna para la Interposición de Querellas por el Delito de Colusión', FNE (June 2018) <https://www.fne.gob.cl/wp-content/uploads/2018/06/Gu%C3%ADa-de-Querellas-final-definitiva.pdf>.

54 Superintendencia de Valores y Seguros.

55 Case C 184-2008 of the TDLC, FNE's claim against Farmacias Ahumada SA and others.

Competition compliance and anti-corruption regulation

Additionally, the same facts constituting anticompetitive infringements could also imply infringements of the anti-corruption regulation, especially any conduct relating to collusive behaviour (bid rigging) related to public procurement markets. This relationship between the regulations can produce the risk that legal provisions against corruption undermine the effectiveness of leniency programmes against bid rigging in public procurement.[56]

Competition compliance and labour law

Labour laws can both aid and be in dispute with competition rules. These two areas of corporate compliance go hand in hand, and through fostering a holistic approach to corporate governance, companies can assist in a better compliance to competition rules through their employees.

For example, by creating bonuses and other incentives for employee performance regarding compliance programmes within the company, employers incentivise a culture of compliance. Similarly, through the existence of expedited channels for reporting anticompetitive conduct supported by a bounty system (i.e., the creation of rewards for whistle-blowers), companies may be able to increase the rate of detection of anticompetitive conduct.

In other types of measures, companies may adopt 'negative' incentives for employees to respect compliance programmes, such as certain internal consequences, which might include the recalling of bonuses, civil damage claims by the employer and the loss of reputation.

All these measures must be stated within a company's internal rules; it is also recommended that they are included in employees' contracts.

On the other hand, as mentioned, labour laws can be in direct conflict with competition rules and proceedings. One of the clearest cases is when the need to investigate possible anticompetitive conduct by one or more employees clashes with the employees' right to privacy. While different legislation can have different thresholds regarding what is considered private within the workplace, there is a general consensus that emails, computers and work phones may be monitored; however, it must be explicitly and clearly stated prior to any such monitoring being carried out, and be non-discriminatory (i.e., all employees must be subject to this a priori monitoring).

56 Luz, Reinaldo; Spagnolo, Giancarlo (2016), 'Leniency, Collusion, Corruption, and Whistleblowing', Working paper to Stockholm Institute of Transition Economics.

In Chile, both the FNE and the TDLC recommend that the review of email inboxes is the preferred method of monitoring the effectiveness of compliance programmes. Meanwhile, labour case law states that this kind of screening must be stated in a company's internal rules and be applied as a general, preventive and aleatory measure. The specific monitoring of an employee's email inbox, especially with investigative intent, in most cases is considered strictly prohibited except for when an employee consents to such an examination.

Problems arise when possible anticompetition behaviour by an employee is reported, as a company complying strictly with labour laws would not be able to investigate a possible infringement of competition rules.

Elements of an effective anticompetition compliance programme

Even where Chilean legislation does not provide specific requirements regarding competition compliance programmes, case law under both the FNE and TDLC has established certain standards that work as indicators, or minimum requirements, for a programme to be effective, notwithstanding that its effectiveness will ultimately depend on how commercial policies are implemented and the particularities of each case.

Another issue relates to the effects of compliance programmes in the field of corporate liability. Recently, the TDLC reduced fines based on the conscientious implementation of a compliance programme, and even raised the possibility of exemptions from liability, which radically differs from practice in the European Union and the United States.

Below are the requirements of an effective anticompetition compliance programme, according to FNE's and TDLC's standards. These criteria are not new to the region, and other countries have applied similar requirements for compliance programmes, including Peru,[57] Mexico,[58] Colombia[59] and Brazil.[60]

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57 'Guía de Programas de Cumplimiento de las Normas de Libre Competencia (Proyecto)', Indecopi (September 2019) <https://www.indecopi.gob.pe/documents/51771/2962929/Guía+de+Programa+de+Cumplimiento>.

58 'Recomendaciones para el cumplimiento de la Ley Federal de Competencia Económica dirigidas al sector privado', Cofece (August 2015) <https://www.cofece.mx/cofece/images/Documentos_Micrositios/RecomendacionesCumplimentosLFCE_021215.pdf>.

59 'Icontec Pretende Establecer Buenas Prácticas de Protección para la Libre Competencia', Fenalco <www.fenalco.com.co/gesti%C3%B3n-jur%C3%ADdica/icontec-pretende-establecer-buenas-pr%C3%A1cticas-de-protecci%C3%B3n-para-la-libre>.

60 'Guia para Programas de Compliance', CADE (January 2016) <www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-compliance-versao-oficial.pdf>.

FNE's Guidelines on Competition Compliance Programmes

In 2012, the FNE published its 'Guidelines on Competition Compliance Programmes' with the aim of encouraging economic agents to develop internal mechanisms that seek to prevent and detect anticompetitive conduct, by providing some of the markers that the FNE considers a competition compliance programme should contain.[61]

These Guidelines can be seen as the FNE's response to the then increasing trend by competition authorities, on an international level, of aiding the prevention and deterrence of anticompetitive conduct by encouraging the implementation of competition compliance programmes. The FNE's Guidelines have clearly been influenced by earlier guides and documents issued by other competition authorities. For example, the European Commission's 'Compliance Matters' includes many of the same compliance measures: identification of risks, involving senior executives in the compliance policy, the establishment of reporting channels, permanently updating the compliance policy, monitoring and auditing.

Furthermore, Chilean authorities have explicitly recognised the influence of the OECD's Policy Roundtable on 'Promoting Compliance with Competition Law Policy' of 2011. In the summary document of that roundtable, the Chilean representative is quoted as saying: 'The FNE is currently in the process of evaluating what approach to take regarding these programmes, so this Roundtable is very timely for supporting our decision-making.' We can now see some clear correlation between the OECD's document and the FNE's guide (e.g., the evaluation of risks, commitment of the company, monitoring, audits, secure reporting channels, permanent assessment of compliance and use of incentives to promote compliance, among other things).

Other documents appearing around the same time, such as the US Department of Justice's FCPA Resource Guide, and later documents set out many of the same measures already mentioned multiple times.[62] This shows that most competition authorities agree about the minimum measures and characteristics of a competition compliance programme, with certain minimal differences between them depending on the specific characteristics of each jurisdiction.

For the FNE, a competition compliance programme must meet at least the following four conjunctive essential requirements:

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61 'Programas de Cumplimiento de la Normativa de Libre Competencia', FNE (June 2012) <https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf>.

62 For example, 'Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations', US Department of Justice, Antitrust Division (July 2019) <https://www.justice.gov/atr/page/file/1182001/download>.

A real commitment to comply with the competition law, which must be transmitted through the actions of each agent, requiring that both internal and external policies are consistent with competition law.

The identification of current and potential competition risks applied to the specific entity and its different business areas or divisions, especially by recognising weak areas where those risks will probably occur. This requirement is especially important, since it will determine the characteristics of the company's compliance programme in accordance with the corresponding level and areas of risk and the characteristics of the market in which the firm operates. For these purposes, the FNE recommends a detailed study by experts in competition, which should be reviewed at regular intervals or in the event of any relevant change of circumstances.

The existence of internal structures and procedures in accordance with competition law and consistent with it, which relates closely to the first requirement. Some manifestations of a proper commitment would be, for instance, (1) incentives, compensation, bonuses and other benefits to workers who comply with competition law, (2) the establishment of appropriate communication channels for reporting possible anticompetitive conduct, (3) the establishment of a separate and independent pricing area that is distinct from the commercial area, and (4) the designation of a person in charge of the company's competition compliance programme (compliance officer).

The active participation of senior executives and board members of the company in the implementation and development of a compliance programme. All the previous requirements can only be achieved if all individuals within the company, especially those in senior positions, show the importance of compliance with competition law. Finally, the compliance officer should have full autonomy and independence within the company (e.g., responding directly to the board of directors and exhibiting precisely defined grounds for removal).

Additionally, the FNE mentions specific elements that a compliance programme can include to achieve a greater degree of effectiveness. The FNE describes them as having a 'pyramidal' structure: as the measures are progressively more intense and the cost is greater, their effectiveness also increases. The Guidelines establish five distinct elements, in increasing order: (1) manual; (2) training; (3) monitoring; (4) audits; and (5) disciplinary measures.

First, a competition compliance programme must have, at the very least, a written manual that clearly and comprehensively explains the main aspects of competition law, potential risks, types of anticompetitive conduct, means of reporting this conduct, the person in charge of the programme, among other things. This manual must be available to all company personnel and must be permanently and easily accessible by all employees.

Second, training regarding proper compliance with the programme and the manual must be carried out within the company, ideally by an external competition expert. This training will encompass practical explanation of the extent of the programme, the internal competition policies of the agents and the internal procedures of the company regarding compliance with competition rules. Face-to-face training can be complemented with online courses or training, and its frequency will depend on the specific needs of the company.

As third and fourth measures, the FNE mentions monitoring and audits. Both are mechanisms that allow the identification of the level of effectiveness of the compliance programme, and both can be done by internal and external professionals. The FNE recommends that an audit is carried out each time there is a report of a possible infraction, and to carry out general preventive audits.

Finally, the FNE recommends disciplinary action is imposed on workers who do not comply with the compliance programme, indicating expressly the penalties to be faced by an offending employee. At the same time, establishing incentives for those employees who duly comply with the programme can act as an incentive that will encourage compliance with competition rules.

Relevant Chilean case law on competition compliance programmes

The TDLC has imposed compliance programmes as corrective measures in cartel cases.[63] Although this case law provides certain guidelines as to what the competition authorities may consider an effective compliance programme, it should always be borne in mind that these programmes have been imposed as a specific penalty and corrective response and, therefore, no longer follow a fully effective preventive objective.

Compliance programmes imposed as penalty measures have several characteristics in common, as the TDLC typically requires: (1) the implementation of a compliance programme that satisfies the requirements established by the FNE Guidelines, as a sign of deference to the prosecuting entity; (2) the creation of a compliance committee (which must be established in the statutes of the company and be responsible for proposing the appointment and removal of a compliance officer to the board of directors, and ensuring the correct performance of the

63 Ruling No. 160/2017, Case C 299-2015, Case C 184-2008 of the TDLC, FNE's claim against CMPC Tissue SA and others; Ruling No. 165/2018, Case C 312-2016, FNE's claim against Fresenius and others; Ruling No. 167/2019, Case C 304-2016, FNE's claim against Cencosud and others; Ruling No. 171/2019, Case C 292-2015, FNE's claim against CCNI SA and others; Ruling No. 172/2020, Case C 321-2017, FNE's claim against *Industrial y Comercial Baxter de Chile Ltda and others*.

officer's duties); (3) that the instituted compliance officer performs his or her role full-time and reports directly to the board of directors; (4) the inclusion of comprehensive competition compliance training, carried out by economists or lawyers who are experts in competition matters, for senior executives and administrative personnel, and any other individuals indicated by the compliance officer; and (5) the implementation of frequent competition audits that must consider, at least, the review of corporate email inboxes and records of calls from corporate phones, the incentives established in work contracts, the participation of the company in tender processes and in trade associations, among other things.

Conclusion

The evolution of competition regulation in several jurisdictions has significantly raised the standards and requirements for companies to mitigate the growing legal exposure associated with anticompetition infringements. This poses a challenge for companies in having to adapt to changes and new standards, especially for those agents with a relevant market power that participate in risky or complex markets. As a result, the implementation of an effective competition compliance programme - the minimum requirements for which have been set fairly uniformly by the authorities of most Latin American jurisdictions - and a real commitment to comply with competition law, must be considered nowadays as one of the most essential elements of corporate compliance in Latin America.

APPENDIX 1

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Lorena Pavic is partner at Carey and co-head of the firm's antitrust and regulated markets, public law, and corporate, mergers and acquisitions groups.

She received the Women in Antitrust award from *Global Competition Review* and was recognised as one of the 100 female leaders in Chile by *El Mercurio* newspaper, both in 2017. She has been widely recognised by international publications, including *Chambers Latin America*, *The Legal 500*, *Latin Lawyer* and *Best Lawyers*, among others.

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This guide delivers specialist insight to our readers – general counsel, compliance officers, government agencies and private practitioners –who must navigate the region's complex, fast-changing framework of rules and regulations.

In preparing this guide, we have been working with practitioners from a variety of disciplines and geographies, who have contributed a wealth of knowledge and experience. We are grateful for their cooperation and insight.

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