

Restraints of Trade and Dominance in Chile: Overview

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A Q&A guide to restraints of trade and dominance in Chile.

This Q&A is part of the global guide to restraints of trade. Areas covered include monopolies and abuses of market power, regulatory authorities and the regulatory framework, the scope of rules, exemptions, exclusions, statutes of limitation, notification, investigations, penalties and enforcement, third party damages claims, EU law, joint ventures and proposals for reform.

Restraints of Trade

Scope of Rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Regulatory Framework

Restrictive agreements and practices are regulated in Chile by Article 3 of Law Decree 211 of 1973 (Competition Law), which penalises any act, deed, or agreement that prevents, restricts, or hinders competition, or which tends to produce such effects (*Article 3(1)*). Therefore, restrictive agreements and practices that produce anti-competitive effects, or tend to do so, are subject to administrative sanctions, including fines (*Article 26*).

Article 3 distinguishes between collusive practices and other anti-competitive conduct as follows:

- Agreements involving competitors and consisting in price-fixing, market allocation, production limitation or bid rigging (hard-core cartels) are considered per se illegal under Article 3(a). These horizontal agreements are subject to both administrative and criminal sanctions (*Article 62*).
- Agreements involving competitors setting marketing conditions or excluding existing or potential competitors are only illegal if they confer market power, and therefore must be analysed under the rule of reason (*Article 3(a), second part*).

- Vertical restraints are not per se illegal, and these must be assessed under the rule of reason. Vertical restraints can result in an abuse of a dominant position, which would be sanctioned by Article 3(b), or in a general anti-competitive infringement sanctioned by Article 3(1). The same applies to dual distribution practices.

There are no industry-specific regulations

Regulatory Authority

The authorities that enforce the Competition Law are the:

- **National Economic Prosecutor's Office (*Fiscalía Nacional Económica*) (FNE).** The FNE is the investigatory body that investigates any fact, act, or convention that prevents, restricts, or hinders competition, or that tends to produce such effects. If the FNE determines that there has been a breach of the Competition Law, the FNE can file an action with the Competition Court (the decision-making body) for the imposition of sanctions. Reaching a settlement with the infringer is also an alternative (*see Question 12 to 13*).
- **Competition Court (*Tribunal de Defensa de la Libre Competencia*).** The Competition Court's main function is judging disputes arising from competition infringements. The Competition Court has other important powers, such as:
 - judging non-contentious competition proceedings;
 - issuing general instructions;
 - issuing reports mandated by special laws;
 - making policy recommendations to the executive branch;
 - hearing the special appeal against the FNE's resolution that prohibits a transaction reviewed under the merger control regime.
- **Supreme Court.** The Supreme Court hears appeals against final judgments and decisions of the Competition Court. Only the Competition Court and the Supreme Court, in the case of an appeal, can impose sanctions for competition infringements.

All these authorities have jurisdiction throughout Chile.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

The Competition Law applies to both formal agreements and informal practices.

Parents and subsidiaries/related companies are part of the same business group and, as such, are considered as a single economic operator under the Competition Law. Therefore, from a competition point of view, agreements between related companies are analysed from the perspective of the effects on third parties outside the business group.

Exemptions

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

Anti-competitive infringements other than hard-core cartels are not per se unlawful and can be justified under the rule of reason. However, most jurisprudence considers hard-core cartels to be per se unlawful under the current regulation (although this is debatable), and the legislation does not set out criteria for exempting these practices from prohibitions.

The only block exemption in Chile is provided for under Article 5 of Law Decree 3,059. According to this provision, Chilean shipping companies can participate in shipping freight conferences, pooling agreements and consortia that regulate and rationalise services, and will not be subject to the Competition Law rules for these purposes.

Exclusions and Statutes of Limitation

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

No types of agreements or practices are excluded from the scope of Article 3 of the Competition Law (other than the exemption established by Article 5 of Law Decree 3,059 (*see Question 3*)).

Statutes of Limitation

There is a general three-year statute of limitations for competition infringements. The three-year period is counted from the execution of the anti-competitive conduct.

The only exception to this is for illicit horizontal agreements or cartels (*Article 3(a)*), which are subject to a five-year statute of limitations. The limitations period in this case does not start to run while the effects on the market arising from the illicit agreement remain.

The statute of limitations is interrupted with the notification of the FNE's accusation or a third-party complaint.

There are no grounds for suspension of the statute of limitations.

Notification

5. What are the notification requirements for restrictive agreements and practices?

Notification

Restrictive agreements (other than hard-core cartels) can only be approved or cleared in advance by the Competition Court if the parties voluntarily decide to submit the agreement to a public non-contentious proceeding before the court known as a "consultation", in which anyone with a legitimate interest can provide background information. Under Article 18(2) of the Competition Law, the Competition Court has the power to hear matters of a non-contentious nature that may infringe the provisions of the law, for which purpose it can determine conditions to be complied with in relation to the facts, acts, or agreements that are subject to the consultation. The Competition Court can therefore approve a restrictive agreement, whether unconditionally or subject to certain conditions, to ensure that the agreement does not undermine competition in Chile.

Informal Guidance/opinion

It is not possible to obtain informal guidance before, or instead of, a formal public consultation before the Competition Court.

Responsibility for Notification

A consultation can only be initiated by the parties to or those with a legitimate interest in the facts, acts or agreements (whether existing or to be concluded) that are the subject of the consultation.

Relevant Authority

The consultation must be submitted to the Competition Court.

Form of Notification

There is no applicable form to submit a consultation to the Competition Court. The interested parties must file an application explaining why the matter is of a non-contentious nature and how it could potentially infringe the provisions of the Competition Law. Other formal requirements include:

- Demonstrating the legal capacity of the person applying for the consultation.
- Identifying the markets that may be affected by the facts, acts or agreements that are subject of the consultation.
- Appointing an attorney and granting them a power of attorney.

Filing Fee

There are no filing fees.

Investigations

6. Who can start an investigation into a restrictive agreement or practice?

Regulators

The FNE conducts market monitoring and can start an investigation into a restrictive agreement or practice on its own initiative. In addition, government authorities may file a complaint about anti-competitive conduct to the FNE, which may consequently initiate an investigation or dismiss the complaint according to an admissibility check.

Third Parties

Third parties can file complaints regarding anti-competitive conduct with the FNE. The FNE will then either initiate an investigation or dismiss the complaint. A complaint must identify the:

- Complainant, who may request that their identity be withheld.
- Specific market in which the events are taking place.
- Economic operators involved.
- Facts that would constitute anti-competitive conduct.

The complaint can be filed at the FNE's offices or through an online form (available at <https://fne.cerofilas.gob.cl>). There are no informal complaints.

The FNE must examine all complaints under Article 41 of the Competition Law, although it can decide to investigate or dismiss the complaint based on an admissibility check. To determine whether it is appropriate to investigate or dismiss the complaint, the FNE may, within 60 days of receiving the complaint, request information from private individuals, as well as call any person who may have knowledge of the alleged act to testify.

Even without an FNE investigation, third parties can bring a competition claim before the Competition Court in a private-to-private claim.

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Representations

Any third party can file a complaint with the FNE, regardless of whether it has a special interest in the case. The complainant can also make representations during the course of an investigation.

Document Access

Third parties, including the initial formal complainant, can make a request for access to public information regarding any investigative file (*Law 20,285*). However, the FNE can order (either on its own initiative or at the request of the interested party) that certain parts of the file be kept reserved or confidential, on any of the following grounds:

- To protect the identity of those who have made statements or provided information in the context of a leniency application.
- The relevant information contains formulas, strategies, trade secrets or any other element whose disclosure could significantly affect the competitive development of its owner.
- The disclosure of the information may undermine the effectiveness of FNE investigations.

Any request for access to the investigative file by third parties must be notified to the investigated parties, who can oppose the request based on these reasons.

The decision to close the investigation must be communicated to the complainant through an official letter, attaching a copy of the corresponding resolution.

Be Heard

The complainant can request to be heard during the course of an investigation, and can lodge an appeal for reconsideration (*recurso de reposición*) against a decision by the FNE to close the investigation within five administrative days of being notified of this (*Article 59, Law 19,880*).

8. What are the stages of the investigation and timetable?

FNE investigations, whether conducted on its own initiative or following a complaint, are not subject to strict timetables. The only formal steps relate to:

- Issuance by the FNE of its decision to initiate an investigation. This must be notified to the investigated parties within five days (except in the case of classified investigations).
- The end of the investigation. This will generally result in one of the following:
 - further action (generally, filing of an indictment or a consultation request with the Competition Court);
 - a settlement with the investigated parties, which must then be approved by the Competition Court;
 - the decision to close the file, which must be notified to the investigated parties and the complainant, if applicable.

The duration of the investigation is not regulated, so the only relevant limit is the applicable statute of limitations.

Publicity and Confidentiality

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

Investigations by the FNE, whether they are newly-opened or ongoing, are not made public.

Investigations are only made public by the FNE once the investigation has been terminated (with the FNE deciding to either take further action, reach a settlement with the investigated parties or closes the file without further action). In general, any of these decisions involves publishing the:

- Names of the investigated parties.
- Subject matter of the investigation.
- FNE's conclusions.
- Remedies that have been adopted, if any.

In addition, third parties from whom the FNE requests information during an investigation are normally aware of the investigation and its subject matter, since the official request for information letter contains the name or title of the investigation.

Automatic Confidentiality

No information is automatically kept confidential. The FNE may order, on its own initiative or at the request of the interested party, certain parts of the file to be kept reserved or confidential (*see Question 7*). In addition, the FNE, on notifying the President of the Competition Court, can order that an investigation be classified as confidential to safeguard the effectiveness of the

investigation (without being notified to the affected parties). Such a declaration may be made on the opening of an investigation or during its course, and the confidentiality ceases once the investigation has been closed.

Confidentiality on Request

The parties can request that certain information be kept confidential. See [Question 7](#).

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

During the investigation, the FNE can take statements and refer requests for information to the investigated parties and third parties, including other authorities, at any time. Providing complete answers to these requests for information is mandatory and failing to do so can be sanctioned by the Competition Court. In cases of collusion, it also has the power, with prior authorisation from a Minister of the Court of Appeals of Santiago, to order the police to carry out:

- Raids, searches and seizures.
- Interception of all kinds of communications.
- Requests for communication records from telecommunications companies.

Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

Settlements consisting of early resolution procedures, where the parties admit infringements in return for reduced penalties, are not provided for in the Competition Law and there is no special procedure for this. However, an investigated entity can offer remedies during the course of the investigation upon learning of the FNE's concerns.

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

The FNE may reach a formal settlement (extrajudicial agreement) with parties who accept remedies to address competition concerns, without filing an indictment with the Competition Court. Such an agreement must be approved by the Competition Court in a special procedure for this purpose.

The Competition Court will hear the settlement agreement at a single hearing, without the form of a trial, within five working days of receipt of the background information. During the hearing it may hear arguments from the parties to the settlement agreement, as well as the views of those with a legitimate interest. The National Consumer Service and consumer associations are presumed to have a legitimate interest. The Competition Court will approve or reject the agreement within a maximum period of 15 working days from the date of the hearing. These decisions, once enforceable, are binding on the parties who participated in the agreement and can only be subject to an appeal for reconsideration to the same Competition Court.

The FNE may also reach an informal settlement with the parties during the investigation and decide to close the file because the remedies adopted by the parties are sufficient to eliminate the competition concerns identified in the course of the investigation.

Penalties and Enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

Under Article 26 of the Competition Law, the Competition Court or Supreme Court can order the:

- Modification or termination of acts, contracts, agreements, schemes or arrangements that are contrary to the provisions of the Competition Law (*Article 26(a)*).
- Modification or dissolution of companies, corporations and other legal persons involved in the anti-competitive acts, contracts, agreements, schemes or arrangements (*Article 26(b)*).

In the case of cartels, the courts can, for up to five years from the time the final judgment becomes enforceable, ban the offender from:

- Contracting with state administration bodies autonomous bodies or institutions.
- Contracting with bodies, companies or services to which the state makes contributions.
- Contracting with the Chilean national congress and judiciary.

- Being awarded any concession granted by the state.

(Article 26(d), Competition Law.)

These are all administrative sanctions.

Fines

The Competition Court and Supreme Court can impose administrative fines on the companies participating in an infringement of up to either:

- 30% of the offender's sales in the line of goods or services associated with the infringement during the period of the infringement.
- Twice the economic benefit of the infringement.

Alternatively, if it is not possible to determine the sales and the economic benefit obtained by the offender, the courts can impose fines up to a sum equivalent to 60,000 annual tax units (Article 26(c)). (Annual tax units are indexed accounting units mainly used for tax and penalty purposes.)

If the offender does not pay within ten business days of the court's decision becoming final, the court can impose a detention of up to 15 days, or a proportional fine, and repeat these measures to obtain compliance with the obligation.

Personal Liability

Administrative fines can be imposed on:

- The legal person concerned.
- Its directors and managers.
- Any person who has been involved in carrying out the anti-competitive conduct.

Cartels also give rise to criminal sanctions applicable to individuals, including:

- Imprisonment for between three years and one day and ten years.
- Temporary absolute disqualification of between seven years and one day and ten years from holding the office of director or manager of a:
 - public stock company (*sociedad anónima abierta*);
 - company subject to special rules;
 - state company or a company in which the state has a shareholding; or
 - trade or professional association.

Immunity/leniency

There is a leniency programme that allows applicants to obtain administrative immunity (for the first applicant) or reduced administrative sanctions (for the second applicant) for those who, having participated in a cartel, provide evidence to the FNE that leads to proof of the illicit conduct and the identities of those who perpetrated it. The first applicant for leniency can also be exempted from criminal liability. The second applicant may obtain a reduction of one degree in the established criminal penalty.

Impact on Agreements

The Competition Court can Supreme Court can decide to modify or terminate agreements that are contrary to the provisions of the Competition Law.

Third Party Damages Claims and Appeals

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third Party Damages

Follow-on actions can be brought by third parties claiming damages for losses suffered because of a prohibited restrictive agreement or practice, based on a final Competition Court or Supreme Court infringement decision. The National Consumer Service can file a class action on behalf of affected consumers when their general or collective interest is affected by a competition infringement. Stand-alone damages actions based on an infringement of the Competition Law are not possible.

Special Procedures/rules

The damages action must be brought before the Competition Court and is subject to a short and concentrated contentious procedure. In deciding on the damages action, the Competition Court will base its verdict on the facts that serve as the background to the action, as set out in its own competition judgment. The statute of limitations for actions arising from an anti-competitive infringement is four years from the date on which the final competition judgment became enforceable.

Collective/class Actions

If anti-competitive conduct affects the collective or general interest of consumers, a follow-on class damages action can be brought by:

- The National Consumer Service.
- A consumer association constituted at least six months before the filing of the action.
- A group of no less than 50 individual consumers sharing the same interest.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of Appeal and Procedure

Only a final judgment of the Competition Court imposing or denying the measures referred to in Article 26 of the Competition Law (*see Question 13*) can be subject to appeal, to the Supreme Court. This appeal must be well-founded, and can be filed by the FNE or by any of the parties with the Competition Court within ten working days of the notification of the judgment.

Third Party Rights of Appeal

In a contentious procedure, only the FNE and the parties to the agreement can file an appeal. In a public consultation, any third party with a legitimate interest that was a party to the procedure (that is, provided background information) can file an appeal.

Monopolies and Abuses of Market Power

Scope of Rules

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Regulatory Framework

Article 3(b) of the Competition Law specifically regulates abuses of market power by banning the abusive exploitation by an economic agent, or a group of economic agents, of a dominant position on the market, through:

- Fixing purchase or sale prices.
- Requiring the sale of another product on a sale.
- Allocating market zones or quotas.
- Requiring similar abuses from others.

Abuses of market power are subject to the administrative measures and fines under Article 26 of the Competition Law (*see Question 13*). Criminal law does not apply to these types of abuses.

Regulatory Authority

The regulatory authorities are the:

- FNE.
- Competition Court.
- Supreme Court

See *Question 1*.

17. How is dominance/market power determined?

There is no statutory definition of dominance or market power. The Competition Court's case law has defined market power as the ability of an economic operator to act independently of other competitors, customers and suppliers because there is no effective competitive constraint that can be exercised against it, so that it is able to set conditions that would not have been obtained in the absence of that high degree of market power. Market power is determined based on several elements, including:

- Market shares.
- Barriers and other conditions to entry.
- Conditions for market expansion.

18. Are there any broad categories of behaviour that may constitute abusive conduct?

Article 3(b) of the Competition Law refers to certain types of abuses, including:

- Fixing purchase or sale prices.
- Imposing the sale of another product on a sale (tying, bundling).
- Allocating market zones or quotas.

The Competition Law also refers also to other "similar abuses", which may include, for example:

- Loyalty discounts.
- Exclusive dealing.
- Refusing to deal.
- Predatory pricing.

Exemptions and Exclusions

19. Are there any exemptions or exclusions?

There are no exemptions or exclusions.

Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

It is only possible to obtain clearance of a conduct through a public consultation procedure (*see Question 5*).

Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

There are no procedural differences between investigations into monopolies and abuses of market power, and investigations into restrictive agreements and practices. See [Question 6 to 9](#) and [Question 11 to 12](#).

22. What are the regulator's powers of investigation?

These are the same as for restrictive agreements and practices. See [Question 10](#).

Penalties and Enforcement

23. What are the penalties for abuse of market power and what orders can the regulator make?

These are the same as for restrictive agreements and practices. See [Question 13](#).

Third Party Damages Claims

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third Party Damages

The situation is the same as for restrictive agreements and practices. See [Question 14](#).

Special Procedures/rules

The situation is the same as for restrictive agreements and practices. See [Question 14](#).

Collective/class Actions

The situation is the same as for restrictive agreements and practices. See [Question 14](#).

EU Law

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

Joint Ventures

26. How are joint ventures analysed under competition law?

Full-function joint ventures that involve the creation of a new economic operator independent from its parents are subject to the Chilean merger control regime on either a mandatory or a voluntary basis, depending on whether the relevant turnover thresholds are met.

Non-full-function joint ventures are not subject to the Chilean merger control regime but are subject to the general provisions of Article 3 of the Competition Law, which prohibits facts, acts or agreements that prevent, restrict or hinder competition, or that tend to produce such effects. There is therefore no special treatment for this type of joint ventures.

Inter-agency Co-operation

27. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The FNE co-operates with regulatory authorities in other jurisdictions in relation to infringements of competition law. The legal basis for this is Article 39(1) of the Competition Law, which authorises the FNE to enter into agreements with foreign agencies or other bodies whose purpose is to promote or defend competition in economic activities. The scope and extent of co-operation

will depend on the specific agreement entered by the FNE. Co-operation duties are also set out in the competition chapters of certain free trade agreements to which Chile is a party.

Recent Cases and Trends

28. What are the recent developments, trends or notable recent cases concerning abuse of market power?

One of the most notable recent cases concerning abuse of market power in Chile is the FNE's accusation against Canal del Fútbol (CDF) for abusing its monopoly position in the market for the live broadcasting of sports matches of the National Professional Football Championship (CNFP) by imposing a series of commercial practices on cable operators, including:

- Limiting or controlling the promotions that cable operators can implement for consumers.
- Establishing minimum resale prices.
- Setting an arbitrary number of minimum guaranteed subscribers.
- Tying of basic and premium/HD channels.

There is also a recent trend towards regulating the payments card industry, particularly merchant discounts and interchange fees, considering the current dominant position held by Transbank, the largest card acquirer in Chile, and its vertical integration with card issuer banks. In this context, there is currently a statutory committee working on setting ceilings for interchange fees.

Proposals for Reform

29. Are there any proposals for reform concerning restrictive agreements and market dominance?

In March 2020, the "Anti-Collusion and Strengthening of the FNE" Bill, which amends the Competition Law, was introduced in the National Congress. This bill:

- Provides new tools to the FNE to strengthen the investigation and prosecution of collusive practices.
- Increases the penalty for the crime of collusion when it involves basic goods and services.
- Proposes to incorporate a concept of the anonymous whistleblower into the Chilean legal system for reporting anti-competitive conduct.

- Proposes various amendments to the Competition Law, to strengthen the effectiveness of the FNE's actions.

The bill is currently at a standstill in Congress, with no clear date when it can be expected to be passed.

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- Advising EssilorLuxottica SA on the mandatory merger control procedure before the FNE regarding the global acquisition of control over GrandVision NV.
- Advising Veolia Environnement SA on the mandatory merger control procedure before the FNE regarding the global acquisition of control over Suez SA.
- Advising a global tech company on an anti-trust investigation by the FNE.
- **Languages.** English, Spanish

Professional associations/memberships. Member of the Antitrust Committee, Chilean Bar Association.

Publications

- *Co-author of the Chilean chapter, Cartels & Leniency, ICLG, 2020.*
- *Co-author of the Chilean chapter, Overview of Competition Law in Latin America, IBRAC, 2016.*
- *Co-author of the book "Dumping and Disloyal International Competition", 1995.*

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