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THE GUIDE TO CORPORATE COMPLIANCE

THIRD EDITION

Editor
Andrew M Levine

Associate editors
Reynaldo Manzanarez Radilla
Valeria Plastino
Fabio Selhorst

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Third Edition

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Publisher's Note

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

Edited by Andrew M Levine, a litigation partner at Debevoise & Plimpton LLP, with the assistance of associate editors Reynaldo Manzanarez Radilla, a corporate attorney and compliance professional, Valeria Plastino, vice president, general counsel and regional compliance officer at Lumen Technologies, and Fabio Selhorst, senior vice president of corporate affairs 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 Mergers and Acquisitions* and *The Guide to Restructuring*, 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 IV

Legislative and Regulatory Pressure Points

CHAPTER 15

Navigating Competition Rules

Lorena Pavic, José Pardo, Benjamín Torres and Raimundo Gálvez[1]

How compliance with competition law shapes business activity

In many Latin America jurisdictions, competition regulation has become one of the most relevant legal issues to be considered when doing business, as countries throughout the region have responded to the new challenges that this discipline represents by strengthening their competition policies and institutions.

Therefore, the implementation of an effective competition compliance programme that meets the raising standards that jurisdictions throughout the region have established on this matter has proven to be of the utmost importance when doing business in Latin America.

This chapter aims to provide a general framework of the different aspects that should be considered when designing a competition compliance programme, giving an overview of the legal reforms in this area in recent years, relevant case law in Latin America, and sanctions that companies may face if antitrust infringements are detected, as well as possible connections with other compliance risks.

Legal reforms on competition

In the past decade, the evolution of the different Latin American legal frameworks on competition has involved major reforms, which have significantly raised the standards and requirements for companies regarding a wide range of competition topics. These include exclusionary and exploitative conduct, vertical restraints, commercial policies, membership of trade associations, merger control, interlocking regulation and cartel enforcement, among others.

1 Lorena Pavic and José Pardo are partners, and Benjamín Torres and Raimundo Gálvez are associates at Carey.

Chile

In the case of Chile, the most relevant 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.[2] 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, independently of the parties' market power, the intent of the infringer or the anticompetitive effects of the conduct;[3]
- the recriminalisation of cartels, by the establishment of a penal sanction of up to 10 years' imprisonment;[4]
- 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;[5]
- 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;
- strengthening the leniency programme by the introduction of a criminal liability exemption for the crime of collusion;[6]

2 '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.

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

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

5 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.

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

- the establishment of a mandatory ex ante control for concentrations whose parties equal or surpass certain turnover thresholds;[7]
- 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;[8] 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.

Peru

In the case of Peru, in 2018, a new Legislative Decree was introduced that incorporated rewards for useful information to detect, investigate and sanction cartels.[9] In addition, Peru's Competition Authority, Indecopi, issued guidelines for public officials in 2018 for combating collusion in public procurement.[10] In June 2020, Indecopi published its 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 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.[11]

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7 So far, the National Economic Prosecutor's Office (FNE) has analysed approximately 116 concentrations under the mandatory merger control.

8 The FNE submitted its first two claims for alleged interlocking conduct in December 2021. See Case C 436-2021 of the TDLC, FNE's claim against Hernán Büchi Buc and others; and Case C 437-2021 of the TDLC, FNE's claim against Juan Hurtado Vicuña and others. The TDLC has not ruled yet on any of these cases.

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

10 '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.

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

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 were officially published and entered into force in June 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 applies now to concentrations occurring in all fields of economic activities.

Argentina

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, a leniency programme and increased fines for anticompetitive conduct, among other measures.[12]

Mexico

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).[13] In turn, Panama established the Authority for the Protection of the Consumer and Defence of Competition (Acodeco)[14] in 2015.[15]

Furthermore, Mexico introduced a Federal Telecommunications Institute, which is exclusively responsible for the broadcasting and telecommunications markets,[16] and a Directorate General of Digital Markets to analyse the development of digital markets and their impact on competition.[17]

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12 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.

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

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

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

16 Instituto Federal de Telecomunicaciones, http://www.ift.org.mx/sites/default/files/contenidogeneral/conocenos/Modificacion_EOIFT_130718.pdf.

17 https://www.eleconomista.com.mx/empresas/Cofece-crea-direccion-para-supervisar-a-los-mercados-digitales-20200707-0041.html.

Brazil

Regarding Brazil, its competition agency (CADE) issued in 2016 its Guidelines on Competition Compliance Programmes,[18] which address specific measures enterprises must adopt to avoid breaching competition rules and also what CADE expects from an effective antitrust compliance programme. In March 2020, the Brazilian authority also updated its guidelines regarding CADE's antitrust leniency programme.[19]

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.[20] The FNE has obtained convictions in the 19 claims filed since then.

This evolution occurs in a regulatory environment in which the legal and institutional frameworks are rather young. This means that the criteria to be applied by the authorities are often still uncertain.[21] Authorities may be overzealous in their investigations, applying conservative standards 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 not many rulings on unilateral conduct, the merger control regime is still young, and the first and only case of concerted practices as a hub-and-spoke cartel was sentenced by the Supreme Court in April 2020.[22] This most recent case is especially relevant from the compliance standpoint. One of the most relevant aspects

18 https://cdn.cade.gov.br/portal-ingles/topics/publications/guidelines/compliance-guidelines-final-version.pdf.

19 https://cdn.cade.gov.br/portal-ingles/topics/publications/guidelines/GuidelinesCADEsAntitrustLeniencyProgram.pdf.

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

21 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.

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

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.

In the case of Mexico, there is no jurisprudential practice or regulatory recognition that allows reducing a sanction resulting from the implementation of a compliance programme. However, authorities may consider the cooperation of the offender and its good faith for purposes of grading the sanction.[23]

In Colombia, although there is no legal framework that regulates compliance programmes, their requirements and their effects, there is an instrument of the Energy and Gas Regulatory Commission, Resolution No. 80 of 2019. This regulation established a mandatory compliance system for regulated parties in the energy and gas sector, which includes compliance with competition regulations.[24] On the other hand, the Colombian Institute of Technical Standards and Certification (INCOTEC), the body in charge of issuing technical standards and certifying quality standards for companies, published in January 2020 a document that defines certain guidelines for the establishment of good practices in the protection of competition. Nonetheless, none of the above-mentioned documents refers to the effects that the adoption of a compliance programme may have when determining the fine to be applied to an agent that has violated competition rules.

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 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.[25]

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

23 https://centrocompetencia.com/compliance-en-latinoamerica-de-dulce-y-agraz.

24 idem.

25 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.

competitiveness and success of that conduct.[26] 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.[27]

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 or exploitative 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 Latin America

The different jurisdictions in Latin America present some differences in the conducts qualified as anticompetitive, particularly in relation to those that are exposed to criminal sanctions.

For example, in Chile, 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.

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;[28] and

26 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.

27 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.

28 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.

- 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).[29]

In Chile, regarding criminal penalties, Article 62 of DL 211 punishes from three years and one day up to 10 years anyone who enters into, organises or executes anticompetitive agreements that fix prices, limit production, allocate market zones or quotas or affect the outcome of public bids, namely hardcore cartels.

In Colombia, criminal sanctions apply only to bid rigging.[30] 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.

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 and five years. Brazil's antitrust authority (the Administrative Council for Economic Defence (CADE))[31] has signed a series of cooperation agreements with criminal prosecutors' offices from a number of states, to make criminal prosecutions more effective, and to facilitate the notification of foreign individuals and entities investigated by the agency, the collection of relevant evidence and information, and the possibility of learning new techniques from other agencies.

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.

In the case of Peru, the Criminal Code establishes the crime of 'abuse of economic power' punishing (1) the abuse of dominant position and (2) the participation in practices and agreements restricting competition with the purpose of preventing, restricting or distorting competition. The person who engages in such conduct may be punished with two to six years of imprisonment.

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

30 Law No. 1474, Article 410A.

31 Conselho Administrativo de Defesa Econômica.

Beyond the legal context, the reality is that the number of detected cartels has increased significantly over time in Latin America. According to a study carried out by the World Bank, in recent decades, out of a total of around 400 cartels discovered in the region, around 250 were detected in Brazil, Chile, Colombia, Mexico and Peru.[32] Another of the study's findings was that most of the sectors affected by cartels are of importance to countries' competitiveness and productivity, such as manufacturing, warehousing and transportation.

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.[33]

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.[34]

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,[35] and in December 2019, the FNE filed an antitrust claim for

32 https://documentos.bancomundial.org/es/publication/documents-reports/documentdetail/148021625810668365/fixing-markets-not-prices-policy-options-to-tackle-economic-cartels-in-latin-america-and-the-caribbean.

33 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.

34 DL 211, Article 39 *bis*.

35 '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),

collusion against companies active in the market of feed and nutrition for salmon, requesting fines totalling US$70 million.[36] More recently, in October 2021, the FNE filed a claim against Brink's, Prosegur and Loomis, companies active in the securities transportation market, and six of their executives, for, according to the FNE, having colluded to fix prices for the transportation of securities and related services. This case is particularly interesting, since it is the first case of collusion charged under the current legal text, that is, after the legal reform to DL 211 of 2016. Thus, if the TDLC and the Supreme Court issue a final conviction, the cartel may be criminally prosecuted in application of the criminal sanctions contemplated for the crime of collusion.[37]

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.[38]

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.[39]

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

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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.

36 '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.

37 See Case C-430-2021 of the TDLC, FNE claim against Brink's, Prosegur and Loomis.

38 '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.

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

statement – the Paris Letter[40] – 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.[41]

Further, there have been recent jurisdictional changes that have added leniency programmes to competition regimes. For example, in Argentina, a set of amendments were 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. In the case of Peru, Indecopi issued in 2019 its Leniency Programmes Guidelines.[42] In Chile, the FNE published its Internal Guidelines on Leniency in Cartel Cases in 2017,[43] providing legal certainty to whoever wishes to obtain leniency benefits and limiting the scope of discretion conferred by the law to this agency.

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.

40 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.

41 '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.

42 https://www.indecopi.gob.pe/documents/51771/4402954/ESP+Lineamientos+del+Programa+de+Recompensas.

43 https://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines_Leniency_Cartel_Cases.pdf.

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.[44]

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.[45] 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.[46] 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.[47]
- 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).[48]
- Notifying parties must comply with the remedies in the case of conditional approvals.
- Companies are not allowed to implement the transaction in the case of a prohibition ruling.

In May 2021, the FNE released a new version of the Guidelines for the Analysis of Horizontal Mergers and Acquisitions, which reflect the FNE's experience in years of operation of the mandatory merger control. The main innovations compared to the previous 2012 version include:

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44 In November 2021, the TDLC convicted Correos de Chile for abusive exclusionary practices (through the application of targeted retroactive rebates). The TDLC sentenced the Chilean state-owned company to pay a fine of 6,000 UTA (approximately US$4.6 million), without imposing additional measures. See Ruling No. 178/2021.

45 DL 211, Title IV.

46 id., at Article 49.

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

48 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 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.

- a direct reference to counterfactual assessment as a basic predictive method of merger control;
- a description of the quantitative methodologies used to estimate unilateral risks;
- a section dedicated to the evaluation of mergers in dynamic markets and digital platforms;
- greater detail in coordinated risk hypotheses; and
- an explanation of the criteria used to evaluate the failing firm defence, among other topics.

Also, the FNE published an Instruction on Pre-notifications, which establishes a formal stage available to companies and economic agents to resolve substantive and procedural doubts for future notifications in the context of the merger control.[49]

Recently, in November 2021, the FNE filed a claim before the TDLC against a company active in the maritime transport service, for the acquisition of a competing vessel (Navimag Carga S.A.). This transaction did not exceed the mandatory notification thresholds at the time it was completed, so it was not subject to mandatory control. However, the FNE considered that such acquisition implied the monopolisation by the acquirer of the bidirectional route Puerto Montt–Chacabuco, which could constitute an infringement of Article 3, Paragraph 1 of DL 211 (i.e., a general anticompetitive offence). The FNE requested the imposition of fines and a number of additional measures against the acquiring company.[50]

Concerning merger control legislation, Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, Uruguay and, most recently,[51] 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. This regime came into force on 14 June 2021.

49 https://www.fne.gob.cl/en/fne-actualiza-y-fortalece-regimen-de-control-de-operaciones-de-concentracion-con-nueva-guia-e-instructivo/.

50 See Case C 433-2021 of the TDLC, FNE's claim against Navimag Carga S.A.

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

In April 2021, Ecuador established a 'fast-track' merger control procedure as a result of the covid-19 crisis.[52] 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.[53]

Another example is Mexico. Cofece published in April 2021 an update of its Merger Notification Guidelines, which seeks to provide greater certainty to economic agents regarding the Commission's treatment of merger analysis. Specifically, the Guide establishes those elements that Cofece will consider in its merger analysis in order to clarify: (1) its treatment of collaboration agreements between economic agents; (2) issues relating to the calculation of notification thresholds; (3) who is required to notify a concentration involving multiple purchasers; and (4) what information must be submitted to raise the failing firm defence.

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.

52 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.

53 '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.

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.[54]

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.[55] So far, this sanction has not been applied because there have been no cases regarding events that occurred after the amendment came into force.

Several Latin American countries have imposed criminal sanctions against price fixing cartels. In this regard, Colombia's Criminal Code establishes as a criminal breach bid-rigging in public procurement procedures,[56] and sanctions it with six to 12 years of imprisonment. In a similar sense, Peru's Criminal Code also considers collusive agreements as a crime in the context of public tender procedures.[57] Finally, the Economic Crimes Act of Brazil considers collusive behaviours as a crime and sanctions such conduct with two to five years of imprisonment.[58]

Competition compliance and consumer protection

As well as criminal responsibility, anticompetitive conduct may affect consumers, who may be entitled to compensation. In Chile, 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.

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54 id., at Article 62.

55 Currently, one of the main discussions in Chile is whether to increase the period of one year to access alternative penalties, so as to further discourage collusive conduct as well as incentivise the leniency programme. The Chilean government presented in March 2020 a bill that seeks to increase prison penalties for cases of collusion in basic goods or services, establishing a minimum of five years of imprisonment. Additionally, the bill seeks to provide new tools to the FNE for its role in the investigation of crimes against competition, such as protection for anonymous whistle-blowers, increased penalties for the destruction of evidence and more intrusive measures.

56 Article 410-A.

57 Article 384.

58 Article 4, Law 8137/1990.

This type of civil responsibility is widely contemplated across the region. For example, in the case of Mexico, Article 134 of the Federal Law of Economic Competition establishes that those who have suffered damages as a result of a monopolistic practices or an unlawful concentration may file legal actions in defence of their rights before the courts specialised in antitrust matters. As in the case of Chile, the obligation to pay for this type of damages has its direct antecedent in the declaration of the unlawfulness of such conduct by the competent court, regardless of the fact that the plaintiff has to prove the damage and causation between the damage and the anticompetitive conduct.

Likewise, in Peru, Article 52 of the Peruvian Law for the Repression of Anticompetitive Conduct enables any person who has suffered damages as a consequence of an anticompetitive conduct declared by administrative resolution to file a civil claim for damages before the Judicial Power. The article also empowers the Indecopi to initiate class actions in defense of affected consumers. On 17 May 2021, Indecopi published a guide on compensation for damages to consumers for anticompetitive behaviour,[59] which seeks to complement and delineate the criteria for the application of such rule.

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)[60] 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 Unidad de

59 https://cdn.www.gob.pe/uploads/document/file/1898027/Lineamientos%20CLC%20sobre%20demandas%20resarcitorias%20VF%20%281%29%20%281%29.pdf.pdf

60 Superintendencia de Valores y Seguros.

Fomento (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.[61]

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.[62]

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 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

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

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

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).

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.

There is also a growing interest among competition authorities in three types of conduct in which the affected good is the labour market: no-poach agreements, namely, agreements not to hire employees of competitors; wage-fixing agreements, which are agreements on salaries; and the exchange of information on prices and profits and other relevant variables.

Elements of an effective competition compliance programme

In general, legislation in Latin American jurisdictions does not provide specific requirements regarding competition compliance programmes, being a subject that has had to be developed by case law and by the guidelines of the different competition agencies in the region on this matter.

In the case of Chile, case law under both the FNE and the 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,[63] Mexico,[64] Colombia[65] and Brazil.[66]

A good example: 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.[67]

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

63 '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.

64 '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.pd>.

65 '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.

66 '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.

67 '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.

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.[68] 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:

- 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).

68 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.

- 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. It is important to carry them out on a regular and updated basis, as competition is a very dynamic discipline, where doctrine and case law are constantly evolving.

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 case law on competition compliance programmes in Latin Americas

In Chile, the TDLC has imposed compliance programmes as corrective measures in cartel cases.[69] 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 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.

In Peru, in November 2021, Indecopi sanctioned 33 construction companies and 26 executives for forming a bid-rigging type cartel to divide among themselves 112 public bidding processes between the years 2002 and 2016. As a sanction, the companies and executives involved were sentenced to pay high fines and were ordered to implement compliance programmes for a period of five years, with the purpose of discouraging the formation of cartels and promoting the timely detection of anticompetitive practices.

69 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.

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 today as one of the most essential elements of corporate compliance in Latin America.

APPENDIX 1

About the Authors

Lorena Pavic
Carey y Cía

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.

She is founder and mentor of Carey's mentorship programme for young female lawyers, Learning to Lead, postgraduate professor in many universities and a member of several entities, such as the Chilean Trade Association, the Antitrust Committee of the Chilean Bar Association, the Centre for Antitrust Studies of the Catholic University of Chile, the Women's Competition Network and others.

Lorena graduated *summa cum laude* from the University of Chile and holds a degree in regulation and competition from the same university, and a degree in public law from the Catholic University of Valparaíso.

José Pardo
Carey y Cía

José Pardo is partner at Carey and co-head of the firm's antitrust and regulated markets group. His main practice includes antitrust, regulation, administrative law and litigation.

He has been recognised in competition and antitrust by international publications such as *Chambers Latin America*, *The Legal 500* and *Best Lawyers.* He is member of the Litigation Commission of Libertades Públicas AG and a teaching

assistant at the University of Chile. He worked as a foreign associate in the antitrust and competition group at Freshfields Bruckhaus Deringer in Brussels (2016–2017).

José is co-author of a book and several articles for national and national publications. He graduated *summa cum laude* from the University of Chile. He also holds an LLM from the University of Chicago and a degree in administrative law from the Catholic University of Chile.

Benjamín Torres
Carey y Cía

Benjamín Torres is an associate at Carey and a member of the antitrust and regulated markets group. His practice focuses on antitrust, litigation and mergers and acquisitions.

He has been a teaching assistant in procedural law, civil law and Roman law at the University of Chile. Before becoming associate, he worked as a law clerk for the same group at Carey. He graduated *summa cum laude* from the University of Chile.

Raimundo Gálvez
Carey y Cía

Raimundo Gálvez is an associate at Carey and a member of the antitrust and regulated markets group. His practice focuses on antitrust, litigation and mergers and acquisitions. He has been a teaching assistant in civil law and antitrust law at the University of Chile. Before becoming associate, he worked as a law clerk at the National Economic Prosecutor's Office (FNE). He graduated s*umma cum laude* from the University of Chile.

Carey y Cía
Isidora Goyenechea 2800
43rd floor
Las Condes
Santiago
Chile
Tel: +56 2 2928 2200
Fax: +56 2 2928 2228
lpavic@carey.cl
jpardo@carey.cl
btorres@carey.cl
www.carey.cl

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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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