

Cartel Regulation

Getting the fine down
in 42 jurisdictions worldwide

2010

Contributing editor: Martin Low QC



Published by
GETTING THE DEAL THROUGH

in association with:

Advokatfirmaet Hjort DA
Arzinger & Partners
Barcellos Tucunduva
bvp Hügel Rechtsanwälte
Bredin Prat
Carey y Cía
Chitale & Chitale Partners
Chrysses Demetriades & Co LLC
Clayton Utz
De Brauw Blackstone Westbroek NV
ELIG Attorneys-at-Law
Elvinger, Hoss & Prussen
Epstein Chomsky Osnat & Co
Eubelius
Gorrissen Federspiel
Hengeler Mueller
Jaeckel/Montoya Abogados
King & Wood
Lenz & Staehelin
M&P Bernitsas Law Offices
Mannheimer Swartling
Marques Mendes & Associados
Matheson Ormsby Prentice
McMillan LLP
Meredith Connell
Motieka & Audzevičius
Nagashima Ohno & Tsunematsu
Nortons Incorporated
Odvetniki Šelih & partnerji
Nestor Nestor Diculescu Kingston Petersen
Noerr
Oppenheim
Paul, Hastings, Janofsky & Walker LLP
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Polenak Law Firm
Raidla Lejins & Norcous
Russell McVeagh
Quevedo Abogados
SimmonsCooper Partners
Slaughter and May
Ughi e Nunziante
Wardyński & Partners
Yoon & Yang LLC

Cartel Regulation 2010**Contributing editor**

Martin Low QC, McMillan LLP

Business development manager

Joseph Samuel

Marketing managers

Alan Lee
 Dan Brennan
 George Ingledew
 Edward Perugia
 Robyn Hetherington
 Dan White
 Tamzin Mahmoud
 Ellie Notley

Subscriptions manager

Nadine Radcliffe
 Subscriptions@
 GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Nick Drummond-Roe

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Production editor

Joanne Morley

Senior subeditor

Kathryn Smuland

Subeditors

Ariana Frampton
 Charlotte Stretch

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Cartel Regulation 2010

Published by
 Law Business Research Ltd
 87 Lancaster Road
 London, W11 1QQ, UK
 Tel: +44 20 7908 1188
 Fax: +44 20 7229 6910
 © Law Business Research Ltd
 2010

No photocopying: copyright
 licences do not apply.

ISSN 1473-3420

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of January 2010, be advised that this is a developing area.

Printed and distributed by
 Encompass Print Solutions.
 Tel: 0870 897 3239

Law

Business

Research

Overview	Kirby D Behre, Michael PA Cohen and Kristen Warden <i>Paul, Hastings, Janofsky & Walker LLP</i>	3
Argentina	Viviana Guadagni <i>Quevedo Abogados</i>	6
Australia	Michael Corrigan and Anna Modrak <i>Clayton Utz</i>	11
Austria	Astrid Ablasser-Neuhuber and Florian Neumayr <i>bpv Hügel Rechtsanwälte</i>	18
Belgium	Hans Gilliams, Jan Bocken and Koen Baekelandt <i>Eubelius</i>	23
Brazil	Mauro Grinberg, Leonor Cordovil and Carlos Amadeu Pereira de Barros <i>Barcellos Tucunduva</i>	31
Canada	D Martin Low QC, A Neil Campbell, J William Rowley QC and Mark Opashinov <i>McMillan LLP</i>	36
Chile	Claudio Lizana and Lorena Pavic <i>Carey y Cía</i>	44
China	Susan Ning, Ding Liang and Jiang Liyong <i>King & Wood</i>	50
Colombia	Jorge Jaeckel and Claudia Montoya <i>Jaeckel/Montoya Abogados</i>	55
Cyprus	Thomas Keane <i>Chrysses Demetriades & Co LLC</i>	60
Denmark	Jan-Erik Svensson <i>Gorrissen Federspiel</i>	65
European Union	Hans-Jörg Niemeyer and Dirk Hamann <i>Hengeler Mueller</i> John Boyce and Anna Lyle-Smythe <i>Slaughter and May</i>	70
France	Hugues Calvet and Ning-Ly Seng <i>Bredin Prat</i>	81
Germany	Alf-Henrik Bischke and Thorsten Mäger <i>Hengeler Mueller</i>	90
Greece	Angela Nissyrios <i>M&P Bernitsas Law Offices</i>	97
Hungary	Zoltán Marosi and Gábor Fejes <i>Oppenheim</i>	104
India	Suchitra Chitale <i>Chitale & Chitale Partners</i>	110
Ireland	Helen Kelly and Donogh Hardiman <i>Matheson Ormsby Prentice</i>	115
Israel	Eytan Epstein, Tamar Dolev Green and Michelle Morrison Trau <i>Epstein Chomsky Osnat & Co</i>	122
Italy	Rino Caiazzo, Kathleen Stagi and Francesca Costantini <i>Ughi e Nunziante</i>	130
Japan	Eriko Watanabe <i>Nagashima Ohno & Tsunematsu</i>	138
Korea	Hoil Yoon <i>Yoon & Yang LLC</i>	145
Latvia	Dace Silava-Tomsone and Ugis Zeltins <i>Raidla Lejins & Norcous</i>	150
Lithuania	Emil Radzihovsky, Henrikas Celencevičius and Giedrius Kolesnikovas <i>Motieka & Audzevičius</i>	156
Luxembourg	Patrick Santer and Léon Gloden <i>Elvinger, Hoss & Prussen</i>	164
Macedonia	Tatjana Popovski Buloski <i>Polenak Law Firm</i>	169
Netherlands	Jolling K de Pree and Simone JH Evans <i>De Brauw Blackstone Westbroek NV</i>	174
New Zealand	Sarah Keene and Nick Flanagan <i>Russell McVeagh and Meredith Connell</i>	184
Nigeria	Babatunde Irukera and Ikem Isiekwena <i>SimmonsCooper Partners</i>	194
Norway	Heddy Ludvigsen and Monica Syrdal <i>Advokatfirmaet Hjort DA</i>	198
Poland	Dorothy Hansberry-Bieguńska, Sabina Famirska and Antoni Bolecki <i>Wardyrński & Partners</i>	205
Portugal	Mário Marques Mendes and Pedro Vilarinho Pires <i>Marques Mendes & Associados</i>	212
Romania	Georgeta Harapcea <i>Nestor Nestor Diculescu Kingston Petersen</i>	219
Russia	Evgeny Maslennikov and Ilja Ratschkov <i>Noerr</i>	225
Slovenia	Nataša Pipan Nahtigal <i>Odvetniki Šelih & partnerji</i>	233
South Africa	Anthony Norton, John Oxenham and Maria Celaya <i>Nortons Incorporated</i>	239
Sweden	Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg <i>Mannheimer Swartling</i>	246
Switzerland	Marcel Meinhardt and Benoît Merkt <i>Lenz & Staehelin</i>	255
Turkey	Gönenç Gürkaynak and M Hakan Özgökçen <i>ELIG Attorneys-at-Law</i>	263
Ukraine	Stanislav Gerasymenko <i>Arzinger & Partners</i>	269
United Kingdom	Sarah Cardell and Lisa Wright <i>Slaughter and May</i>	275
United States	Moses Silverman and Aidan Synnott <i>Paul, Weiss, Rifkind, Wharton & Garrison LLP</i>	286
Quick reference tables		295

Chile

Claudio Lizana and Lorena Pavic

Carey y Cía

Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

Law Decree No. 211 of 1973 (DL 211) establishes the legal framework for antitrust matters in Chile.

DL 211 provides that the Antitrust Court and the national economic prosecutor (FNE) are responsible for enforcing competition law in Chile.

The FNE Office is an independent administrative entity in charge of investigating conduct that may constitute DL 211 violations, representing the public interest before the Antitrust Court and seeking enforcement of resolutions, decisions and instructions issued and passed by the Antitrust Court.

In turn, the Antitrust Court is a special, independent court of law, subject to the supervision of the Supreme Court. Its role is to prevent, correct and sanction anti-competitive conduct, to decide all cases that the FNE or private persons may submit to its consideration. It is also in charge of issuing general guidelines for the enforcement of competition law.

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

DL 211 has been recently amended as of 12 October 2009, introducing several reforms intended to reinforce the antitrust law enforcement on cartels. The new law granted greater investigative powers to the FNE by affording exceptionally intrusive devices in order to detect cartels, such as carrying out dawn raids, entering into private or government-owned areas, registration and seizure of objects and documents, interception of communications and requesting communication companies' records of transmitted or received communications.

This amendment also introduced a leniency programme aimed at facilitating cartel detection and punishment. The leniency mechanism considers full-fine immunity to the first cartel member that provides substantial information leading to proof of the collusion and identification of cartel members, and a reduction up to 50 per cent of the fine in case of subsequent informers that provide additional information. Also, the amendment increases the amount of applicable fines for cartels up to approximately US\$26 million and the expiration of the statute of limitations for horizontal agreements is extended from two to five years.

Additionally, Congress is currently discussing a new bill that would establish criminal penalties against individuals implicated in collusion, including imprisonment from 541 days to five years.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 3 of DL 211 states, generically, that anyone who carries out or enters into, individually or collectively, any conduct, act or agreement that hampers, restricts or hinders free competition or that tends to produce such effects, will be sanctioned with the measures contemplated therein.

Likewise, it broadly enumerates certain events, acts or agreements that are deemed to hamper, restrict or hinder free competition, among which cartels and collusion are specifically forbidden in the following terms: 'Express or tacit agreements between competitors or agreed practices that grant them market power, consisting of fixing sale or purchase prices or other commercial terms, placing restraints on production, territorial assignments or market quotas, exclude competitors or affect the result of bidding process.'

Therefore, cartels and collusion will be considered anti-competitive if: there is an express or implied agreement among competitors; such agreements exist to fix sales or purchase prices, limit production, allocate market zones or shares, exclude competitors or affect the result of bidding process; and such agreement allows competitors to reach market power.

However, as the enumeration of types of conduct contained in article 3 of DL 211 is merely exemplary, it is possible to sanction other agreements between competitors that restrict or hamper free competition.

4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

In Chile there are no industry-specific offences and defences provided for under the DL 211. Therefore, any agreement between competitors should be judged under the general provisions of DL 211. There is only one statutory exemption related to the promotion of the Chilean merchant navy according to Decree Law 3,059 of 1979.

5 Application of the law

Does the law apply to individuals or corporations or both?

DL 211 refers broadly to 'agreements between competitors', which includes individuals and corporations. Cartel charges may be laid against both a corporation and individuals.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

Chilean law, including antitrust law – DL 211 – is valid and applicable only within the territory of Chile. Therefore, cartels acting in several countries would be investigated in Chile if the parties to the

cartel are located in Chile, have assets in Chile or the effects of the cartel affect the Chilean internal or external market.

There is no provision regarding extraterritorial reach of Chilean antitrust law, however, it is possible that in order to investigate the existence of a cartel in Chile, the FNE or the Antitrust Court may request information and cooperation from foreign antitrust agencies.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

The FNE may conduct *ex officio* or *ex parte* investigations regarding conduct that may violate DL 211. Upon receiving a complaint from a third party, the FNE may determine whether to proceed with such investigation by declaring or not declaring its admissibility.

If the complaint is declared admissible, the FNE has to give instructions to initiate an investigation. Otherwise, the accuser has to be informed of the inadmissibility.

Once the FNE has given instructions to proceed with an investigation, such circumstance must be reported to any parties affected by the investigation. However, the FNE may also give instructions that there will be no notice of the initiation of an investigation to the affected parties with the previous authorisation of the Antitrust Court. Also, upon notice of the chairman of the Antitrust Court, the FNE may instruct that some investigations be kept confidential (although the affected parties are informed).

When conducting any investigations, the FNE may exercise any of the investigative powers granted under DL 211 (see question 8).

Any persons who obstruct the investigations carried out by the FNE may be subject to up to 15 days imprisonment. The arrest warrant is issued by the judge having competent jurisdiction in criminal matters under generally applicable rules upon request by the FNE, with the prior authorisation of the Antitrust Court.

As a result of the investigations carried on by the FNE, the case will either be dismissed (if the practices under investigation are not deemed contrary to free competition or if the information obtained fails to prove involvement in such practices) or lead to the filing of a lawsuit or claim in the Tribunal de Defensa de la Libre Competencia (TDLC) against the companies under investigation.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

The FNE represents the general interests of the economic community, and its principal powers are to investigate eventual breaches of DL 211 in order to request that the Antitrust Court punish such anti-competitive conduct.

The FNE may gather – through the officers assigned to each case – and analyse any information or documentation obtained from private persons or public services that is considered relevant to the investigation.

Article 39(g) empowers the FNE to request the information necessary to its investigation from any officer of the public services or entities, of the municipalities, or of the companies in which the government, companies, entities or municipalities have representation or participation. Additionally and upon notice of the chairman of the Antitrust Court, the civil police force has to make officers available or conduct specific activities requested by the FNE in connection with ongoing investigations.

Article 39(h) empowers the FNE to request private persons to provide any information and records that it may consider necessary with regard to ongoing investigations. However, individuals and representatives of legal entities from whom the FNE requests

information that may cause damage to their own interests, may demand that the Antitrust Court annul or amend such request.

According to the amendment recently introduced to DL 211, new powers were granted to the FNE in order to carry out investigations aimed at proving the conduct described in article 3(a) of DL 211, that is, applying to cartels.

Pursuant to article 39(n), the FNE may carry out – assisted by the police – the following acts:

- accessing private or public areas and, if necessary, unlocking or breaking in;
- registering and seizing any kind of objects or documents that may be useful to prove the existence of an infringement;
- intercepting any kind of communications; or
- ordering any company that renders communication services to give access to copies or registers of transmitted or received communications.

However, the exercise of such investigative powers will require the authorisation of the following entities (double control): the Antitrust Court and the respective judge of the Court of Appeals. Such authorisations are granted only in serious cases when there is evidence of the existence of cartel behaviour.

The exercise of the aforementioned powers is subject to the requirements and formalities set out in the Criminal Procedural Code.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Currently, there are seven cooperation agreements in force between the FNE and other competition authorities regarding mutual technical assistance and the application of their competition laws as a whole, and not specifically focused on cartels:

- memorandum of understanding with Canada;
- memorandum of understanding with Costa Rica;
- agreement with Mexico;
- memorandum of understanding with El Salvador;
- cooperation agreement with Spain;
- technical assistance agreement with Ecuador; and
- cooperation agreement with Brazil.

Likewise, several free trade agreements currently in force (ie, with Canada, EFTA, the European Union, Korea and the United States) are playing a very important role regarding cooperation between competition authorities due to their antitrust sections, which are real frameworks for mutual technical assistance, exchange of information, notifications and communications, and the application of competition law.

Cooperation agreements have mostly been used in mutual technical assistance and in practice, there is almost no experience of other types of cooperation (exchange of information) except for the case of collusion in the oxygen market, investigated both in Chile and in Argentina, where the FNE requested assistance from Argentinean competition authorities, given their similar experience.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

In general, cartels investigated in other jurisdictions may trigger similar investigations in Chile provided that the cartel affects the Chilean

market. However, to date the Chilean competition authorities have not conducted a multijurisdictional investigation, so there are no precedents in this regard.

11 Adjudication

How is a cartel matter adjudicated?

In Chile, the FNE is competent to investigate antitrust matters and the Antitrust Court is the authority entitled to establish infringements of DL 211 and to impose sanctions on the parties to concerted actions. As explained below, final judgments issued by the Antitrust Court are subject to a remedy of complaint before the Supreme Court.

Once there is a final antitrust ruling, private actions for damages may be brought before the competent civil court according to the general rules.

12 Appeal process

What is the appeal process?

The final judgment imposing or waiving the application of some of the sanctions contemplated by article 26 of DL 211 is only subject to a remedy of complaint before the Supreme Court.

Such remedy has to be well-founded and may be filed by the FNE or any of the parties, before the Antitrust Court, within 10 days of the respective service.

The hearing of the remedy before the Supreme Court has priority over other issues, but the trial of the case may not be suspended.

The filing of the remedy may not suspend the enforcement of the judgment issued by the Antitrust Court except for payment of the fines, for which purpose certain provisions have to be observed. However, at the request of a party, and upon a well-founded resolution, the Supreme Court may suspend the effects of the judgment in whole or in part.

Cartel or collusion cases sanctioned by the Antitrust Court have been consistently dismissed by the Supreme Court on the basis of lack of evidence. In fact, to date, there has only been one collusion case sanctioned in Chile by the Supreme Court since the creation of the Antitrust Court at the beginning of 2004.

The Supreme Court has requested direct evidence of the collusive agreement, and in the case of indirect evidence, it has requested that there not be another possible reasonable explanation for the conduct under investigation.

13 Burden of proof

With which party is the burden of proof?

The burden of proof lies with the plaintiff (the FNE or any other party that has instituted proceedings).

As stated above, considering the Supreme Court standard of proof, it has been very difficult for the FNE to demonstrate collusive behaviour. In fact, such a strict standard settled by the Supreme Court explains, in part, the new investigative powers granted to the FNE by the last amendment to DL 211, which includes several intrusive measures in order to detect cartel activity (and obtain direct evidence of the conduct).

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Neither DL 211 nor the Criminal Code contemplates criminal sanctions for cartel activity. It has been argued that cartel behaviour

affecting prices may qualify as a criminal offence pursuant to article 285 of the Criminal Code, which contemplates imprisonment from 61 days to three years for 'fraudulent adulteration of prices'. However, to date there has been no collusion case sanctioned under article 285.

The Chilean Congress is currently discussing a new bill that would establish criminal penalties against individuals implicated in collusive behaviour (described in article 3(a) of DL 211) affecting essential economic activities, including imprisonment from 541 days to five years.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In its final judgment, the Antitrust Court may impose the following sanctions:

- To amend or terminate the acts, contracts, agreements, systems or arrangements which are contrary to the provisions of DL 211.
- To order the amendment or dissolution of the partnerships, corporation or other private-law entities involved in the acts, contracts, agreements, systems or arrangements contrary to DL 211.
- To apply fines for fiscal benefit for up to an amount equivalent to 30,000 UTA (unidades tributarias anuales or tax assessment unit). Fines may be imposed on the corresponding legal entity, on its directors, managers and on any other person involved in the relevant act. Fines imposed against individuals may not be paid by the legal entity in which they worked, or by its shareholders, partners or related parties. In the case of fines applied to legal entities, their directors, managers and those persons having benefited from the respective act are jointly liable for the payment thereof, provided they took part in it.

In determining the amount of the fine, the Antitrust Court has to weigh the following circumstances: (i) the economic benefit derived from the infringement; (ii) the seriousness of the conduct; (iii) any recidivist history of the violator; and (iv) the cooperation provided to the FNE before or during the investigation.

Once the Antitrust Court issues a final and binding judgment, private persons have the right to file suit for damages caused by the competition law offender.

This action for damages has to be brought before the competent civil court in a summary proceeding. Civil actions for the collection of damages from an anti-competitive behaviour lapses four years after the date the final judgment becomes enforceable.

To date, there have been no successful damages actions after a ruling of the Antitrust Court has been issued in connection with cartel behaviour (currently there are two damages actions pending in connection with predatory pricing and exclusionary practices).

Finally, there is no special provision regarding damages in cartel cases in law. Therefore, if a cartel is sanctioned by the Antitrust Court, the parties affected may initiate a civil damages action as provided for by DL 211 before an ordinary civil court.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The same conduct of a cartel activity can be subject to both civil liability and administrative sanctions. Civil liability consists basically of actions for damages (as explained in question 15) and administrative sanctions refers to any measure or fine imposed by the Antitrust Court (as explained in question 15). In principle, Chilean laws do not

contemplate criminal sanctions for collusive behaviour (as explained in question 14).

17 Private damage claims and class actions

Are private damage claims or class actions possible?

Private damage claims may be brought under general Chilean civil law rules before the ordinary courts (see question 15). No class actions are available in Chile for antitrust infringements.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

Although the Antitrust Court has imposed fines for cartel or collusion cases, the Supreme Court dismissed almost all cases on the grounds of lack of evidence. In practice, there has been only one cartel case sanctioned by the Supreme Court since the creation of the Antitrust Court (2004), when the Supreme Court in 2008 fined retail chains Almacenes Paris and Falabella 3,750 and 6,000 UTA, respectively.

Recently, the FNE filed a claim against the three main chemist chains (Salcobrand, Cruz Verde and FASA), alleging a conspiracy to increase prices in 222 pharmaceutical products. In March 2009, FASA pleaded guilty to the price-fixing allegations and reached a settlement with the FNE, while the other defendants insisted on their innocence. Although at the time of the settlement, DL 211 did not contemplate a leniency mechanism for cartel cases, the Antitrust Court approved the agreement by which FASA was released from all charges and received a substantial fine reduction (from the US\$17 million originally demanded to US\$1 million). The Antitrust Court decision was later confirmed by the Supreme Court. However, a final decision regarding the other defendants is still pending before the Antitrust Court.

With respect to the amount of fines and its determination, please see question 15.

Sanctions

19 Sentencing guidelines

Do sentencing guidelines exist?

There are no sentencing guidelines. However, as stated in question 15, pursuant article 26 of DL 211, when determining the amount of fines the Antitrust Court may consider, among other things, the following circumstances: (i) the economic benefit derived from the infringement; (ii) the seriousness of the conduct; (iii) any recidivist history of the violator; and (iv) the cooperation provided to the FNE before or during the investigation.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Not applicable.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

Article 39bis of DL 211 contemplates a leniency and immunity programme established under Law No. 20,361, which introduced several amendments to DL 211 and became effective on 12 October 2009.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

Article 39bis states that any party behaving as set forth in article 3(a) (collusive behaviour) may request a reduction of or an exemption from the fine, if it supplies the FNE with relevant information that helps prove such conduct and determines the persons involved. To qualify for such benefits, the following three conditions have to be met:

- the party has to supply accurate, reliable and verifiable information representing an effective contribution of elements of proof sufficient to support a claim before the Antitrust Court;
- the party must refrain from disclosing the request for this benefit until the FNE has filed the claim before the Antitrust Court or has ordered to file the case; and
- the party must end its participation in such conduct immediately after presenting its request.

To apply for exemption from the fine, as well as the aforementioned requisites, the party must be the first to report the conduct and to supply information to the FNE.

In turn, if after one party has already supplied information, another party involved in the conduct wishes to apply for a reduction of its fine, the applicant must supply additional information. In any case, the reduction of the fine may not exceed 50 per cent of the greatest fine levied on the rest of the defendants not benefiting by the leniency.

In the antitrust claim to be filed before the Antitrust Court, the FNE will identify each party involved in the cartel that met the requirements to obtain the benefit of exemption or reduction of the fine. If the Antitrust Court declares that the conduct was in fact proven, no fine or additional fine may be imposed against those parties indicated by the FNE as benefiting from exemption from or reduction of fine, except for those that worked as cartel planners by coercing the other members to get involved in the collusion.

23 First in

What is the importance of being 'first in' to cooperate?

As explained above, only the 'first in' may be granted full immunity from a fine, provided the other conditions for such immunity are also met.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

The second party to report the existence of a cartel may only be granted a reduction of the fine up to 50 per cent of the greatest fine imposed by the FNE on any defendant not benefiting from the leniency programme, provided that the other conditions are met. There are no 'immunity plus' or 'amnesty plus' options under DL 211.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

As a general principle, the best time to approach the FNE seeking leniency or immunity is as soon as possible to the extent the applicant has sufficient evidence to support the antitrust claim.

As explained above, only the first in may be granted full immunity, and subsequent informers may apply only for a reduction up to 50 per cent of the maximum fine imposed.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

Pursuant to article 42 of DL 211 and Law No. 20,285 (regarding access to public information), the FNE and those persons employed by the FNE may not disclose any facts that are ascertained in the course of a leniency application. Likewise, the internal leniency guidelines issued by the FNE (Leniency Guidelines) expressly recognise a duty of secrecy imposed on the FNE, by virtue of which its members have to maintain strict confidentiality regarding any information, even with respect to any other FNE officials, governmental employees or foreign authorities and organisations.

The Leniency Guidelines also state that if an application does not succeed (regardless of the stage of the application or cause for such failure) the FNE has to return any information provided by the applicant and destroy any copy of such information.

Finally, according to article 42 of DL 211, any infringement of the confidentiality obligation by the FNE may trigger sanctions contemplated in the Criminal Code, along with administrative penalties.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

In general, the requirements for a successful leniency application are those mentioned in question 22. Therefore, with respect to first-in applicants, they must deliver valuable information that helps to prove the collusion and to identify cartel members. In the case of applicants 'going second', they are also required to deliver valuable information to the FNE, but additional to that informed by the first-in applicant. Finally, applicants must refrain from disclosing the existence of their leniency applications and must immediately end their participation in the collusive conduct.

As the leniency programme only became effective as of 12 October 2009, there is no evidence of successful leniency applications yet.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

Pursuant to article 39(ñ), the FNE may enter into agreements with the parties involved during the investigation. This special authority was expressly introduced by the last amendment to DL 211, and has been interpreted to apply to less serious conducts, different from cartel behaviour (in which case the leniency programme applies).

Once the FNE files a claim before the Antitrust Court, it may enter into an agreement with the parties during the controversial proceedings, subject to the approval of the Antitrust Court. If such agreement is approved by the Antitrust Court, it will become legally enforceable and binding. Judgments issued by the Antitrust Court in this regard are subject to a remedy of complaint before the Supreme Court. This type of agreement was the one reached by FASA and the FNE in the chemist chain cartel case where FASA pleaded guilty to the price-fixing allegations and reached a settlement with the FNE.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

Although DL 211 does not regulate this matter, the Leniency Guidelines expressly state that, in case of legal entities, any benefits granted to a corporate defendant are also granted to those managers, employees or consultants duly identified by the legal entity in the leniency

application submitted to the FNE. However, such benefits may not be granted if such employees acted as independent economic agents in the same market during the time of the collusive behaviour.

Likewise, it is understood that any benefits are granted to employees, regardless of whether or not they are actually working for the corporation at the time of the leniency application. Further, according to the Leniency Guidelines, any benefits granted to individuals are not extended to legal entities or to any other individual.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

Leniency or immunity only exists insofar as the conditions contained in article 39bis of DL 211 are fulfilled (see question 22).

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

To date there is no public knowledge of any leniency application submitted since the leniency programme became effective (October 2009). However, the Leniency Guidelines provide a detailed procedure in order to carry on an immunity application, in the following terms.

A leniency application is made by filing an electronic form on the FNE website (www.fne.cl). The applicant has to provide the following information: (i) identification, including name, ID number and email; (ii) a description of the collusive conduct; (iii) the applicant has to declare its intention of initiating the proceeding in order to obtain the benefits contemplated in article 39bis of DL 211; and (iv) the applicant's commitment not to reveal the leniency request until the FNE has filed the claim or has ordered to file the case.

Upon submitting the form, the applicant receives an application certificate indicating the date and time of submission.

Anyone wishing to make a leniency application, but who is uncertain as to whether the benefits are still available, may approach the FNE through any means (there is a special phone number for the leniency programme). However, the order of the applications is strictly determined according to the submission of the electronic forms in the FNE's website.

Within three days of the submission, the FNE will call the applicant to a planning meeting at the FNE office. In such meeting, the FNE confirms the applicant's identification and notifies the application indicator (a document that certifies the application status). Also, the parties will agree on how the information will be delivered in the 'information delivery meeting'.

The FNE may enact a non-compliance decree if the applicant does not show up to the planning meeting or if the attorney does not prove its legal capacity in such meeting. If that is the case, the application indicator is cancelled. Likewise, a non-compliance decree is also issued if, at the time of the planning meeting, the FNE has previously filed a claim before the Antitrust Court regarding the same conduct and with respect to the same defendants.

The information delivery meeting takes place within 90 days of the planning meeting, and its purpose is to gather all the information that will help to prove the conduct and to determine the parties involved in the collusion. Also, in such meeting the applicant may submit a formal leniency application. The FNE may issue a non-compliance decree if the applicant does not attend the information delivery meeting. In that case, the applicant going second will replace the other applicant.

A compliance decree must be issued by the FNE if the applicant fulfils all the requirements established in article 39bis of DL 211, detailing the benefits to be granted. These benefits will be officially detailed in the claim filed by the FNE before the Antitrust Court.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

As stated, the Chilean leniency mechanism was introduced under the last amendment to DL 211, which became effective as of 12 October 2009. There is no ongoing or proposed leniency or immunity policy reviews.

Defending a case**33 Representation**

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

In general, counsel may only represent both employees and a corporation if there is no conflict of interest between them.

Current or former employees are generally advised to seek independent legal advice as soon as a conflict of interest with the corporation arises.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

As stated above, counsel is allowed to represent multiple corporate defendants to the extent there is no conflict of interest among the defendants. Moreover, considering that in collusion cases the alleged conduct consists precisely of concerted actions among competitors, a joint defence does not seem to be advisable.

Update and trends

Since October 2009, DL 211 contemplates new investigative powers for the FNE in order to detect cartels, including several intrusive devices. The same amendment also introduced a new leniency programme aimed at facilitating cartel detection and punishment, which considers full fine immunity to the first cartel member that provides substantial information, and a reduction up to 50 per cent of the fine in case of subsequent informers. The amendment also increases both the amount of applicable fines for cartels and the statute of limitations for horizontal agreements.

Finally, the introduction of criminal penalties for collusive behaviour will be the most important upcoming development regarding cartel enforcement.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

In general, a corporation may pay the legal costs imposed on its employees. However, as stated in question 15, fines imposed against individuals may not be paid by the legal entity in which they worked, or by its shareholders, partners or related parties.

36 Getting the fine down

What is the optimal way in which to get the fine down?

A fine exemption or reduction is granted if the conditions to obtain leniency are fulfilled. Additionally, cooperation with the FNE during the investigation of a cartel case might be taken into account by the Antitrust Court as a mitigating factor when determining the amount of a fine.

Carey y Cía

Claudio Lizana
Lorena Pavic

clizana@carey.cl
lpavic@carey.cl

Miraflores 222, 24th floor
Santiago Centro
Santiago
Chile

Tel: +562 365 7200
Fax: +562 633 1980
www.carey.cl

GETTING THE DEAL THROUGH®

Annual volumes published on:

Air Transport	Merger Control
Anti-Corruption Regulation	Mergers & Acquisitions
Arbitration	Mining
Banking Regulation	Oil Regulation
Cartel Regulation	Patents
Climate Regulation	Pharmaceutical Antitrust
Construction	Private Antitrust Litigation
Copyright	Private Equity
Corporate Governance	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Environment	Restructuring & Insolvency
Franchise	Securities Finance
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trademarks
Licensing	Vertical Agreements
Life Sciences	

**For more information or to
purchase books, please visit:**
www.GettingTheDealThrough.com



Strategic research partners of
the ABA International Section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association