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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Decree Law No. 211 (“**DL 211**”), specifically in its article 3, prohibits billboards, establishing the following penalties:

- 1) Antitrust sanctions: the Competition Court (“**TDLC**” – *Tribunal de Defensa de la Libre Competencia*) or the Supreme Court may impose fines and other sanctions to the offender. In this sense, the monetary penalties imposed by the TDLC are for fiscal benefit. In addition to the monetary fines, in cases of collusion the TDLC may prohibit contracting, under any title, with state bodies or companies, and on being awarded any concession granted by the state, for a maximum of five years from the date of the final ruling.
- 2) Damages: any entity or person who has been damaged by an anti-competitive conduct may submit damage claims in order to be compensated.
- 3) Criminal sanctions: criminal sanctions may be imposed on both companies and individuals that: executed, ordered or performed an anti-competitive agreement to fix sale or purchase prices for goods or services in one or more markets; restricted output or supply; divided, assigned or distributed market zones; or affected the result of tender processes conducted by public or private companies that are rendered by public services or by public bodies.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 3 of DL 211 in general sanctions any deed, act or agreement that impedes, restricts or thwarts competition, or tends to produce such effects. This article enumerates certain events, acts or agreements that are deemed to hamper, restrict or hinder competition, among which cartels are specifically prohibited in the following terms: “*a) agreements and concerted practices among competitors, and which consist of fixing sale or purchase prices, limiting output, assignment of market zones or quotas, affecting the outcome of tender*

processes, as well as agreements and concerted practices that, conferring market power to the competitors, consist of the determination of marketing terms and conditions, or the exclusion of current or potential competitors”.

The criminal prohibition of collusion is established in article 62 of DL 211.

1.3 Who enforces the cartel prohibition?

The TDLC, the Supreme Court and the National Economic Prosecutor (“**FNE**” – *Fiscalía Nacional Económica*) are responsible for enforcing the cartel prohibition within their own scope of authorities.

The FNE is an administrative agency whose general duty is to defend and promote free competition and – among other specific duties related with mergers, unilateral anti-competitive conducts and advocacy – is in charge of investigating cartel conducts, managing applications for leniency and representing the public interest before the TDLC when filing a cartel claim before the TDLC. The FNE is also in charge of seeking enforcement of the decisions passed by the TDLC, as well as filing a criminal complaint for collusion before the competent criminal court only after the TDLC has declared that a cartel existed.

The TDLC is a special and independent court, whose function is to prevent, correct and sanction competitive infringements, and is subject to the supervision of the Supreme Court. One of its functions is decide upon cartel cases the FNE or private parties may submit to its consideration.

Additionally, a competent criminal public prosecutor and criminal courts are responsible for the criminal enforcement of collusion.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Antitrust perspective (articles 39–41 of DL 211):

1. An investigation by the FNE can be triggered by a leniency application, an *ex officio* initiation – because of its own market intelligence – or as a result of a complaint filed by a third party.

2. Upon receiving a complaint from a third party, the FNE may request, within the 60 days, background information, as well as call any person to testify who may have knowledge of the alleged act.
3. The FNE will have four months from the date of receipt of the complaint to carry out an admissibility examination of the complaint from a third party.
4. If the complaint is declared admissible, the FNE must give instructions to initiate an investigation that is reported to any affected parties.
5. Once initiated – either *ex officio*, by a third-party complaint, or by a leniency application – the FNE will investigate the case, and may carry out raids, subpoenas, requests for information from the affected parties or any other entity, among others.
6. As a result of the investigation, it will either be dismissed or lead to the filing of a lawsuit or claim before the TDLC. The ruling of the TDLC is subject to a special appeal (*recurso de reclamación*) before the Supreme Court.

Criminal perspective (in general, between section 166 to section 258 of the Chilean Procedure Code):

1. The National Economic Prosecutor shall have the exclusive initiative to: (i) file a denunciation before the Criminal Prosecutor's Office for the crime of collusion; or (ii) file a criminal complaint directly before the criminal court (*juez de garantía*) to the extent that there is an enforceable judgment by the TDLC and the facts in question seriously compromise free competition in the markets.
2. In case of choosing alternative (i) mentioned above, the Criminal Prosecutor's Office will initiate an investigation. If alternative (ii) is chosen, the criminal court shall inform the Criminal Prosecutor's Office of the case in order to initiate an investigation.
3. Once the investigation has concluded, the Criminal Prosecutor will bring charges against the defendant by the Criminal Prosecutor's Office before the Criminal Court.
4. Conclusion of the investigation by alternative outlets, such as a compensation agreement between the victim and the defendant, or the conditional adjournment of the investigation.
5. Indictment.
6. Trial.
7. Sentence.

1.5 Are there any sector-specific offences or exemptions?

As a general rule, anti-competitive infringements other than cartels are not *per se* unlawful and can be justified under the rule of reason. However, as a general rule, there are no exemptions to the sanctioning of cartels, being commonly *per se* unlawful.

According to the provision under article 5 of Law Decree 3,059, Chilean shipping companies can participate in shipping freight conferences, pooling agreements and consortia that regulate and rationalise services, and will not be subject to the DL 211 rules for these purposes.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Chilean jurisdiction would apply only if a cartel has effects in the Chilean territory.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes*
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
Right to 'image' computer hard drives using forensic IT tools	Yes*	Yes
Right to retain original documents	Yes*	Yes*
Right to require an explanation of documents or information supplied	Yes	Yes
Right to secure premises overnight (e.g. by seal)	No	Yes*

Please note that * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

In cartel investigations the FNE may request, through a grounded petition and with prior approval from the TDLC and of a Minister of the Santiago court of appeals, that the police (*Carabineros de Chile*) or investigative police (*Policía de Investigaciones*) may, under the direction of the employee of the FNE, proceed to:

- 1) enter public or private premises and, if necessary, raid and break and enter;
- 2) register and seize all types of objects and documents that may prove the cartel;
- 3) authorise wiretapping of all types of communications; and
- 4) order any communications services to provide copies and records of transmitted or received communications made thereby.

To grant the authorisation, a Minister of the Santiago court of appeals must verify the existence of such qualified grounds regarding the existence of collusive acts and its must precisely specify the measures, the duration for which they will be enforced, and the persons who will be affected.

2.3 Are there general surveillance powers (e.g. bugging)?

DL 211 does not grant the FNE with general surveillance powers. The FNE may obtain authorisation from the referred court of appeals for intercepting communications only in

serious and qualified cases of cartel investigations, according to the terms explained above.

2.4 Are there any other significant powers of investigation?

Yes, according to article 39 of DL 211, the FNE may additionally:

- 1) Either *ex officio* or at the request of an interested party, request that certain parts of the file should be kept reserved or confidential.
- 2) Instruct that there will be no notice of the initiation of an investigation to the affected party, with the authorisation of the TDLC.
- 3) Require the TDLC to exercise any of its authorities and adopt preventive measures on the investigations that the FNE is developing.

Additionally, investigative authorities of the competent criminal prosecutor's office when conducting a criminal investigation of collusion have the following powers:

- 1) Exclusively lead the investigation.
- 2) Instruct investigative actions to the police.
- 3) Bring charges and indictments against the defendants.
- 4) Request the Criminal Court for authorisation to lift bank secrecy, and, in general, other investigative actions, that can deprive, restrict, or disturb the defendant or third parties of the exercise of rights that the Constitution ensures.
- 5) Protect witnesses and victims and request protection measures.
- 6) Request precautionary measures against the defendant in order to, for example, ensure its attendance before the Criminal Court.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

While it depends on the particularities of the case under investigation, the FNE is under no legal obligation to wait for legal advisors.

2.6 Is in-house legal advice protected by the rules of privilege?

Pursuant to article 39 n.4) of DL 211 and article 220 of the Criminal Procedure Code, the FNE may not seize or wiretap the following information:

- 1) Communications between the people investigated and individuals that are not compelled to declare as witnesses, such as those persons who, given their condition, profession or legal function, such as an attorney, doctor or confessor, and must keep the secret confided to them.
- 2) Notes taken by the people previously mentioned in relation to said communications.
- 3) Other objects or documents to which the non-declaration faculty naturally extends.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

This is not applicable.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Within the powers of the National Economic Prosecutor, article 39 letter h) of DL 211 establishes that, in the context of the requests for information that it may make to individuals:

- 1) Any party, who, with the purpose of hindering, diverting, or eluding the authority of the FNE, conceals information or submits false information will be penalised with minor imprisonment, in its minimum to medium degree.
- 2) Any party who is bound to respond to the information requests of the FNE, who unjustifiably fails to respond or only partially responds to such requests, will be penalised with a fine up to two *unidades tributarias anuales* (approximately USD 1,660) for each day of delay.

In addition, the recently enacted Economic Crimes Law (No. 21,595) establishes that concealing information or providing false information to the FNE, described above, will be considered first category economic crimes, which means that under any circumstance, they will have special rules for determining the penalty, a special regime of alternative penalties and prohibitions. Furthermore, it generates criminal liability of the legal entity if there is no crime prevention model implemented.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The TDLC may impose:

- a) the modification or termination of agreements, contracts or arrangements against competition that violate the provisions of DL 211;
- b) the modification or dissolution of the company, corporation or other legal entity involved in the cartel;
- c) 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 cartel was executed, or up to twice the economic benefit received as a result of the collusion. 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 CLP 45.5 billion or USD 56.8 million); and
- d) the prohibition of contracting, under any title, with state bodies or companies, and on being awarded any concession granted by the state, for a maximum of five years from the date of the final ruling.

From a criminal perspective, according to Law No. 20,393 regarding Criminal liability of Legal Entities, companies may also have criminal liability. On the other hand, Law No. 21,595 established that collusion is a crime that may be committed and for which a company may be liable. However, article 65 of the same Act established that, as long as a law does not coordinate the concurrence of different penalties, sanctions and remedies that may be applied to a company for collusion, corporations will not be criminally liable for this conduct. In other words, as long as the law that coordinates these sanctions is not issued, companies will not be criminally liable for cartels.

Finally, and as explained in section 8 below, companies and individuals that have entered into a collusive agreement will be exposed to damage claims from consumers or any other affected third party.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The TDLC may apply the fines mentioned in letters a) through c) in the answer to question 3.1 above to the directors, administrators and all individuals that intervened in the cartel.

From a criminal perspective, an individual may be punished with imprisonment of up to three years and one day up to 10 years (in the event alternative punishment may apply, it can only be requested after the convict has been imprisoned for one year). Also, he or she may be subject to absolute temporal disqualification to act as a director or manager in an open stock corporation or in a corporation subject to special regulations, a state-owned company or one in which the state has an interest in, or in any trade or professional union.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

According to the FNE's Internal Guidelines for the Application of Fines, the FNE may reduce the base amount of the fine taking into account the real, effective and certain possibility of the offender of paying the fine to be imposed by the TDLC, having regard to its size, in terms of operating revenues and ability to pay. This circumstance will be especially applied if the infringer is an individual. The economic capacity of the offender may also be considered when the FNE has received objective background information that the fine threatens to jeopardise irreparably the economic viability of the offender.

3.4 What are the applicable limitation periods?

For the application of sanctions by the TDLC, the statute of limitation is five years as from the time the cartel's effects on the market have ceased.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

No, they cannot.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

An employee is jointly responsible for paying the fines imposed on legal persons, its directors, administrators and those individuals that benefitted from the respective cartel, as long as they participated in it.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Yes. Moreover, according to the FNE's Internal Guidelines for the Application of Fines, the FNE understands that the "offender" in terms of article 26 includes all those entities that are part of the same economic agent, to the extent that responsibility for the acts carried out by it may be predicted with regard to the same decision-making centre.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

According to article 39 bis of DL 211, participants of a cartel may request a reduction or an exemption of fines if they supply the FNE with relevant information that helps to prove such conduct and determines the persons involved. The following benefits may be granted:

- 1) Exemption benefit: the first applicant may be exempted from: (i) the sanction of compulsory dissolution of a legal entity established in article 26, letter b); (ii) the antitrust fine; and (iii) criminal liability for the crime of collusion ("Exemption Benefit").
- 2) Reduction benefit: the second applicant may obtain the following benefits: (i) a reduction of up to 50% of the fine that would have been otherwise requested to the TDLC by the FNE; (ii) a reduction by one degree of the penalty for the crime of collusion; and (iii) the applicant will not be required to comply with the minimum of one year of effective imprisonment established in subsection four of article 62 if the FNE's complaint involves more than two competitors, and provided that the beneficiary fulfils the requirements established in Law No. 18,216 to substitute the enforcement of penalties involving the deprivation of liberty ("Reduction Benefit").

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. The applicant initiates the leniency process by requesting a "marker" ("Marker Request"). The following information is required:

- 1) Full name, telephone number and contact email address.
- 2) Identification of the natural person or the legal entity being represented.
- 3) A domicile in Chile.
- 4) A general description of the conduct and the affected market.

Once the Marker Request has been filed, the FNE will inform and guarantee to the applicant its place by issuing a "marker". Along with issuing the marker, the FNE will set a deadline within which the formal application must be filed, accompanied by the supporting information ("Benefit Request"). If the Benefit Request fulfils the legal requirements, the FNE will grant the requested benefit provisionally by issuing an official letter establishing the requirements that the applicant must fulfil to obtain the definitive benefit. When the applicant fulfils such requirements, the provisional benefit becomes definitive upon the FNE's filing of the complaint before the TDLC.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

According to the FNE's Leniency Guidelines, a Marker Request may be made by: (i) logging in through the link available at the FNE's website; or (ii) contacting the FNE's leniency officer by phone or by email.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The FNE shall keep confidential the existence of the Benefit Request, which includes its supporting information and any other information obtained during the leniency process. Such confidentiality will cease when a complaint is filed with the TDLC. However, the identity of those who have made statements or provided information during the leniency process with the FNE will be protected as well as any other information that may affect its competitive development.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The FNE's Leniency Guidelines set the duty to cooperate truthfully, opportunistically and continuously with the FNE during the course of the investigation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes, in accordance with FNE's Leniency Guidelines, parties that could not apply for the Exemption Benefit (because they were not the first applicants) may still confess a second act of collusion to the FNE, different from the first. In this case, if the applicant fulfils the requirements to obtain the Reduction Benefit with respect to the first conduct, and the requirements to obtain the Exemption Benefit with respect to the second conduct, the FNE will grant the maximum permitted reduction with respect to the first collusive conduct and the Exemption Benefit with respect to the second conduct.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

No, it is the same procedure.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The FNE is entitled to enter into agreements with the parties involved in an investigation (article 39(ñ) of DL 211). Once the FNE files a claim before the TDLC, it may enter into an agreement with the parties during the proceedings, subject to the approval of the TDLC, a decision that is subject to appeal before the Supreme Court.

7 Appeal Process

7.1 What is the appeal process?

The TDLC's final ruling is only subject to an appeal before the Supreme Court which may be filed by the FNE and/or any of the parties within 10 days.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The filing of the appeal does not suspend the enforcement of the judgment issued by the TDLC, except with respect to the payment of fines. However, at the request of a party and by a grounded decision, the Supreme Court may suspend the proceedings effects of the judgment, in whole or in part (article 27 of DL 211).

7.3 Does the appeal process allow for the cross-examination of witnesses?

By a subsidiary application of article 159 of the Civil Procedure Code, the Supreme Court could request *ex officio* the cross-examination of witnesses (article 29 of the DL 211).

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow-on' actions as opposed to 'stand alone' actions?

A damages claim may be filed after a TDLC's final decision before the same court pursuant to an abbreviate procedure (article 30 of DL 211). Likewise, if the collective or diffuse interests of consumers were affected as a result of a cartel conduct sanctioned by the TDLC, civil damages can be pursued through the class action procedure set forth in the Consumer Protection Act, by way of filing a collective damages claim before the TDLC (article 51 of the Consumer Protection Act).

8.2 Do your procedural rules allow for class-action or representative claims?

Yes. Please refer to the answer above.

8.3 What are the applicable limitation periods?

The applicable limitation period is four years, once the final antitrust ruling is pronounced.

8.4 Does the law recognise a 'passing on' defence in civil damages claims?

There are no precedents on "passing on" defences yet.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

There are no special cost rules for civil damages. However, pursuant to the general procedural rules applicable, the party that is totally defeated in a trial will be condemned to pay the cost of proceedings, unless the court considers that the claimant has had plausible reasons to litigate (article 144 of the Civil Procedural Code for subsidiary application according to article 29 of DL 211).

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The main civil damages claims for cartel conduct have been consumer class action cases. Currently, the only “successfully” concluded claims have been settled. In this regard, the claim regarding the Pharmacies cartel was terminated by a settlement with two of the defendants and therefore the trial will continue with respect to the third defendant who did not agree to the settlement, while at the TDLC, the trial initiated by the Poultry meat cartel was concluded by a court settlement reached by the parties. Finally, the TDLC is currently preparing the ruling in the damage claim based on the Tissue cartel.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The most important development introduced by the Amendments to DL 211 is the criminalisation of collusion and the introduction of a *per se* standard to punish hard core cartels, where the existence of an agreement may be sufficient to condemn, disregarding the market power of the parties requisite and/or the anti-competitive effects of the cartel.

Also, the Amendment to DL 211 introduced a criminal liability exemption for the crime of collusion to individuals who have first provided background information to the FNE in the context of a leniency application. Those who provide information at a later time will be awarded a reduced punishment and will be able to access an alternative punishment without having to effectively comply with the one-year imprisonment penalty (article 63 of DL 211).

Finally, as noted above, the recently enacted Economic Crimes Law (No. 21,595) establishes that cartels, concealing information or providing false information to the FNE and claiming the existence of a cartel, based on false or fraudulent background information, will be considered first category economic crimes, which means, in practice, that under any circumstance, they will have special rules for determining the penalty, a special regime of alternative penalties and prohibitions. Furthermore, this will generate criminal liability of the legal entity, if there is no crime prevention model implemented.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There are no further issues.



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- Plea Bargaining Arrangements
- The Appeal Process
- Damages Actions