

International **Comparative** Legal Guides



Cartels & Leniency **2020**

A practical cross-border insight into cartels & leniency

13th Edition

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Cartels & Leniency 2020

13th Edition

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This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Expert Chapters

- 1** **Cartel Updates: Recent Trends in Fine Calculations, Hybrid Settlement Procedures and Judicial Review at EU Level**
Elvira Aliende Rodriguez & Geert Goeteyn, Shearman & Sterling LLP
- 5** **Flexibility and Discretion in the EU Commission's Cartel Fines Calculation: Recent Decisions and Judgments**
Ingrid Vandendorpe, Thorsten Goetz & Caroline Janssens, Skadden, Arps, Slate, Meagher & Flom LLP
- 11** **Disincentives to Leniency: Proposals to Revive the Golden Goose**
Frédéric Louis, Wilmer Cutler Pickering Hale and Dorr LLP

Country Q&A Chapters

- 17** **Australia**
Nyman Gibson Miralis: Dennis Miralis & Phillip Gibson
- 25** **Austria**
Preslmayr Rechtsanwälte OG: Dieter Hauck
- 32** **Bulgaria**
Popov, Arnaudov & Partners: Hristo Koparanov & Emiliyan Arnaudov
- 39** **Canada**
Cassels Brock & Blackwell LLP: W. Michael G. Osborne & Chris Hersh
- 46** **Chile**
Carey: Claudio Lizana & Carolina Veas
- 52** **China**
DeHeng Law Offices: Ding Liang
- 63** **European Union**
Shearman & Sterling LLP: Elvira Aliende Rodriguez & Geert Goeteyn
- 73** **Finland**
Borenus Attorneys Ltd: Ilkka Aalto-Setälä & Henrik Koivuniemi
- 80** **France**
Aramis: Aurélien Condomines & Pierre Galmiche
- 87** **Germany**
Shearman & Sterling LLP: Mathias Stöcker
- 95** **Hungary**
Bán, S. Szabó & Partners: Chrysta Bán & Álmos Papp
- 102** **India**
Cyril Amarchand Mangaldas: Avaantika Kakkar & Anshuman Sakle
- 110** **Indonesia**
ABNR Counsellors at Law: Chandrawati Dewi & Gustaaf Reerink
- 115** **Italy**
Shearman & Sterling LLP: Elvira Aliende Rodriguez & Agostino Bignardi
- 122** **Japan**
Nagashima Ohno & Tsunematsu: Yusuke Kaeriyama & Takayuki Nakata
- 128** **Luxembourg**
NautaDutilh Avocats Luxembourg: Vincent Wellens
- 134** **Malaysia**
Rahmat Lim & Partners: Azman bin Othman Luk & Penny Wong Sook Kuan
- 140** **Netherlands**
AKD: Joost Houdijk & Robbert Jaspers
- 146** **North Macedonia**
Debarliev Dameski & Kelesoska Attorneys at Law: Dragan Dameski & Jasmina Ilieva Jovanovik
- 154** **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Luís do Nascimento Ferreira & Inês Gouveia
- 166** **Russia**
ALRUD Law Firm: Alla Azmukhanova & Daniil Lozovsky
- 172** **Slovakia**
URBAN FALATH GAŠPEREC BOŠANSKÝ: Ivan Gašperek & Ondrej Urban
- 179** **Spain**
King & Wood Mallesons: Ramón García-Gallardo & Pablo Vila Chirinos
- 194** **Sweden**
Hannes Snellman: Peter Forsberg & Johan Holmquist
- 200** **Switzerland**
Bär & Karrer Ltd.: Mani Reinert
- 206** **Turkey**
ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır
- 215** **Ukraine**
Ilyashev & Partners: Oleksandr Fefelov & Haryk Matosian
- 223** **United Kingdom**
Shearman & Sterling LLP: Matthew Readings & Simon Thexton
- 231** **USA**
Paul, Weiss, Rifkind, Wharton & Garrison LLP: Charles F. (Rick) Rule & Joseph J. Bial

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From the Publisher

Dear Reader,

Welcome to the 13th edition of *The International Comparative Legal Guide to: Cartels & Leniency*, published by Global Legal Group.

This publication, which is also available at www.iclg.com, provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world.

This year, three general chapters cover trends, decisions and judgments in recent cartels cases.

The question and answer chapters, which cover 29 jurisdictions in this edition, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, to whom the editors and publishers are extremely grateful for their invaluable contributions.

Global Legal Group would also like to extend special thanks to contributing editors Geert Goeteyn, Matthew Readings and Elvira Aliende Rodriguez of Shearman & Sterling LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith
Group Publisher
International Comparative Legal Guides

Chile

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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?

Cartels are prohibited under article 3, letter a) of Decree Law 211 (“DL 211”). Cartels are subject to different sanctions:

- 1) Antitrust sanctions: the competition court (“TDLC”, *Tribunal de Defensa de la Libre Competencia*) may impose fines and other measures to the offender.
- 2) Civil sanctions: damages compensation may be imposed on the offender after a final ruling is issued by the TDLC.
- 3) Criminal sanctions: criminal sanctions may be imposed on the 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; restrict output or supply; divide, assign or distribute market zones or quotas; or affect the result of tender processes conducted by public or private companies that render public services or by public bodies.

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

Article 3 of DL 211 generically 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 forbidden 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 and the National Economic Prosecutor (“FNE”, *Fiscalía Nacional Económica*) are mainly responsible for enforcing the cartel prohibition within their own scope of authorities.

The FNE is an independent administrative entity 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 of law, composed of three lawyers and two economists, and subject to the supervision of the Supreme Court, which decides upon cartel cases the FNE or private persons 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, as a consequence 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 has to give instructions to initiate an investigation that is reported to any affected parties.
5. As a result of the case, 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 appeal before the Supreme Court.

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

1. After a claim submitted only by the FNE, the Criminal Prosecutor’s Office will conduct an investigation.
2. Instruction of investigation proceedings to the police by the Criminal Prosecutor’s Office.
3. Bringing 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?

No, there are not.

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 Summary of general investigatory powers.

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

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

In qualified cartel investigations the FNE may request, through a grounded petition and with the prior approval from the TDLC and of a Minister of the Santiago court of appeals, that the police (*Carabineros*) 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 his or her authorisation 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.

2.4 Are there any other significant powers of investigation?

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

- 1) Order to keep confidential investigations conducted *ex officio* or by virtue of complaints, with knowledge of the TDLC's President.
- 2) Either *ex officio* or at the request of an interested party, request that certain parts of the file should be kept reserved or confidential.
- 3) Instruct that there will be no notice of the initiation of an investigation to the affected party, with the authorisation of the TDLC.
- 4) Require the TDLC to exercise any of its authorities and adopt preventive measures on the investigations that the FNE is developing.
- 5) Agree with other public services and State agencies the electronic transfer of information, which does not have the character of secret or reserved according to the law. Likewise, and following a grounded resolution by the FNE, the electronic interconnection with private organisations or institutions may be agreed upon.

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

- 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 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?

The FNE will carry out searches of business and/or residential premises and will not wait for legal advisors to arrive.

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 accused and individuals that are not obliged to declare as witnesses, such as those persons who, given their condition, profession or legal function, such as an attorney, doctor or confessor, must keep the secret confided to them (i.e. in-house counsel).
- 2) Notes taken by the people previously mentioned in relation to said communications.
- 3) Any other objects or documents to which the non-declaration faculty naturally extends.

Furthermore, according to article 60 of the Code of Ethics, the lawyer called to testify as a witness must ensure that his or her right to professional secrecy is recognised.

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?

Before Law No. 20,945 (August 2016) that amended DL 211 (the "Amendment to DL 211"), the only sanction for the obstruction of investigations was arrests for a maximum of 15 days.

Additionally, the Amendment to DL 211 introduced the following sanctions (article 39 DL 211):

- 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* (USD 1,660 approx.) for each day of delay.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The TDLC may impose:

- a) the amendment or termination of agreements, contracts, conventions, systems or arrangements that violate the provisions of DL 211;
- b) the amendment or dissolution of companies, corporations and other private legal entities, which might have intervened in the cartel;
- c) the imposition of fines for amounts up to 30% of the sales of the offender of the product or service line of business associated with the cartel during the period in which the cartel was perpetrated, or up to the double of the economic benefit received as a result of the infringement. If it is not possible to determine neither the sales nor the economic benefit, the TDLC

- d) may impose fines up to a maximum amount equivalent to 60,000 *unidades tributarias anuales* (USD 50 million approx.); and
- d) the prohibition of contracting, under any title, with State bodies or companies, as well as the prohibition of being awarded any concession granted by the State, for a maximum term of five years as from the date the TDLC's decision becomes final and binding.

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 persons that intervened in the performance of the cartel.

From a criminal perspective, an individual may be punished with imprisonment from 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 cartels, the statute of limitation is five years as from the time cartel 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?

According to article 26 of DL 211, a parent company may be held liable for a cartel conducted by its subsidiary if it has benefitted from such cartel and has participated in it in some form.

According to 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.

However, there are no precedents on this matter.

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 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 e-mail 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 in the roster of applications 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 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 a 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 sets the duty to cooperate truthfully, opportunely and continuously with the FNE during the course of the investigation. Therefore, it is reasonable to consider that this obligation remains until the closing of the investigation or a complaint is filed with the TDLC.

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) 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. Such an agreement has only been reached once in Chile regarding a cartel when FASA pleaded guilty to price-fixing allegations in the drugstore market and reached a settlement with the FNE in 2009.

7 Appeal Process

7.1 What is the appeal process?

A 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 DL 211).

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

By a subsidiary application of article 159 of Civil Procedure Code, the TDLC 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 TDLC 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?

Please refer to the answer above.

8.3 What are the applicable limitation periods?

The applicable limitation period is four years.

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 and all of them have been filed after a cartel was sanctioned by the TLDC. The following consumer class actions for civil damages cases arising from cartel conducts are still ongoing: regarding the Pharmacies cartel (filed in 2013), to the Chicken meat producers cartel (filed in 2015) and to the Tissue cartel (filed in 2015), all of them were submitted to ordinary courts according to the procedure applicable before the Amendment to DL 211.

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).

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

There are no further issues.



Claudio Lizana has been a partner at Carey since 2000 and is co-head of the Corporate/M&A and Antitrust and Regulated Markets Groups. He is a member of the Antitrust Committee at the Chilean Bar Association and is widely recognised in Competition and Antitrust by international publications. Claudio is co-author of the Chilean chapter of *Overview of Competition Law in Latin America, IBRAC* (2016) and of the Chilean chapter of *Merger Control, Getting The Deal Through* (2013–2018). Claudio graduated from Universidad de Chile (JD, 1990) and holds an LL.M. from Harvard Law School (1993) and also completed studies in Politics of Global Finance at the London School of Economics (1993).

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Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Digital Health

Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investments Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet Laws
Trade Marks
Vertical Agreements and Dominant Firms