

Chilean Competition Act

Insights to its recent amendments

Research Division
National Economic Prosecutor's Office

Themes

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Chilean Competition System

Competition Act

- **Legal Body:** DL N° 211/1973, and its amendments
- **Goal:** To promote and defend the free competition in markets
 - Orientation toward market efficiency, consumer's welfare is not expressly mentioned
- **Scope:** “...any deed, act or contract that prevents, restricts or obstruct free competition, or that tends to produce these effects”
(Art.3)
- **How:** Rule of reason, non *per se* treatment for any conduct
- **Persons targeted by law:** any private or public, without exemptions
- **Who:** Public and private enforcement of the Law

Chilean Competition System

■ The System:

- Current scheme working since 2004, when DL No.211's amendment came in force

■ The Competition Agency – FNE

- Part of the Executive branch
- Prosecution office, which can carry out investigations procedures for enforce the law
- Provide technical support to TDLC
- In charge of competition advocacy and promotion

■ The Competition Tribunal –TDLC

- Judicial body subject to the Supreme Court of Justice
- Mixed composition (3 lawyers, 2 economists)
- In charge of hear and resolve about adversarial and non-adversarial competition cases and consultations submitted by the FNE or by any private or public entity
- Its decisions may be punitive, restrictive or corrective.

Recent amendments to CA Law 20,361 / 2009

■ Background of the Legal Proposal

- In June 2006, the Chilean Government submitted a bill that, by increasing the System of Competition Defense in Chile, includes a modern and effective regulation of benefits for **exemption** and **reduction** of fines for cases of horizontal agreements (Leniency Program).
- The national and international experience has demonstrated that pursuing and sanctioning the so-called hard core cartels is complex and with poor results, mainly due to the difficulty in obtaining information and evidences concerning the agreement itself and those ones involved in the conduct.

Recent amendments to CA Law 20,361 / 2009

- **Background of the Legal Proposal**
- The probative standard of the Supreme Court (**responsibility for infringement**) reinforced the need of a law reform being able to let the FNE to obtain conclusive evidence to be provided only by an ex-member of a collusive agreement.
- Thus, the leniency program corresponds to a mechanism aiming at the desertion of, at least, one of the cartel members, who is offered with an exemption or eventually a reduction, of the sanction in exchange for the confession of participating in the cartel and rendering evidence that allow the charge for the rest of the members of such organization.

Law 20,361 / 2009

- Main reforms are related to the fighting against cartels, making reference to:
 - The introduction of a Leniency Program;
 - The increase of maximum fines for horizontal agreement infringement applied by the Competition Tribunal (CT);
 - Settlement of new faculties to the FNE: Possibly register public and private sites and intercept communications are particularly relevant (with a reinforced legal control: on one hand, by the CT and on the other one, by a Minister of the respective Supreme Court).
 - The national and international experience has demonstrated that pursuing and sanctioning the so-called hard core cartels is complex and with poor results, mainly due to the difficulty in obtaining information and evidences concerning the agreement itself and those ones involved in the conduct.

Parliamentary Debate

- The inclusion of the figure was the object of strong criticism during the conduct of the parliamentary proceeding, basically owing to the fact that it was considered:
 - A proceeding beyond our legal code that only exists for terrorist and drug dealing offenses (i.e., anticompetitive offenses without being extremely serious cases)
 - It could lead to file a complaint without foundation in order to damage other competitors or to make progress in the process of negotiations.
 - The institution operates in other countries since the market players are willing to avoid the prison sentence which is applicable for many infringements on monopolistic practices, an illicitness not existing in our legislation.
 - Our markets are very concentrated and therefore the suspicion of collusive behavior covers them almost totally.

Stand of the Private Sector

- The one who forms a cartel may not denounce his collaborators due to the close relationship existing among them.
- This implement could be used as a sort of revenge among competitors.
- The Competition Tribunal and the FNE must act with autonomy.
- The statements of the denouncer must be public in order that the defendants have a proper defense.

Leniency Program in Chile

- Effective date: October 12, 2009
- The figure of “leniency program” is regulated in detail by the law, by providing terms and conditions precisely for everyone may have access to the benefit.
- It is only applied to the mentioned conducts in letter a) of article 3rd (Horizontal Agreements).
- Benefits: exemption or reduction up to 50% of the applied fine from the FNE.
- In case of a punishment, the CT must comply with the writ of summons and requests of exemption or reduction of the FNE.

Law 20,361 / 2009 - Provisions

- **Article 39 bis. DL 211:** to have access to the benefits, the executor will have to fulfill the following requirements:
 - a) To provide precise, confident and demonstrable evidences that represent an effective contribution to the gathering of pieces of evidence so as to found a writ of summons before the Competition Tribunal.
 - b) To refrain from divulging the request of these benefits until the National Prosecutor's Bureau has filed the writ of summons or instructs the file of such request and
 - c) To cease participating in the conduct after immediately the filing of the request.

The Role of FNE

- The FNE has to meet legal requirements for the access to the benefit established by the system.
- In October, the FNE published its *“Internal Guide regarding the Benefits of Exemption and Reduction of Fines in Cartel Cases”*.
- The purpose of this Guideline consists of instructing the FNE’s officers and informing the economic agents, and the whole community as well, about the criteria and internal procedure to be used in the application of the Leniency Program in Chile.

Challenges

- The FNE has been preparing to face the challenges imposed by this law reform since three years, mainly by training its officers with respect to the fighting against cartels and the strengthening its internal procedural steps.
- To date, there has been working on priority needs for training in this matter, i.e.:
 - The use of new faculties and settlement of internal procedural steps for the application of the leniency program system.
 - the generation of an expeditious coordination with the Investigation Police.
 - The strengthening of the security conditions for the use and protection of confidential information owned by the FNE, watching over the confidentiality and integrity of the same.



Creating a Competition Culture

Thanks for your attention !

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