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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Criminalisation of cartels and bid rigging conspiracies – Note by Chile

9 June 2020

This document reproduces a written contribution from Chile submitted for Item 1 of the 131st OECD Working Party 3 meeting on 9 June 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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1. Introduction

1. Cartels are illegal under Chilean law since 1959, when the first Chilean Competition Act was enacted. Cartels have been a civil violation ever since, subject to fines and other sanctions. Cartels were also a criminal offence from 1959 to 2003, when the criminal provision in the Competition Act was repealed. In 2016 criminal sanctions for cartels were reenacted.
2. The civil cartel offence includes concerted practices and agreements among competitors to fix prices, limit output, allocate markets, rig bids, establish market conditions or exclude competitors. The criminal cartel offence only covers agreements to fix prices, limit output, allocate markets, or rig public tenders.
3. While both companies and individuals can be liable for the civil offence, only individuals can be punished criminally. Civil sanctions include fines, modification or termination of contracts, the dissolution of companies or other forms of organizations, and administrative debarment. Criminal sanctions include prison sentences from 3 to 10 years and director disqualification.
4. Procedurally, the civil investigation is entrusted to the National Economic Prosecutor's Office ("FNE"). The FNE has criminal-like investigative powers. Civil prosecution can be brought before the Competition Tribunal ("TDLC") by the FNE or private plaintiffs. TDLC's rulings are reviewed in appeal by the Supreme Court. A criminal investigation can only start if a claim is filed by the FNE, once there is a final ruling establishing a civil cartel offence. Criminal investigations are carried out by the Criminal Prosecutor Office (*Ministerio Público*), and prosecution is carried out before ordinary Criminal Courts.
5. Leniency is available for the first two applicants. The first applicant receives immunity from civil and criminal liability. The second applicant receives a reduction in fines and criminal sanctions. The benefit can only be granted by the FNE.
6. No cartels have been criminally prosecuted yet. This is mainly because the amendment of the Competition Act that reinstated the criminal cartel offence is recent. Given the special procedural design provided by the amended Competition Act, for a criminal case to be filed, a cartel functioning after 2016 needs to be fully investigated and civilly prosecuted before the TDLC and eventually the Supreme Court before a criminal proceeding can take place.

2. The Cartel Offence

7. The civil cartel offence covers agreements or concerted practices involving competitors that consist of fixing prices, limiting output, allocating market zones or quotas or rigging bids.¹ Chilean courts have considered these conducts as per-se violations of the Competition Act.² The cartel offence also covers agreements or concerted practices to establish any other marketing conditions or to exclude competitors, but the plaintiff is

¹ Article 3 a) of Decree Law N° 211 ("Competition Act").

² TDLC, Resolución N°54/2018, *Consulta de la Asociación Chilena de Empresas de Turismo A.G. sobre operación de concentración LATAM Airlines Group, American Airlines Inc. y otras.*, C. 14.

required in these cases to show that the agreement or concerted practice conferred market power to the defendants.

8. The criminal cartel offence only covers agreements among competitors to fix prices, limit output, divide or allocate market zones or quotas or rig public tenders.³ Thus, concerted practices and agreements to rig private tenders, exclude competitors or determine marketing conditions are civil, but not criminal offences.

3. Sanctions

9. Both companies and individuals can be civilly prosecuted and sanctioned. Only individuals can be prosecuted and sanctioned criminally.
10. In civil procedures, the TDLC is allowed to (i) modify or terminate any form of contract or agreement, (ii) modify or dissolve companies, corporations or other forms of legal entities, (iii) apply fines, and (iv) debar companies or individuals from contracting with the government for up to five years.
11. Fines can go up to twice the benefit obtained or 30% of the undertaking's turnover in the line of commerce involved in the conduct, for the whole period in which the infringement took place. If none of the above can be determined, fines are capped at a maximum of 60.000 UTA (around 45 million USD).⁴ Fines imposed to individuals cannot be paid by companies.
12. In criminal procedures, individuals can be sanctioned with prison sentences ranging from 3 to 10 years. The law provides a very detailed set of rules for the judge to determine appropriate penalties in cartel cases, depending on the applicable aggravating and extenuating circumstances (in general, the Competition Act establishes a more stringent framework than what is applicable for other criminal offences). The most relevant provision in this matter is the mandatory application of a one-year minimum jail sentence.⁵ Also, individuals can be disqualified from being directors or general managers of state-owned companies, or private companies issuing public debt.
13. Finally, to avoid double jeopardy allegations, the law explicitly states that civil and criminal sanctions were deemed compatible by Congress.⁶

4. Procedure

14. All competition infringements in Chile are decided by the TDLC, an independent Tribunal composed of five judges (three lawyers and two economists). Rulings issued by the TDLC can be appealed before the Supreme Court (the highest court in Chile), which has broad powers to review the TDLC's findings of law and fact.
15. The FNE and private plaintiffs can bring cases before the TDLC, however, the large majority of cartel cases are brought by the FNE. This probably responds to the difficulties of private plaintiffs to reach the high standard of proof required in cartel cases, which is hard to achieve without the broad investigative powers granted to the FNE. In fact, the FNE can request any kind of information and documents from private and public entities, as well

³ Article 62 of the Competition Act.

⁴ Article 26 of the Competition Act. See also: FNEs "Internal guidelines on the determination of fines" (which are imposed by the judiciary). November 2018.

⁵ Article 62 of the Competition Act.

⁶ Article 26, subsection 3.

- as interrogate suspects and question witnesses. With a judicial warrant, the FNE is allowed to conduct search and seizures, and intercept any form of communication.
16. Under the Chilean Constitution, criminal investigations can only be carried out by the Criminal Prosecutor (*Ministerio Público*).⁷ As a general rule, the Criminal Prosecutor is entitled to prosecute criminal offences *ex-officio*.⁸
 17. However, Congress established two special rules for the criminal prosecution of cartels. On the one hand, to avoid parallel civil and criminal investigations and judicial proceedings, Congress decided that cartel criminal investigations can only start once there is a final civil ruling establishing the existence of a horizontal agreement.
 18. On the other hand, considering that not every cartel punished by the TDLC should necessarily be prosecuted criminally, the legislature ruled that criminal investigations can only start by a criminal complaint filed by the FNE. Congress considered the FNE as the best-suited agency to assess which agreements constitute a greater danger to competition, and to decide in which cases criminal prosecution is the most effective mechanism to strengthen the set of rules that protect competition.
 19. As a general rule, filing a criminal claim is not mandatory for the FNE.⁹ If the FNE decides not to file a claim, it is required to release a reasoned decision justifying its decision.¹⁰ The exception to the non-mandatory nature of the criminal claim is contained in subsection two of article 64, which states “*The National Economic Prosecutor’s Office shall file a criminal claim in connection with facts that severely hinder competition in the markets*”.
 20. In June, 2018, the FNE published guidelines anticipating the general criteria of the agency in assessing whether the facts of a case severely hinder competition in the markets, and also announced the criteria the FNE will take into account to decide whether or not to file a complaint when it is discretionary to do so.¹¹
 21. The law also provides a special rule to protect confidential information in the criminal process. According to the Chilean rules of criminal procedure, those under criminal investigation have the right to access all files or evidence that is part of the investigation. During an investigation, secrecy can only stand for 40 days (under certain conditions), and criminal judges cannot allow parties to present redacted versions of documents or files. This clearly creates tensions in competition matters: defendants are generally executives of competing companies, and the evidentiary record normally involves commercially sensitive information of the parties. The disclosure of information from leniency applicants could put them in jeopardy in subsequent damages claims or expose them to prosecution abroad. Aware of this problem, Congress decided that if the Public Prosecution intends to adduce confidential information during the criminal process, it must seek the approval of the Competition Tribunal. Thus, the disclosure of sensitive information will be subject to the prior assessment of a specialized Tribunal on the basis of a reasoned decision.¹²
 22. Finally, the evidence obtained by the FNE using intrusive measures of investigation (dawn raids, wiretaps, etc.) is understood by law to comply with the provisions of the Code of Criminal Procedure and may be used in a criminal trial.

⁷ Chilean Constitution, article 83.

⁸ Article 53 et seq. of the Code of Criminal Procedure.

⁹ Article 64, subsections 1 and 3 of the Competition Act.

¹⁰ Article 64, subsection of the Competition Act.

¹¹ FNE, [Internal Guidelines for filing Criminal Claims in Cartel Cases](#), June 2018.

¹² Article 64, subsection 4 of the Competition Act.

5. Leniency

23. Chilean law contemplates civil and criminal exemptions or benefits for leniency applicants.¹³
24. The first applicant to contribute information to the FNE regarding cartel conduct in a specific market is exempted from: (i) paying any fines; (ii) the sanction of compulsory dissolution of a legal entity, and (iii) criminal liability.
25. The second applicant to contribute information to the FNE in connection with cartel conduct in a specific market obtains: (i) a reduction of up to 50% of the fine that would have been otherwise requested; (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 mandatory year of effective imprisonment.
26. Both companies and individuals can apply for leniency. Only the FNE is entitled to grant the benefits and courts can only deny them if the applicant both organized the cartel and coerced its co-conspirators to participate in it¹⁴.
27. If the FNE files a criminal complaint, individuals who are granted with leniency are expected to give the Criminal Prosecutor the same documents that were previously handed to the FNE. Beneficiaries of the leniency program are also required to appear before the criminal court at the request of the Public Prosecutor, to ratify any depositions submitted before the FNE during the leniency process. Failing to do so without justified cause may lead to harsh consequences: the revocation of the amnesty reward, triggering criminal liability.

6. Enforcement

28. While civil prosecution of cartels has remained consistent in recent years, no cartel cases have yet been filed before criminal courts in Chile.
29. The law that criminalized cartels came into force in August 2016. As explained above, some conditions need to be met before taking a cartel case before criminal courts. First, a cartel functioning after August 30, 2016 must be discovered.¹⁵ Then the cartel needs to be investigated, and complex cartel investigations take time. The average cartel investigation in Chile lasts 2.7 years. After that, the case needs to be fully prosecuted administratively before a criminal case can be filed.
30. The FNE has publicly declared, several times, its commitment to prosecute criminal cartel cases, but it will take some time before all legal requirements are met.

¹³ Articles 39 bis and 63 of the Competition Act. In March 2017 the FNE published a new version of its [Internal Guidelines on Leniency in Cartel Cases](#).

¹⁴ On January 6th, 2020, the Chilean Supreme Court delivered its groundbreaking decision on the *Paper Tissue* cartel case, revoking for the first time the immunity that was granted to an undertaking under this provision of the Competition Act. The Supreme Court found the first leniency applicant to be the organizer of the cartel that coerced other members into participating in the illegal conduct, imposing the firm a fine of (approximately) USD 18 million.

¹⁵ Retroactive application of criminal laws is unconstitutional according to the Chilean Bill of Rights.