# THE HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES

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# Overview

Esteban J Elías and Isadora Rauld
Elías, Napadensky & Cía Abogados

## General framework and enforcement agencies

The Chilean competition law system and regime is regulated by Decree Law 211 of the Antitrust Act (the Act). The Act is generally broader than legislation in other jurisdictions, with respect to oversight of anti-competitive practices. The stated purpose of the Act is to promote and protect free competition in the markets (article 1 of the Act). The Chilean Antitrust System purports to promote efficiency of the markets or, as economists refer to it, the "total surplus", rather than the maximisation of the wellbeing of consumers. Article 3 of the Act defines as illegal conduct "any act, event or convention that prevents, restricts or hinders free competition or tending to produce those effects". Decree Law 211 includes exemplary conduct commonly recognised by the doctrine.

Under the Act, there are two main bodies or agencies in charge of enforcing its provisions: the National Economic Prosecution Office (FNE) and the Tribunal for the Defense of Free Competition (TDLC).

## Evolution of the Act

The Act was enacted 30 years ago; however, it has been subject to a number of reforms and amendments over the years, particularly in the past 15 years. The first major amendment to the Act was implemented by Law No. 19.610 of 1999, which provided the FNE with additional powers and increased the remuneration of the FNE's professionals and staff as a way to retain more qualified professionals. The amendments introduced by Law No. 19.911 in 2004 have been some of the most relevant reforms to the Act, as they created a dual system with one agency in charge of investigating, the FNE, and another agency in charge of enforcing the Law acting in a court capacity, the TDLC. But most importantly it derogated criminal sanctions applied to antitrust conducts and it increased the fines with respect to such conducts. The most recent reform implemented by Law No. 20.361 of 2009 was aimed at improving the investigation capabilities of the FNE towards cartels. This Law also created a leniency programme, increased the amount of certain penalties and extended the statute of limitations.

## TDLC and FNE sanctions in practice

Since 2009, two major cases have been brought under the scope of the Act.

The first, in 2009, concerned the collusion of three main pharmacy chains, Fasa, Cruz Verde and Salcobrand, in connection with the rise in price of 222 critical medications between the years 2007 and 2009. Fasa confessed its participation with the other two chains in the collusion and under article 39 of the 20.361 (the leniency programme) it was exonerated from prosecution and was imposed a fine of US$1 million, as opposed to the other two chains which were exposed to the whole prosecution who were also imposed a fine of US$20 million. (It is important to note that this provision was applied retroactively, as Fasa's conducts with the other two chains occurred before the new provisions were in effect.)

The other most recent case, in 2011, known as "The Chicken Cartel", involved three poultry companies, Agrosuper, Don Pollo and Ariztía, which are accused of colluding in the production, distribution and commercialisation of poultry meat, and counting with the collaboration of the Chilean Association of Poultry Producers. The FNE is investigating the situation and seeking fines of up to US$100 million, plus the dissolution of the Association.

Many discussions are being held regarding the sanctions that should be applied in cases of antitrust conduct, which have been given more importance now with the emergence of the two aforementioned cases; in particular, are administrative fines or sanctions enough to discourage companies from conducting antitrust actions? Should the Chilean legislation re-establish criminal penalties and make them harsher by imposing higher imprisonment time? Should the authorities empower the leniency programme and hope for it to work? Given that the case of "The Chicken Cartel" emerged just two years later, regardless of the attention and sanctions that the pharmacy cartel received, this should give some highlights towards answering those questions.

Some authorities think administrative sanctions are not enough, as the amounts imposed as fines often do not even begin to repair the effective or real

damage caused by the antitrust conducts. Moreover, those sums are not really being paid by the person responsible for the conduct, but by the company, without really deterring a high executive from colluding if they are not going to receive an individual punishment for their actions. Since 1 August 2013 there has been a legislative project before the Chamber of Representatives, which intends to modify several legal texts with the purpose of re-establishing penal sanctions and raising the limit of fines in cases threatening free competition.

Although article 285 of the Chilean Criminal Code sets up imprisonment and fines for a person who, through fraudulent acts, obtains an alteration of the market, those penalties and sanctions are very low and do not effectively stop cartels from emerging. In fact, it is under this article that the executives who were responsible of the pharmacy cartel are being prosecuted thus far without any positive results. Also, article 285 does not contemplate previous agreements between companies, as the crime is punished only when consummated – that is, when the conducts actually alter the market. It is under this scenario that the legislative project is proposing to complement the aforementioned article, providing higher sanctions and including as a punishable crime any kind of threatening preparatory work.

As for the efficiency of the leniency programme in other countries, it has faced some issues in Chile, because the party that elects such programme may still be subject to criminal accusations and could eventually go to jail, under the provisions of the Chilean Criminal Code. Therefore, the parties that may claim the benefits of the leniency programme have been discouraged from using it because of the public exposure and criminal sanctions that they can be subject to under a criminal prosecution.

As pointed out by Ricardo Jungmann, the executive director of the Antitrust Centre of the Catholic University of Chile, in a country such as Chile where there is a small circle of economic groups, executives who have the initiative of denouncing such conducts are given a sort of "economic death", which results in these executives preferring to pay a fine rather than losing all credibility in business, being punished socially by his or her pairs and considered a "traitor".

Elías Napadensky & Cía
ABOGADOS

Antonio Bellet 444 Office 504
Providencia
Santiago 7500494
Chile
Tel: +56 2 2 274 4939
Fax: +56 2 2 957 4326

Esteban J Elías
eelias@eliasnapadensky.com

Isadora Rauld
irauld@eliasnapadensky.com

www.eliasnapadensky.com

Elías, Napadensky & Cía Abogados provides legal services of excellence to both local and multinational companies. The firm specialises in corporate matters, finance structures, complex business litigation, technology law, intellectual and industrial property and entertainment, including, among others, corporate structuring, due diligence planning, mergers and acquisitions, financial assistance, syndicated loans, liability restructuring and leasing and antitrust litigation.

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**Esteban J Elías**
Elías, Napadensky & Cía Abogados

Esteban Elías is a founding partner at Elías, Napadensky & Cía Abogados and professor of economic law at the Central University of Chile. He practises in both Chile and the United States in international corporate and securities law, including public and private equity and debt offerings, mergers and acquisitions, lending, joint ventures, licensing, foreign investment and other corporate matters. He extensively counsels US and Latin American clients in all aspects surrounding their business transactions, and is notably experienced in advising telecoms and technology companies how to define the corporate structure for their Latin American and US operations, as well as assisting them in a wide range of financing and regulatory matters. He also assists technology and internet startups.

*Chambers* recently recognised Esteban Elías in 2014 as a leading global lawyer in the corporate and M&A fields.

Esteban Elías received his JD with high honours from the Central University of Chile Law School and was ranked second out of 133 students. He was awarded a master's (LLM) at American University Washington College of Law in International Finance and Corporate Law.

As professor of economic law he has given presentations both in Chile and abroad on foreign investment, commercial issues, entrepreneurship, innovation and best corporate practices in connection with venture capital and private equity financing, among others. He has also written and published a number of articles regarding different commercial and corporate issues.

Esteban is admitted to practice law in New York and Chile, and is member of the New York Bar Association, the American Bar Association and the Chilean Bar Association.

**Isadora Rauld**
Elías, Napadensky & Cía Abogados

Isadora Rauld is an associate at Elías, Napadensky & Cía Abogados. She practices family law and international corporate law, and has vast experience in public international law. Since 2009, Isadora has participated in the Philip C Jessup International Law Moot Court Competition, organised by the International Law Students Association (ILSA), as an agent for the Chilean team in national and international rounds held in Washington, DC, and as a councilor and judge for her university's team.