

## Chilean Competition Act of 2009: A New Age in Prosecuting Collusion?

One thing at a time, all things in succession. That which grows slowly endures.

--J.G. Hubbard

### I. INTRODUCTION

Latin America has only recently begun to address the expansive competition issues that resulted from the region's shift towards market-oriented, capitalist economies.<sup>1</sup> Attempting to leave behind bloated governments and oppressive regulations, countries have sought to create a set of competition laws and policies<sup>2</sup> that will offset these debilitating forces.<sup>3</sup> Latin American countries view competition policy as an essential step in establishing a free market system.<sup>4</sup>

Over the past thirty years, Chile has quietly become one of Latin America's pioneers in competition policy.<sup>5</sup> In 1973, Chile enacted a competition act which sought

---

<sup>1</sup> Ignacio De León, *LATIN AMERICAN COMPETITION LAW AND POLICY: A POLICY IN SEARCH OF IDENTITY* 2-3 (Kluwer Law International 2001).

<sup>2</sup> Otherwise known as antitrust law in the United States, competition policy refers to a set of policies of which competition law is a part. Organisation for Economic Co-Operation and Development (OECD) & Inter-American Development Bank (IADB), *Competition Law and Policy in Chile*, 187, 196-97 (2006), <http://www.oecd.org/dataoecd/43/60/34823239.pdf> (last visited Oct. 10, 2009) [hereinafter OECD]. It is important to note that competition policy is not merely synonymous with competition law. Competition laws are legal regimes of general application that prohibit or sanction market conduct that restrains the process of competition. This definition excludes laws that regulate prices or specific industries or that incidentally or directly protect competition." CHRIS NOONAN, *THE EMERGING PRINCIPLES OF INTERNATIONAL COMPETITION LAW* 59 (John H. Jackson ed., Oxford University Press 2008). For more information on competition law see generally RICHARD WHISH, *COMPETITION LAW* (Oxford University Press, 6th ed. 2009) (explaining how competition law is used in the UK, European Commission, and internationally) & OLIVER BLACK, *CONCEPTUAL FOUNDATIONS OF ANTI-TRUST* (Cambridge University Press 2005) (describing the philosophical foundations of antitrust law).

<sup>3</sup> De León, *supra* note 1, at 2.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> R. Shyam Khemani & Ana Carrasco-Martin, *The Investment Climate, Competition Policy, and Economic Development in Latin America*, 83 *CHI. KENT L. REV.* 67, 68 (2008).

to assist the government in liberalizing trade and deregulating the market.<sup>6</sup> Thirty years later, Chile enacted a new competition law that replaced the out-of-date competition commissions with a specialized tribunal court whose sole focus was to hear competition disputes.<sup>7</sup> While this change significantly improved the effectiveness of the competition system, enforcement authorities and the specialized court continued to struggle with a persistent problem: the failure to successfully prosecute collusion cases.<sup>8</sup> Efforts to address this continuing problem led to the enactment of Chile's newest amendment to the competition law on April 15, 2009.<sup>9</sup> Primarily focusing on the

---

<sup>6</sup> Decree No. 211 of Dec. 22, 1973 (Chile), amended by Decree No. 511 of Oct. 27, 1980 (Chile), Law No. 19,610 of May 19, 1999 (Chile), & Law No. 19,806 of May 31, 2002 (Chile). An English translation of the 1973 Competition Act can be found at [http://www.unctad.org/sections/ditc\\_ccpb/doc/ditc\\_ccpb\\_nc1\\_chile\\_en.pdf](http://www.unctad.org/sections/ditc_ccpb/doc/ditc_ccpb_nc1_chile_en.pdf); Elina Cruz & Sebastian Zarate, *Building Trust in Antitrust: The Chilean Case*, in COMPETITION LAW AND POLICY IN LATIN AMERICA 157, 159 (Eleanor M. Fox & D. Daniel Sokol, eds., 2009). Although Chile enacted its first competition law in 1959, actual enforcement of the statute did not occur until 1973. *Id.* Between the years 1973 and 2003, Chile used this Act to counteract the monopolistic tendencies associated with the intensive privatization that occurred following General Pinochet's tumultuous overthrow of Socialist President Salvador Allende's government. OECD, *supra* note 2, at 199.

<sup>7</sup> La ley numero 19,911, 14 de noviembre de 2003 (Chile), *translated text available at* [http://www.fne.gob.cl/?content=marco\\_juridico](http://www.fne.gob.cl/?content=marco_juridico) [hereinafter Law No. 19,911].

<sup>8</sup> Cruz & Zarate, *supra* note 6, at 170-71. Collusion refers to:

anticompetitive agreements among competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets and as such are considered the most egregious violations of competition law. By artificially raising prices above the level that would prevail under competitive conditions, hard core cartels force purchasers to pay higher prices than necessary or switch to less suitable alternatives. Whether cartels organize at the manufacturer or retail level, it is generally the final consumer that ultimately suffers, in one form or another, their harmful effects.

Jindrich Kloub, staff attorney at the Cartels Directorate of the European Commission, Address at the Latin American Competition Forum 3-4 (Sept. 9-10, 2009) (transcript available at [http://www.competencia.cl/arch/doc\\_lacf\\_leniency\\_chile.pdf](http://www.competencia.cl/arch/doc_lacf_leniency_chile.pdf)). For more information on cartels and collusion see generally MARK JEPHCOTT & THOMAS LUBBIG, LAW OF CARTELS (Jordan Publishing Limited 2003) (explaining the legal principles governing cartels and enforcement methods).

<sup>9</sup> La ley numero 20,361, 15 de abril de 2009 (Chile) (text available at <http://www.leychile.cl/Navegar?idLey=20361>) [hereinafter Law No. 20,361].

inability to deter collusive conduct,<sup>10</sup> the act sets forth two key mechanisms that assist in detecting and proving collusion: dawn raids<sup>11</sup> and a leniency program.<sup>12</sup>

This Comment argues that although Chile's newest efforts to combat collusion signify a momentous improvement to its competition policy, the adoption of criminal penalties and an Amnesty Plus program would drastically improve the FNE's<sup>13</sup> ability to effectively prosecute and deter collusive conduct.

Given the lack of scholarship dedicated to discussing Chilean competition law, Part II will focus on the development of Chile's competition policy between the years 1973 to 2008.<sup>14</sup> Part III will discuss the significant changes that occurred under the recently passed Competition Act of 2009.<sup>15</sup> Focusing on the greatest improvement, the introduction of a new leniency program, Part III will further evaluate the leniency policies utilized by the United States, European Union, and Brazil to highlight the foundations of Chile's leniency program. Part IV will compare the Chilean model to

---

<sup>10</sup> Fiscalía Nacional Económica, *Informe Anual 2008* [2008 Annual Report] 1, 5 (2009), [http://www.fne.cl/descargas/informes/informe\\_anual\\_2008.pdf](http://www.fne.cl/descargas/informes/informe_anual_2008.pdf) [hereinafter 2008 Annual Report].

<sup>11</sup> Law No. 20,361, art. 39; see *infra* Part III.A.1 (discussing Chile's introduction of a dawn raid and its possible impact). Dawn raids, also referred to as "on-the-spot" investigations are used to carry out investigations into undertakings and to inspect the books and records on the premises of a suspected colluder. JEPHCOTT & LUBBIG, *supra* note 8, at 141. The general purpose is to enable officials to directly obtain evidence. *Id.*

<sup>12</sup> Law No. 20, 361, art. 39 bis.; see *infra* Part III.A.2 (discussing the Chilean leniency program). Leniency can be defined as "the granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities." Wouter P.J. Wils, *Leniency in Antitrust Enforcement: Theory and Practice*, 30 *WORLD COMPETITION* 25, 25 (2007).

<sup>13</sup> FNE stands for *Fiscalia Nacional Economica*. 2008 Annual Report, *supra* note 10, at 1. The FNE is the Office of the National Economic Prosecutor, the body that is in charge of investigating alleged anti-competitive acts and bringing charges before the competition tribunal. Cruz & Zarate, *supra* note 6, at 158-59.

<sup>14</sup> See *infra* notes 18-153 and accompanying text (discussing the evolution of Chile's competition law)

<sup>15</sup> See *infra* notes 154-277 and accompanying text (analyzing Chile's 2009 Act and the leniency models in the US, EU, and Brazil).

these different programs, highlighting the differences between the four models and identifying how the Chilean approach could be improved.<sup>16</sup> Finally, Part V will propose the adoption of criminal penalties and an Amnesty Plus program in Chile to increase the effectiveness of the new leniency policy.<sup>17</sup>

## II. BACKGROUND

This Part will evaluate the evolution of Chile's competition system through an analysis of: (1) the institutional structure under each major act;<sup>18</sup> (2) the substantive framework that was developed under each act;<sup>19</sup> and (3) the progression of case law.<sup>20</sup> In evaluating the individual acts, it will become clear how Chile's competition policy has matured from 1973 until now. Furthermore, it will highlight areas where Chile has succeeded as well as those areas where the Chilean policy has stumbled. In doing so, it will become more evident why the Chilean legislature decided to adopt a new amendment in 2009.

### A. Competition Act of 1973

The emergence of Chile's competition policy arose out of a tumultuous time in Chilean history following the overthrow of President Salvador Allende's Socialist-oriented government on September 11, 1973.<sup>21</sup> Soon after Pinochet took control of the

---

<sup>16</sup> See *infra* notes 278-331 and accompanying text (comparing Chile's leniency model to the EU, US, and Brazil).

<sup>17</sup> See *infra* notes 332-369 and accompanying text (proposing that Chile adopt criminal sanctions and an Amnesty Plus program).

<sup>18</sup> The three major acts that will be discussed are the Competition Act of 1973, the Competition Act of 2003, and the recently approved amendment in 2009.

<sup>19</sup> See *infra* Part II.A.2 (discussing the substantive framework under the 1973 Act).

<sup>20</sup> See *infra* Part II.A.3 (analyzing the case law to underscore enforcement trends).

<sup>21</sup> OECD, *supra* note 2, at 195-96. Under President Allende's government between 1970 and 1973, "[t]he government increased hiring and wages, froze prices, and took ownership or control of farms and firms.

country, he began imposing market-oriented policies that set Chile back on the path to capitalism.<sup>22</sup> Led by the famous economists known throughout Latin America as the “Chicago Boys,” Pinochet and the military government imposed Decree No. 211 – Chile’s revived competition policy.<sup>23</sup>

## 1. Institutional Structure

Decree No. 211 (“1973 Act”) established a “tripartite institutional framework,” which broke the competition system into three parts: (1) the enforcement agency (the National Economic Prosecutor), (2) a special tribunal (the Antitrust Commission), and (3) several advisory Preventative Commissions.<sup>24</sup>

### a. National Economic Prosecutor

The National Economic Prosecutor’s Office (FNE) was established by Title IV of the Competition Act of 1973.<sup>25</sup> The FNE headed the agency that investigated violations of the 1973 Act and brought criminal prosecutions in front of the Commissions.<sup>26</sup> It was broken down into three main enforcement departments.<sup>27</sup> The Legal Department was responsible for conducting investigations, the Economics Department primarily worked

---

Meanwhile, inflation soared, productivity shrank, and shortages (and long lines) became commonplace.” *Id.* at 195. For more information on Chilean history see generally SIMON COLLIER & WILLIAM F. SATER, A HISTORY OF CHILE (Cambridge University Press, 2nd ed. 2004) (1996).

<sup>22</sup> *Id.* at 196.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 204. In comparison to other Latin American countries, this framework was very unique. In Mexico, for example, there is a single agency approach in which their competition institution, the Federal Competition Commission, has control over both the investigations and decision-making. Marcos Avalos Bracho, *Mexican Competition Policy*, in COMPETITION LAW AND POLICY IN LATIN AMERICA 157, 159 (Eleanor M. Fox & D. Daniel Sokol, eds., 2009).

<sup>25</sup> Decree No. 211, tit. IV.

<sup>26</sup> OECD, *supra* note 2, at 204

<sup>27</sup> *Id.*

with lawyers on investigations, and the Regulated Markets and Technical Analysis Department focused on regulatory issues.<sup>28</sup>

Investigations could be initiated by legally valid complaints or *ex officio*.<sup>29</sup> Under Decree No. 211, the Prosecutor was authorized to compel the cooperation and production of documents by state-owned entities, private firms, and individuals.<sup>30</sup> Once the results of the investigations were compiled into a report (“essentially an administrative decision”), they were delivered to either the Preventative Commission or the Antitrust Commission.<sup>31</sup> If the FNE determined that an official proceeding should be initiated, the report was accompanied by a formal charge.<sup>32</sup>

#### b. Antitrust and Preventative Commissions

The Antitrust Commission, also known as the Resolutive Commission, was the highest court in the Chilean competition system.<sup>33</sup> Presided by a Minister of the Supreme Court,<sup>34</sup> it was considered a special court that was not an “organic part of the judiciary.”<sup>35</sup> Instead, the Commission was authorized to perform both judicial and non-judicial functions.<sup>36</sup> On the judicial side, it decided cases that were brought forth by two separate channels: (1) cases brought forth by the FNE or by private parties, and (2)

---

<sup>28</sup> *Id.* at 205.

<sup>29</sup> *Id.* at 207. According to the FNE, *ex officio* means that the FNE can begin investigations on their own initiative. Fiscalía Nacional Económica, *Investigación de Oficio y Regiones* [Investigations on their own initiatives and regional investigations], available at [http://www.fne.cl/?content=inves\\_oficio\\_regiones](http://www.fne.cl/?content=inves_oficio_regiones).

<sup>30</sup> OECD, *supra* note 2, at 207.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 208.

<sup>33</sup> Decree No. 211, tit. I, art. 17.

<sup>34</sup> Decree No. 211, tit. I, art. 16.

<sup>35</sup> Decree No. 211, tit. I, art. 19; OECD, *supra* note 2, at 206. Although the competition court was not part of the typical judiciary system, it was subject to the Supreme Court’s jurisdiction. Decree No. 211, tit. I, art. 19.

<sup>36</sup> Cruz & Zarate, *supra* note 6, at 160.

appeals of cases decided by the Preventative Commission.<sup>37</sup> The Antitrust Commission's decisions could be appealed to the Supreme Court, but they had to involve the dissolution or forced restructuring of a firm, the exclusion of an individual from holding a specific position, or the payment of a fine.<sup>38</sup> In regards to non-judicial authority, the Commission could advise the legislature and make recommendations on amendments to laws that related to competition matters.<sup>39</sup>

In addition to the Antitrust Commission, the Preventative Commissions fell into an odd middle ground between acting as a judicial body and an enforcement agency.<sup>40</sup> Considered a competition authority of first instance,<sup>41</sup> these Commissions were in charge of answering questions on existing acts or contracts that might infringe the provisions of the competition law.<sup>42</sup> In addition, it could direct the Prosecutor's Office to conduct investigations, and it was authorized to issue temporary cease and desist orders for anti-competitive practices and recommend that the FNE intervene in instances where the competition law was being violated.<sup>43</sup> Performing the roles of both

---

<sup>37</sup> *Id.*; Decree No. 211, tit. I, art. 9. Article 9 states, "The decisions and measures agreed upon by the Regional and Central Preventative Commissions may be claimed before the Resolutive Commission, within the term of three working days." Decree No. 211, tit. I, art. 9.

<sup>38</sup> OECD, *supra* note 2, at 209; Decree No. 211, tit. I, art. 19. The text of Article 19 states, "Only the decisions of the Resolutive Commission which order the modification or dissolution of juridical persons, the incompetence to occupy determined offices at professional associations or labor unions and application of fines shall be claimable [before the Supreme Court]." Decree No. 211, tit. I, art. 19.

<sup>39</sup> OECD, *supra* note 2, at 209.

<sup>40</sup> *Id.* at 205.

<sup>41</sup> Thomas M. Studwell, *Latin American Competition Law in the Twenty-First Century: A Practical Guide*, 10 L. & BUS. REV. AM. 747, 756 (2004).

<sup>42</sup> Decree No. 211, tit. I, art. 8; OECD, *supra* note 2, at 205.

<sup>43</sup> Cruz & Zarate, *supra* note 6, at 160; Decree No. 211, tit. I, art. 8.

prosecutor and decision-maker, the Preventative Commissions acted as a middle man between the FNE and Antitrust Commission.<sup>44</sup>

## 2. Substantive Framework

Pursuant to Article 1 of Decree No. 211, “He who enters into or executes, whether individually or collectively, any deed, act or contract that tends to impede free competition within the country’s economic activities...will be punished.”<sup>45</sup> The effect of this broad agreement was that it punished a wide array of activities that sought to impede free competition.<sup>46</sup> Although the 1973 Act makes no expressed mention of goals, the implicit objective was to encourage economic efficiency with the expectation that it would in turn improve consumer welfare.<sup>47</sup>

Article 1’s ban provided the foundation for all enforcement actions, “whether they involve horizontal agreements, vertical agreements, monopolization (abuse of dominance), mergers, or unfair competition.”<sup>48</sup> Expanding upon the enforcement mechanism under this provision, Article 2 listed conduct that tended to impede free-competition.<sup>49</sup> The list included conduct that restricted distribution, assigned quotas,

---

<sup>44</sup> OECD, *supra* note 2, at 209.

<sup>45</sup> Decree No. 211, tit. 1, art. 1.

<sup>46</sup> Cruz & Zarate, *supra* note 6, at 159. Due to the breadth of Article 1, even though Chile is a civil law jurisdiction, “where generally precedents and decisions are non-binding, the legal community viewed the decisions issued by competition commissions as extremely relevant.” *Id.*

<sup>47</sup> OECD, *supra* note 2, at 198.

<sup>48</sup> *Id.* at 211. Evaluating the breadth of Article 1 and its criminal focus, it becomes evident that “the law was based on the United States’ Sherman Antitrust Act.” *Id.* According to Section 1 of the Sherman Antitrust Act, “Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.” Sherman Antitrust Act, 15 U.S.C. § 1 (1898).

<sup>49</sup> Decree No. 211, tit. 1, art. 2.

created market territories, and fixed prices.<sup>50</sup> Finally, Article 2 incorporated a catch-all measure that generally prohibited all actions that relate to eliminating or restricting free competition.<sup>51</sup>

The 1973 Act applied to all individuals, enterprises, and unique to the Chilean system, it applied to government ministries and other agencies.<sup>52</sup> Application to government ministries was a unique feature of Chile's law because it applied to decisions when the ministries were acting as regulators, and not solely when they acted in a "proprietary capacity."<sup>53</sup> It applied to discriminatory government action that

---

<sup>50</sup> Decree No. 211, tit. 1, art. 2. The text in Article 2 states the following actions will be considered to impede free competition:

- a. Those referred to production, such as quota distribution, reductions, or stagnation of them;
- b. Those referred to transport;
- c. Those referred to commerce or distribution, whether wholesaler or retailer, such as quota distribution or the assignment of market zones or exclusive distribution by a sole person or entity, of a same article or several producers;
- d. Those referred to determination of prices of goods and services, as agreements or the imposition of those to others;
- e. Those referred to liberty of work or to liberty of workers to organize themselves, meet, or negotiate collectively, such as agreements or acts of employers, labor unions, or other groups or associations, intended to limit or hamper the free course of collective bargaining within each enterprise or those limiting or hindering the legitimate success to any activity or work; and
- f. Generally, any other measure intended to eliminate, restrict or hindering free-competition.

Decree No. 211, tit. 1, art. 2.

<sup>51</sup> Decree No. 211, tit. 1, art. 2.

<sup>52</sup> OECD, *supra* note 2, at 213.

<sup>53</sup> *Id.* The Chilean system is unusual in comparison to other systems. In Mexico, for instance, Article 28 establishes a complete ban on possible prosecution by competition authorities when the State is operating in certain "strategic areas." OECD, *Competition Law and Policy: An OECD Peer Review* 16 (2004), <http://www.oecd.org/dataoecd/57/9/31430869.pdf>. Strategic areas include: "postal services, telegraph and radiotelegraphy, petroleum and other hydrocarbons, basic petrochemicals and radioactive materials, nuclear energy, electric power, and the functions of the central bank in producing coins and paper currency." *Id.* For more information on Mexican competition law see generally Sergio Garcia-Rodriguez, *Mexico's New Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149 (1995) (discussing the development of Mexican antitrust law and government policy).

created an “unlevel playing field.”<sup>54</sup> Although most competition laws exclude government action, prosecutors in Chile used the law to reach discriminatory regulations or conduct by government actors that otherwise could not be scrutinized.<sup>55</sup> This unusual feature did, however, have its limitations. Under Article 5, mining, oil production, public services, liquor production, health, banking, insurance, the stock market, and transportation were all areas where the 1973 Act did not apply.<sup>56</sup>

Article 1 of the 1973 Act established the broad framework under which the competition law operated.<sup>57</sup> Article 2 further expanded upon the general provision by providing a list of anti-competitive acts that could be prosecuted under the law.<sup>58</sup> While the 1973 Act sent a strong message by regulating the actions of individuals, businesses, and even government agencies, efforts to establish a basic law that would cover all types of activities led to inefficiencies and confusion as to how the law should be applied.<sup>59</sup> This confusion led to a situation where the FNE focused on certain areas of anti-competitive conduct, disregarding the rest.<sup>60</sup>

### 3. Case Law

---

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Decree No. 211, tit. 1, art. 5; De León, *supra* note 1, at 120.

<sup>57</sup> Decree No. 211, tit. 1, art. 1; OECD, *supra* note 2, at 211.

<sup>58</sup> Decree No. 211, tit. 1, art. 2; OECD, *supra* note 2, at 211.

<sup>59</sup> There is some continuing uncertainty about the legal effect of Article 2. In the early years, the Prosecutor’s Office and the Commissions apparently took the position that Article 2 was not merely illustrative of conduct that *tends* to restrain free competition, but a declaration that the listed forms of conduct are always (or *per se*) illegal. That approach justified the condemnation of non-price vertical restraints without consideration of efficiencies or market power.

OECD, *supra* note 2, at 212.

<sup>60</sup> Cruz & Zarate, *supra* note 6, at 165.

Exploring the case law between the period 1973 to 2003, it is clear that the 1973 Act succeeded in a few areas, particularly monopolization and vertical restraints,<sup>61</sup> while failing in other areas.<sup>62</sup> This trend suggests that the resources available to the Commissions and FNE made them more adept at prosecuting cases where a single actor maintained a dominant position.<sup>63</sup> The Commission's inability to prosecute collusion further prevented them from uncovering and prosecuting multiple actors who agreed to participate in collusive agreements, such as price fixing.<sup>64</sup>

Between the years 1974 and 1993, the Antitrust Commission decided 367 matters.<sup>65</sup> Among those decisions, 278 fell into three main substantive categories: horizontal arrangements,<sup>66</sup> vertical arrangements,<sup>67</sup> and monopolization.<sup>68</sup> Further

---

<sup>61</sup> One example of the Antitrust Commission's success occurred in the 1990s when a natural gas pipeline was being created between Chile and Argentina. De León, *supra* note 1, at 191; OECD, *supra* note 2, at 233. The Antitrust Commission "limited the concentration of cross-shareholding among the corporations engaged in transportation, distribution and big customers to fifteen percent, to avoid their individual control of upstream or downstream companies." De León, *supra* note 1, at 191.

<sup>62</sup> Cruz & Zarate, *supra* note 6, at 165. Mergers and collusive agreements were two areas where the Chilean competition authorities failed to effectively prosecute violators. *Id.* at 166.

<sup>63</sup> See *infra* notes 72-78 and accompanying text (discussing the FNE's trend of focusing on monopolization and vertical restraint cases).

<sup>64</sup> Collusion is considered the most difficult anti-competitive conduct to uncover and prosecute because the cartel members are operating in secret. Kloub, *supra* note 8, at 4. "[M]odern cartels, aware of their illegality, operate in secrecy and oftentimes engage in elaborate efforts to conceal their existence from the authorities. They employ encoded language, encrypted telecommunication means, anonymous email accounts and other ways of maintaining secrecy." *Id.*

<sup>65</sup> OECD, *supra* note 2, at 245.

<sup>66</sup> *Id.* Horizontal agreements are practices undertaken through agreements, contracts, or any other collective undertaking between non-competitors that restrict competition, such as price fixing, bid rigging, market segmentation, customer allocation, and other forms of output restraint. De León, *supra* note 1, at 78, 87.

<sup>67</sup> *Id.* One common form of exploitative vertical restriction is resale price maintenance. This refers to agreements entered into between the upstream and downstream firms setting the price (maximum, minimum, fixed) at which the latter would be bound to sell the products or services to customers. De León, *supra* note 1, at 83. Since these arrangements may bring about certain efficiencies pertaining to transaction costs between retailers and suppliers, they are often analyzed differently than horizontal agreements. De León, *supra* note 1, at 82-83; OECD, *supra* note 2, at 220.

<sup>68</sup> OECD, *supra* note 2, at 245. Monopolization refers to a case where a single firm enjoys either market power or dominance in the market. Common examples of monopolistic behavior include refusal to deal

separating the cases into these categories, the case load broke down into: 45 horizontal cases, 53 vertical cases, 42 monopolization cases that involved vertical arrangements, 114 other monopolization cases (some of which may have involved vertical arrangements), and 6 unfair competition cases involving dominant firms.<sup>69</sup> Similar to the Antitrust Commission, the Central Preventative Commission focused primarily on monopolization and vertical arrangements.<sup>70</sup> In the seventy-eight cases where alleged anti-competitive conduct was either approved or condemned, thirty-eight cases involved vertical arrangements, and twenty-seven monopoly cases pertained to vertical restraints.<sup>71</sup>

Analyzing the pattern of cases presented by the 2004 OECD *Peer Review of Competition Policy*, it becomes evident that between the years 1973 and 1993, the FNE and Commissions first concentrated on monopolization cases, especially in the infrastructure sector, and second on vertical restraints.<sup>72</sup> In the area of mergers, due to efficiency considerations, the competition authorities found few cases to be anti-competitive.<sup>73</sup> Another area that found very little consideration was collusion. During

---

or supply, price discrimination through promotions and discounts, and predatory pricing. De León, *supra* note 1, at 87.

<sup>69</sup> OECD, *supra* note 2, at 245. In these cases, “the Prosecutor’s Office or private party initiating a complaint won only fifty-five percent of the cases. Most challenges to horizontal arrangements and unfair competition were lost, while most vertical and monopolization cases were won.” *Id.* at 247.

<sup>70</sup> *Id.* at 248. The Preventative Commission handled 227 matters over the 19-year period. *Id.* “Of the 227 matters, only 118 fit in defined violation categories, and only 78 of these ended with approval or disapproval of the conduct.” *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Cruz & Zarate, *supra* note 6, at 165.

<sup>73</sup> *Id.* at 166. The 1973 Act did not include a specific prohibition of anticompetitive mergers or a premerger notification system. OECD, *supra* note 2, at 223. Aside from efficiency considerations, another reason for the lack of merger enforcement was that “competition institutions...actively sought to prevent mergers from deterring the development of competition in the few but important potentially competitive

the period 1973 to 2003, only 6.3 per cent of the total number of competition cases related to collusion.<sup>74</sup> Focusing solely on those cases, there are two visible trends that existed within this period.<sup>75</sup> First, between the years 1973 and 1987, there was a high number of collusion cases along with a large number of court decisions that found anti-competitive practices.<sup>76</sup> Then, after 1988, both the number of collusion cases and decisions finding an infringement declined.<sup>77</sup> Following the trend, collusion prosecution and enforcement continued to deteriorate in the twenty-first century.<sup>78</sup>

The 1973 Act represents Chile's initial steps towards establishing a more effective and efficient competition policy. The tripartite institutional framework tended to provide overlapping authority and inefficiencies between the FNE and Preventative Commissions.<sup>79</sup> Furthermore, Article 1 of Decree No. 211 embodied the fundamental problem with Chile's policy at the time: it never expressed a clearly defined objective.<sup>80</sup> Instead, a nebulous cloud settled over the competition institutions as arguments arose as to whether the goal of economic efficiency or freedom to compete would lay at the

---

elements of infrastructure sectors, but they made less effort to determine whether mergers in other markets were likely to create a monopoly or facilitate collusion." *Id.*

<sup>74</sup> Cruz & Zarate, *supra* note 6, at 165.

<sup>75</sup> See *infra* notes 76-78 and accompanying text (discussing the collusion trends).

<sup>76</sup> Cruz & Zarate, *supra* note 6, at 166.

<sup>77</sup> *Id.* Scholars Elina Cruz and Sebastian Zarate, professors at the Center of Competition Law at Pontificia University in Santiago, Chile, explained the two trends by focusing on the enormous changes that occurred in Chile during the first time period (1973-1987). *Id.* at 168-69. "[D]uring this time, many of the decisions issued by the competition commissions had more to do with contributing to liberalization and adapting a new economic reality than with a strong enforcement against collusion itself. Chile completed the liberalization process for the most part by the end of the 1980s." *Id.* at 169.

<sup>78</sup> See *infra* Part II.B.3 (discussing case law in the period 2003 to 2008).

<sup>79</sup> OECD, *supra* note 2, at 205.

<sup>80</sup> Decree No. 211, tit. 1, art. 1. "The statutory goals of antitrust are economic efficiency and consumer welfare, but in the last decade or so somewhat broader goals, such as economic freedom or non-discrimination have been enunciated." John M. Connor, *Latin America and the Control of International Cartels*, Address at the Latin American Competition Policy Conference 28 (April 4, 2008) (transcript available at <http://ssrn.com/abstract=1156401>).

heart of the competition policy.<sup>81</sup> Analyzing the case law, it is evident that the FNE and Commissions focused the majority of their efforts on uncovering single firm monopolization while overlooking the more egregious collusive violations.<sup>82</sup> Despite all of these setbacks, Chile continued to take steps forward and adapt to their ever-changing country; and on November 14, 2003, the Chilean legislature approved Law No. 19,911 – Chile’s new and improved competition policy.<sup>83</sup>

### *B. Competition Act of 2003*

The enactment of the competition amendment in 2003 signaled a pronounced effort by the Chilean government to improve competition enforcement by strengthening the competition institutions.<sup>84</sup> Aside from eliminating the Commissions and establishing a specialized court in its place,<sup>85</sup> the law instituted reforms to the enforcement measures at the court’s disposal as well as new prosecutorial powers for the FNE.<sup>86</sup> Although these new powers improved the overall capacity of the FNE and the specialized tribunal, the Competition Act of 2003 (“2003 Act”) failed to adopt measures that would attack the heart of the problem: the inability to detect and deter collusion.<sup>87</sup>

#### 1. Institutional Structure

---

<sup>81</sup> OECD, *supra* note 2, at 198.

<sup>82</sup> Cruz & Zarate, *supra* note 6, at 165.

<sup>83</sup> Law No. 19,911, *supra* note 7.

<sup>84</sup> Cruz & Zarate, *supra* note 6, at 159. “In May 2004, because of its ‘erratic rulings,’ the Antitrust Commission was replaced by the Free-Competition Defense Tribunal.” Connor, *supra* note 71, at 28.

<sup>85</sup> Law No. 19,911, ch. II, art. 5. *See infra* Part II.B.1.a (discussing the foundations of Chile’s specialized court).

<sup>86</sup> Law No. 19,911, ch. II, art. 26 & ch. III, art. 39. *See infra* Part II.B.1.b (analyzing the FNE’s new investigatory remedies under the 2003 Act).

<sup>87</sup> Law No. 19,911, ch. II, art. 26 & ch. III, art. 39.

The new institutional model represents a break from the tripartite institutional framework that existed under the 1973 Act. In its place, the competition authorities instituted a “bifurcated agency model” whereby there were two separate bodies that would handle enforcement – one body, the FNE, would handle investigations while the second body, the newly formed TDLC,<sup>88</sup> would act as the judiciary.<sup>89</sup> Previously there was confusion as to whether the FNE was solely an investigatory body or a partial enforcement body connected to the Preventative Commission. In contrast, the new law clearly established that the Prosecutor’s Office was “an autonomous administrative agency.”<sup>90</sup> This section will evaluate the two main institutional reforms under the 2003 Act: (a) the creation of a specialized court,<sup>91</sup> and (b) expanded powers for the FNE.<sup>92</sup>

#### a. Tribunal for the Defense of Free Competition

The 2003 Act established a specialized competition tribunal that replaced the out-of-date Resolutive and Preventative Commissions.<sup>93</sup> The TDLC is a separate entity with judicial powers, but, similar to the Antitrust Commission, it is not considered a part of the judiciary.<sup>94</sup> It has a total of five members including three lawyers and two economists.<sup>95</sup> Due to the inclusion of economists and members with expertise, the decisions issued by the TDLC have changed competition enforcement because the

---

<sup>88</sup> The TDLC stands for *la Tribunal de la Defensa de Libre Competencia*. It acts as the specialized tribunal for competition matters.

<sup>89</sup> Cruz & Zarate, *supra* note 6, at 162.

<sup>90</sup> *Id.* “Up through 1998, the FNE had only about 30 employees, but the number doubled in 1999. A parallel budget increase allowed the FNE to attract better qualified professional staff in the early 2000s.” Connor, *supra* note 80, at 29.

<sup>91</sup> See *infra* Part II.B.1.a (evaluating the new Chilean specialized court).

<sup>92</sup> See *infra* Part II.B.1.b (discussing the FNE’s investigatory powers).

<sup>93</sup> Cruz & Zarate, *supra* note 6, at 160.

<sup>94</sup> OECD, *supra* note 2, at 189.

<sup>95</sup> Law No. 19,911, ch. II, art. 6.

decisions are now founded upon economic theory and include significant technical analysis.<sup>96</sup> Members of the TDLC serve terms of six years with the opportunity to serve more than one term.<sup>97</sup>

Under Article 5 of the new act, the TDLC was made subject to the correctional and economic supervision of the Chilean Supreme Court.<sup>98</sup> During legislative discussion about this provision, there was little debate devoted to judicial review because under the 1973 Act, the Supreme Court had little, if any, influence.<sup>99</sup> However, judicial review was significantly expanded under the 2003 Act.<sup>100</sup> According to the new competition act, the TDLC had the power to terminate or amend agreements, order the dissolution of a partnership, and apply fines.<sup>101</sup> In each of these situations, parties to the suit could apply for judicial review to the Supreme Court.<sup>102</sup> The effect of this new

---

<sup>96</sup> Cruz & Zarate, *supra* note 6, at 161.

<sup>97</sup> Law No. 19,911, ch. II, art. 7; OECD, *supra* note 2, at 189. During their terms, they can only be removed for cause. Law No. 19,911, ch. II, art. 12; OECD, *supra* note 2, at 189. In addition, “[n]either public servants nor officers or employees of publicly held corporations are eligible.” *Id.* Law No. 19,911, ch. II, art. 12; OECD, *supra* note 2, at 189.

<sup>98</sup> Law No. 19,911, ch. II, art. 5.

<sup>99</sup> Cruz & Zarate, *supra* note 6, at 161.

<sup>100</sup> *Id.* at 181

<sup>101</sup> Law No. 19,911, ch. II, art. 26. According to Article 26, the Court may adopt the following remedies:

- (a) To amend or terminate the acts, contracts, agreements, systems or arrangements which are contrary to the provisions of the law;
- (b) To order the amendment or dissolution of the partnerships, corporation of other private-law entities involved in the acts, contracts, agreements, systems, or arrangements referred to in the foregoing paragraph;
- (c) To apply fines for fiscal benefit for up to an amount equivalent to twenty thousand annual tax units. The fines may be imposed on the corresponding legal entity, on its directors, managers and on any person having been involved in the conduction of the relevant act. In the case of fines applied to legal entities, their directors, managers and those persons having benefitted from the respective act shall be jointly liable to the payment thereof, provided they took part in its conduction.

Law No. 19,911, ch. II, art. 26.

<sup>102</sup> Law No. 19,911, ch. II, art. 27; Cruz & Zarate, *supra* note 6, at 182.

power is that the Supreme Court has become the “ultimate decision-maker in the competition law system.”<sup>103</sup>

The problem with this new role is that the Court lacks the expertise to effectively rule on competition law matters.<sup>104</sup> An obvious result was that the Supreme Court could efficiently adjudicate matters that pertained to individual rights, but when the ruling involved economics and competition law, the decisions were muddled and inconsistent.<sup>105</sup> In addition, the Supreme Court did not apply any deference to the TDLC’s decisions.<sup>106</sup> Thus, the Supreme Court wandered into technical competition matters that required judges who were actually trained to analyze such complicated issues, such as the TDLC.<sup>107</sup> This unintended extension of judicial review to the Supreme Court has hampered the success of the TDLC, especially in regards to collusion, and will continue to plague its development until the legislature addresses this issue.<sup>108</sup>

#### b. Prosecutorial Powers

The new powers conferred by the 2003 Act were meant to provide additional tools to deter the expansion of collusion within Chile. Article 39 of the 2003 Act establishes the powers that the FNE has at its disposal.<sup>109</sup> Under the new investigatory

---

<sup>103</sup> Cruz & Zarate, *supra* note 6, at 162.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 182 (citing E Cruz, ‘Precios Predatorios y Libre Competencia,’ *Revista Anales de Derecho UC. Temas de Libre Competencia* (2007)).

<sup>106</sup> *Id.* at 183.

<sup>107</sup> *Id.* at 184.

<sup>108</sup> One proposal to fix this perplexing problem is to limit the interpretation of the Supreme Court’s judicial review (*Recurso de Reclamación*). *Id.* By limiting the scope of the Court, it would not be able to amend the decisions of the TDLC that relate to substantive competition matters. *Id.*

<sup>109</sup> Law No. 19,911, ch. III, art. 39.

remedies, the FNE can: (1) require the collaboration of officers of corporations or State entities, (2) compel the production of information by any office or entity, and (3) subpoena private parties for information and documents.<sup>110</sup>

The main purpose for these new powers was to address the FNE's growing struggle in prosecuting cases involving collusive agreements.<sup>111</sup> From 2003 until 2008, there were only seven TDLC decisions regarding collusive agreements, plus three more cases that were pending.<sup>112</sup> In comparison to other cases handled by the TDLC, this represented a mere eight percent of the total case load.<sup>113</sup> Furthermore, the Supreme Court overturned every decision in which collusion was found.<sup>114</sup> The primary reason for the FNE's failure stemmed from insufficient evidence.<sup>115</sup> Not only did the FNE lack

---

<sup>110</sup> Law No. 19,911, ch. III, art. 39. The 2003 Act provides the FNE with the following powers:

- (f) To request the collaboration of any officer of the public services, municipalities or corporations, entities or partnerships in which the State or its corporations, entities or partnerships, or the municipalities, have a contribution, representation or participation, who will be bound to prove it;
- (g) To request any office, service or entity referred to in the foregoing paragraph, to put at its disposal the background information it may deem necessary for the investigations, reports or claims that it is conducting or in which it is bound to intervene.
- (h) To request from private parties such information and documents that it may consider necessary on the occasion of the investigation it is conducting.

Law No. 19,911, ch. III, art. 39. See Law No. 19,911, ch. III, art. 39 for a complete list of the FNE's powers under Article 39.

<sup>111</sup> Cruz & Zarate, *supra* note 6, at 170.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* "The country's greatest international cartel case, the \$7 million fines in *Oxygen*, was dismissed by the Supreme Court in January 2007." Connor, *supra* note 80, at 29. In the *Shipping Companies* case, "the Exporters Association filed a complaint against a number of shipping companies regarding an agreement in prices among them and discriminatory practices applied to their clients." Aldo González, *Quality of Evidence and Cartel Prosecution: The Case of Chile*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* 189, 199 (Eleanor M. Fox & D. Daniel Sokol, eds., 2009). After the TDLC unanimously condemned the shipping agencies for collusion, the Supreme Court overturned the decision. *Id.* at 199-200. The Supreme Court stated that "the facts cited as evidence of commercial behavior represented only one hypothesis for collusion," and therefore "such evidence was not conclusive of unlawful conduct." *Id.* at 200.

<sup>115</sup> Cruz & Zarate, *supra* note 6, at 172.

the power to inspect the premises of its undertakings, there was also no leniency policy in place to rely on for additional evidence gathering.<sup>116</sup> In addition, the fact that collusive agreements are usually performed in secret and parties to the collusion usually try to hide any evidence of their existence further debilitated the FNE's efforts.

117

The improvements in Article 39 of the 2003 Act stopped short of providing the FNE with truly effective tools to investigate anti-competitive behavior.<sup>118</sup> Instead of implementing a leniency program to entice collusive parties to come to divulge their violations or provide for raids on the alleged violator's premises, the 2003 Act provided superficial powers that did not significantly expand the FNE's investigatory powers.<sup>119</sup> Similar to before, colluders engaging in secret practices could still hide materials because Article 39 only allowed for subpoenas of private parties or requests to public entities or state-owned enterprises for relevant information.<sup>120</sup> Due to the failure to adopt real investigatory tools, the FNE was forced to sit on its hands until 2009 when they were finally given some power to uncover collusive practices.<sup>121</sup>

---

<sup>116</sup> *Id.* Both of these issues have been addressed by Chile's recent 2009 amendment and will be discussed in the following sections. See *infra* Part III.A (discussing Chile's implementation of dawn raids and a leniency policy).

<sup>117</sup> Jason D. Medinger, *Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence*, 52 EMORY L.J. 1439, 1439 (2003); Patricia C. Botana, *Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs*, 13 COLUM. J. EUR. L. 47, 53 (2006/2007).

<sup>118</sup> Cruz & Zarate, *supra* note 6, at 175, 178. The lack of tools led to the inability to collect evidence. As a result, when the FNE received a decision in its favor from the TDLC, the Supreme Court overturned it. For instance, in the *Medical Oxygen* case, following a 4:1 decision by the TDLC finding the companies guilty of collusion, the Supreme Court unanimously overturned it, stating that "the evidence submitted was inadequate to prove collusion." González, *supra* note 114, at 201.

<sup>119</sup> "Without the modern tools of cartel investigation common in other jurisdictions, the FNE is not equipped to find or punish international cartels." Connor, *supra* note 80, at 49.

<sup>120</sup> Law No. 19,911, ch. III, art. 39.

<sup>121</sup> See *infra* Part III.A.1 (discussing the FNE's adoption of dawn raids).

## 2. Substantive Changes to the 2003 Act

Addressing the need to clarify the goal of Chile's competition policy, the 2003 Act modified Article 1 of the competition law in order to clearly establish its purpose. Prior to the 2003 Act, Article 1 simply stated, "He who enters into or executes, whether individually or collectively, any deed, act or contract that tends to impede free competition within the country's economic activities...will be punished."<sup>122</sup> One of the OECD's principle criticisms with this provision was that it failed to lay out the goal of Chile's competition policy.<sup>123</sup> As a result, it was unclear which policies should be pursued or whether the policies chosen were pursuing the ends that the legislature intended.<sup>124</sup>

Even though the substantive framework did not drastically change under the 2003 Act, the legislators shed light on the goal of Chile's competition policy by revising Article 1.<sup>125</sup> Under the new act, it stated: "This law is intended to promote and defend free market competition. Any attempt against free competition in business activities shall be corrected, prohibited, or repressed in the manner prescribed by the law."<sup>126</sup>

This new provision clearly established the end that Chile was trying to reach: to

---

<sup>122</sup> Decree No. 211 tit. I, art. 1.

<sup>123</sup> OECD, *supra* note 2, at 203.

<sup>124</sup> Connor, *supra* note 80, at 28.

<sup>125</sup> The revisions to Article 1 coincide with the general focus of the TDLC. According to Eduardo Miranda, President of the TDLC, the defense of competition is a class of indirect regulation whose objective is to control the exercise of market power in situations in which said control depends upon the existence of various businesses that compete amongst each other. Eduardo Jara Miranda, *Segunda Cuenta Pública del Presidente del Tribunal de Defensa de la Libre Competencia* [Second Public Account by the President of the Tribunal for the Defense of Free Competition] (May 12, 2005) (transcript available at <http://www.tdlc.cl/UserFiles/P0001/File/CUENTAS%20PUBLICAS%20TDLC/Cuenta%20Publica%202006.pdf>).

<sup>126</sup> Law No. 19,911, ch. 1, art. 1.

promote and defend the free market.<sup>127</sup> One impact from this reform was that it made it more difficult for parties to argue that the purpose of the competition law was actually founded upon another consideration.<sup>128</sup> Furthermore, competition authorities could now focus their attention on the real purpose of the goal (investigating and enforcing the competition law) as opposed to squabbling about what conduct the law actually protected.

#### a. Fines, but No Jail Time

The 2003 Act drastically expanded the fines under the competition law while at the same time eliminating criminal sanctions.<sup>129</sup> Under Article 26, the maximum fine that the TDLC could apply is 20,000 units, or approximately US\$16,500,000.<sup>130</sup> The maximum fine under the 1973 Act was only US\$230,000, and during 30 years of competition enforcement, the average fine administered was only US\$13,500.<sup>131</sup> Furthermore, in the seventy-three cases in which fines were assessed, they totaled less than US\$ 1 million.<sup>132</sup> The drastic increase in the amount of fines was meant to serve as an additional deterrent to businesses that were considering anti-competitive actions.

---

<sup>127</sup> Law No. 19,911, ch. 1, art. 1. "Chile's government regards the principal goal of its competition law as being to promote economic efficiency with the expectation that in the long run this maximises consumer welfare." OECD, *supra* note 2, at 198. According to some scholars, "some statements seem to imply that economic efficiency is not merely the principal priority, but the only real goal of the law. Thus, innovation and consumer welfare are regarded not as goals in themselves but as the expected result of efficiency." *Id.* at 202. Given the interplay between efficiency goals versus non-efficiency goals, it is readily apparent how easy it is to forget the purpose of the law when it is not expressly stated.

<sup>128</sup> OECD, *supra* note 2, at 198.

<sup>129</sup> Law No. 19,911, ch.II, art. 26.

<sup>130</sup> Law No. 19,911, ch.II, art. 26, Cruz & Zarate, *supra* note 6, at 161.

<sup>131</sup> OECD, *supra* note 2, at 210. "Until the maximum fine was increased in 2004, Chile's cap was unlikely to provide minimal deterrence for the typical large-scale international cartel." Connor, *supra* note 80, at 49.

<sup>132</sup> OECD, *supra* note 2, at 210.

Since the inception of the 2003 Act, the Tribunal has imposed fines of over US\$6 million. The increase in the imposition of fines over the past five years served as a strong signal that the TDLC was making a serious effort at punishing anti-competitive conduct.

The use of the increased fines as a deterrent is only effective, however, if the TDLC and Supreme Court enforces them.<sup>133</sup> Between the years 1973 and 2003, the Supreme Court reduced the Antitrust Commission's fines on average by fifty percent.<sup>134</sup> These actions sent the message that the judicial system was not actually serious about prosecuting and enforcing the competition law; instead, businesses and individuals engaging in anti-competitive conduct could simply write the sanction off as a price of doing business.<sup>135</sup>

Further weakening the competition system, the 2003 Act eliminated criminal sanctions for illegal conduct.<sup>136</sup> Although the criminal penalties were rarely used, their existence still served as a deterrent.<sup>137</sup> Without the threat of incarceration, directors and managers of businesses intending to engage in anti-competitive conduct simply performed a cost-benefit analysis to determine whether or not their profits would exceed the amount of penalties that they would receive if they were prosecuted.<sup>138</sup>

---

<sup>133</sup> "Out of more than 2000 decisions of the Commission during 1973-2002, only 73 carried fines. Of those decisions with fines, only nine referred to horizontal agreements. The average cartel fine per case was \$51,000." Connor, *supra* note 80, at 29.

<sup>134</sup> OECD, *supra* note 2, at 210.

<sup>135</sup> See *infra* Part IV.A.1 (discussing how colluders rationalize their violations through a cost/benefit analysis).

<sup>136</sup> Law No. 19,911, ch. II, art. 26; OECD, *supra* note 2, at 210.

<sup>137</sup> Cruz & Zarate, *supra* note 6, at 161.

<sup>138</sup> Kloub, *supra* note 8, at 12.

Deterrence of antitrust violations depends on removing the motive for committing antitrust violations. Rational companies that commit antitrust violations enter into a calculus. Employees (including officers, directors, and agents) of companies who choose

Under the 1973 Act, these directors and managers had to take into account the realistic possibility that they could find themselves incarcerated for their conduct.<sup>139</sup> While the drastic increase of fines provides a strong deterrent under the 2003 Act, the lack of criminal penalties weakened the enforcement potential of the FNE and TDLC.

### 3. Case Law

The introduction of a stronger enforcement regime following the 2003 Act encouraged competition authorities to make a more concerted and serious approach towards deterring anti-competitive conduct.<sup>140</sup> Unlike before, the Tribunal met regularly and members specialized in competition matters, thus translating into better enforcement of competition law.<sup>141</sup> In 2008 alone, the FNE initiated thirty-three investigations that fell within high-impact markets to consumers, such as in the cases of pharmacies, passenger transportation, commercial and retail business, and

---

to engage in antitrust violations often do so because they believe violations will lead to more profit for their employers. If the likely costs of the violation outweigh or equal the likely profits, antitrust violations will be deterred; if the likely costs do not outweigh or equal the likely profits, the profit-maximizing company will engage in the violation and consumer welfare will be harmed.

James R. Eiszner, *Antitrust Civil Damages Remedies: The Consumer Welfare Perspective*, 75 UMKC L. REV. 375, 377-78 (2006).

<sup>139</sup> Since cartelists are able to make a cost/benefit analysis and discount a possible fine as a cost of doing business, "cartel penalties not only should be large enough to negate financial incentives to conspire, but also should include substantial jail time for responsible individuals. Nothing is a greater deterrent and nothing is a greater incentive for a cartelist." Thomas O. Barnett, Assistant Attorney General of the Antitrust Division for the Department of Justice, *Criminal Enforcement of Antitrust Laws: The U.S. Model 5*, Address before Fordham Competition Law Institute's Annual Conference on International Antitrust Law Policy (Sept. 14, 2006) (transcript available at <http://www.usdoj.gov/atr/public/speeches/218336.htm>).

<sup>140</sup> Cruz & Zarate, *supra* note 6, at 170. In 2001, prior to the enactment of the 2003 Act, the Antitrust Commission made fifty-five rulings. OECD, *supra* note 2, at 248. By 2005, the TDLC was hearing a total of ninety-three cases, almost double what the Commission heard in 2001. Miranda, *supra* note 125.

<sup>141</sup> Cruz & Zarate, *supra* note 6, at 170.

telecommunications.<sup>142</sup> In 2008, the FNE presented nine complaints to the TDLC, a fifty percent increase from the year before.<sup>143</sup>

Between the years 2003 and 2008, there were only seven TDLC decisions relating to collusive agreements.<sup>144</sup> This case load represents eight percent of the total cases, a two percent increase from the period of 1973 to 2002.<sup>145</sup> Some scholars have suggested that this meager increase is due to two reasons.<sup>146</sup> First, a bill at the time was being debated in Congress that would introduce a leniency program.<sup>147</sup> Scholars Cruz and Zarate suggest that some colluding parties were waiting for the bill to be approved before they divulged their acts.<sup>148</sup> Second, they contended that the Supreme Court's decision to overturn every ruling by the TDLC in which collusion was found served as a strong deterrent to confess.<sup>149</sup> Analysis of the case law clearly demonstrates the fissures and weaknesses within the competition system.

---

<sup>142</sup> 2008 *Annual Report*, *supra* note 10, at 8. Of these new investigations, 48.4 percent were investigations initiated by private action while 51.6 percent of the investigations were a result of investigations by the FNE. *Id.*

<sup>143</sup> *Id.* at 10.

<sup>144</sup> Cruz & Zarate, *supra* note 6, at 170.

<sup>145</sup> *Id.* The one time in which colluders have been fined is in the case of *Medical Oxygen*. Connor, *supra* note 80, at 49. The participants were fined about \$300,000. *Id.* "The only other international case, *Gasoline Distribution*, was closed after many years of investigation. Chile has neither investigated nor punished any global cartels." *Id.*

<sup>146</sup> According to the 2005 Report by the President of the TDLC, contrary to the reasons submitted by some scholars, the TDLC placed special emphasis on establishing minimum rules of competitive functioning in the market, as opposed to imposing sanctions or establishing artificial market structures. Eduardo Jara Miranda, *Primera Cuenta Pública del Presidente del Tribunal de Defensa de la Libre Competencia* [First Public Account by the President of the Tribunal for the Defense of Free Competition] (May 12, 2005) (transcript available at <http://www.tdlc.cl/UserFiles/P0001/File/CUENTAS%20PUBLICAS%20TDLC/Cuenta%20Publica%202005.pdf>).

<sup>147</sup> Cruz & Zarate, *supra* note 6, at 170.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

Looking at the 2003 Act as a whole, it addressed several of the inefficiencies that arose out of the 1973 Act's tripartite institutional framework. Primarily, the inclusion of a specialized court had led to a more professional court that had the expertise to address the complicated issues associated with competition cases.<sup>150</sup> Second, the addition of an explicit objective under Article 1 clarified the direction that the competition authorities were supposed to take.<sup>151</sup> While great gains were made in these areas, the introduction of superficial investigatory remedies failed to enhance the FNE's enforcement powers.<sup>152</sup> This failure is underscored by the fact that the FNE continues to face evidentiary obstacles in prosecuting collusion, and upholding sentences before the Supreme Court.<sup>153</sup> In the following sections, this Comment will investigate whether the leniency program and dawn raids are enough to enable the FNE to find collusion and successfully prosecute it.

### III. DISCUSSION

#### A. *Competition Act of 2009*

On April 15, 2009, the Chilean legislature approved a set of reforms that sought to correct the shortfalls of the 2003 Competition Act.<sup>154</sup> While minor revisions were made to the substantive provisions in Article 3 to further clarify the law,<sup>155</sup> the

---

<sup>150</sup> Cruz & Zarate, *supra* note 6, at 161.

<sup>151</sup> Decree No. 211, tit. I, art. 1.

<sup>152</sup> Cruz & Zarate, *supra* note 6 at 175, 178; González, *supra* note 103, at 201.

<sup>153</sup> Cruz & Zarate, *supra* note 6, at 170.

<sup>154</sup> Law No. 20,361, *supra* note 9.

<sup>155</sup> In addition to the corrective and prohibitive measures provided to the Tribunal, Article 3 now generally provides for preventative measures at the court's disposal to confront anti-competitive conduct. Law No. 20, 361, art. 3. According to Mr. Miranda, president of the Tribunal, this provision relates to merger procedures and will be a new fundamental pillar for the role of the Tribunal as one of the organizations charged with promoting competition in the country's markets. Eduardo Jara Miranda,

Competition Act of 2009 (“2009 Act”) primarily sought to employ new tools that would better enable the FNE to confront the inability to fetter out collusion and prosecute it.<sup>156</sup> The two most important additions include: (1) the ability to conduct dawn raids,<sup>157</sup> and (2) the introduction of a leniency program.<sup>158</sup>

### 1. Dawn Raids

The use of dawn raids as an apparatus to strengthen the FNE’s enforcement of collusion was a highly contentious issue that underwent strong debate in the Chilean Chamber of Deputies.<sup>159</sup> The main conflict centered upon whether to categorize the

---

*Quinta Cuenta Pública del Presidente del Tribunal de Defensa de la Libre Competencia [Fifth Public Account by the President of the Tribunal for the Defense of Free Competition]* 15 (2009) (transcript available at <http://www.tdlc.cl/UserFiles/P0001/File/CUENTAS%20PUBLICAS%20TDLc/Cuenta%20Publica%202009.pdf>). Included in the list of prohibited conduct under Article 3, subsection (a) now identifies bid-rigging as a violation of Chile’s competition law (“afectar el resultado de procesos licitatorios”). Law No. 20,361, art. 3.

<sup>156</sup> Law No. 20,361, art. 37 & 39 bis.. According to the FNE, the new changes in the 2009 Act are directed towards reestablishing the fight against hard cartels, the modification being seen as political recognition that cartel activity is the most damaging anti-competitive conduct and the need to establish specific tools to combat it. Fiscalía Nacional Económica, *Desafíos recientes para el combate a carteles: El nuevo programa de clemencia de Chile* [Recent challenges for combating cartels: The new program of leniency in Chile] ¶15 (Sept. 9-10, 2009), available at [http://www.competencia.cl/arch/doc\\_sessionI\\_chile\\_fne\\_esp.pdf](http://www.competencia.cl/arch/doc_sessionI_chile_fne_esp.pdf) [hereinafter *Recent Challenges in Chile*].

<sup>157</sup> Law No. 20,361, art. 37.

<sup>158</sup> Law No. 20,361, art. 26. Another tool at the FNE’s disposal is a settlement mechanism. Under Article 39, the FNE has the power to make agreements with economic agents involved in their investigations, with the object of promoting free market competition. Law No. 20,361, art. 39. These agreements are subject to review by the Tribunal.<sup>158</sup> Within a period of fifteen days, the Tribunal must decide to approve or reject the agreement. Law No. 20,361, art. 39. This settlement procedure is a drastic improvement from earlier competition laws. Under the earlier laws, even if the FNE and violating party agreed to a certain fine or prison sentence, they would have to proceed with a complete trial because the 1973 and 2003 competition laws failed to include a settlement procedure. Decree No. 211, tit. IV, art. 24; Law No. 19,911, ch.III, art. 39. According to the 2009 reforms, subject to Tribunal approval, both parties can negotiate agreements and avoid the lengthy and unnecessary proceedings. Law No. 20,361, art. 39. Not only will this provision shorten the duration of cases, it will further preserve the Tribunal’s time and resources to deal with cases where a dispute actually exists.

<sup>159</sup> Cruz & Zarate, *supra* note 6, at 178. The Chamber of Deputies is one of two houses in the Chilean legislature. Cámara de Diputados de Chile [Chilean Chamber of Deputies], *Acerca de la Cámara de Diputados* [About the Chamber of Deputies], [http://www.camara.cl/camara/camara\\_diputados.aspx](http://www.camara.cl/camara/camara_diputados.aspx) (last visited Oct. 30, 2009).

competition law as an administrative or criminal matter.<sup>160</sup> According to a representative of a policy institute linked to right-wing political parties in Chile who spoke before the Chamber of Deputies, “[I]t does not seem convenient to empower the Office of the Economic Prosecutor with faculties that simply belong to a criminal investigation, which—in any case—affect constitutionally protected rights, such as people’s privacy and intimacy.”<sup>161</sup>

Despite the on-going debate as to whether or not the competition law should be defined as a criminal or administrative body, the Chilean legislature approved Article 39, subsection (n) which authorizes the FNE to conduct dawn raids.<sup>162</sup> According to the new provision, under certain conditions, the FNE can make a request to a Court of Appeals judge which would permit law enforcement to undertake dawn raids.<sup>163</sup> The authorization, however, must specify with precision the methods that will be used, the time period for their use, and the people or entities that are being investigated.<sup>164</sup>

Falling under the category of dawn raids, the FNE’s powers include: (1) entering public and private places; (2) registering and seizing all classes of objects and

---

<sup>160</sup> Cruz & Zarate, *supra* note 6, at 179. “When the granting of these investigative tools was debated in Congress, it was alleged that giving them to the FNE might affect constitutionally protected rights, ie the right to a fair trial and investigation, and as in this particular case, those fundamental rights related to the protection of privacy.” *Id.* at 181.

<sup>161</sup> *Id.* at 178 (citing Chamber of Deputies, Report of the Select Committee of Economy, 2006, Bill No. 4324-03-1).

<sup>162</sup> Law No. 20,361, art. 39. In addition to dawn raids, Article 20 increased the statute of limitations for judicial action for anti-competitive infractions. *Recent Challenges in Chile*, *supra* note 156, at ¶ 21. Prior to the 2009 Act, judicial action could be brought within two years of the executed action. *Id.* Under the new act, the general statute of limitations is three years. *Id.* In cases of horizontal agreements or concerted practices, a charge can be brought within five years from the time at which the actors cease the collusive acts. *Id.*

<sup>163</sup> Cruz & Zarate, *supra* note 6, at 178; <sup>163</sup> Law No. 20,361, art. 39.

<sup>164</sup> Law No, 20,361, art. 39.

documents that provide evidence of the existence of an infraction; (3) authorizing the interception of all classes of communications; and (4) ordering whatever business that provides communication services to provide copies and registers of the communications transmitted or received by the alleged violating party.<sup>165</sup> Taking into account the FNE's poor performance in preventing collusion, these powers enable the FNE to verify the existence of a precise and grave history of collusion.<sup>166</sup>

Similar policies were implemented in both the European Union and Brazil.<sup>167</sup> Under Regulation No. 1 in the European Union, authorities are authorized to carry out unannounced inspections with the same inspection powers as there would be in an announced inspection.<sup>168</sup> These raids are normally used when investigators wish to inspect multiple companies simultaneously (ie. in cases of alleged collusion), or when investigators believe that the firm involved is not likely to be cooperative.<sup>169</sup> In the case of Brazil, the Secretariat of Economic Law (SDE)<sup>170</sup> was given the power to conduct dawn raids as a result of an OECD recommendation to amend the 1994 Antitrust

---

<sup>165</sup> Law No, 20,361, art. 39.

<sup>166</sup> Law No, 20,361, art. 39. The use of a dawn raid is necessary in order to establish an effective leniency program that will facilitate prosecution of collusion. "[I]n order to be effective, leniency programmes must be complemented by other investigative means so as to demonstrate that the competition authority has the ability to uncover cartels on its own, thus maintaining the requisite level of uncertainty on the part of cartelists to induce them to break ranks." Kloub, *supra* note 8, at 4.

<sup>167</sup> Council Regulation No. 1/2003, 2003 O.J. (L 1) 5. It pertains to the rules on competition laid down in Articles 81 and 82 of the Treaty; Thomas C. Vinje & Peter I.B. Goldschmidt, *Investigations and Enforcement Proceedings*, in *WORLD ANTITRUST LAW AND PRACTICE* §24, §24.3.2 (James M. Garrett, ed., 1997); Ana Paula Martinez, Head of the Competition Division for the Ministry of Justice in Brazil, *Leniency Program and Dawn Raids: The Turning Point in Brazilian Competition Law & Policy*, Address at the Chilean Competition Day (Oct. 25, 2007) (transcript available at [http://www.fne.cl/descargas/dia\\_competencia/data/2007/ddlc\\_2007\\_apm.pdf](http://www.fne.cl/descargas/dia_competencia/data/2007/ddlc_2007_apm.pdf)).

<sup>168</sup> Council Regulation No. 1/2003, 2003 O.J. (L 1) 5.

<sup>169</sup> Vinje & Goldschmidt, *supra* note 167, at §24.3.2.

<sup>170</sup> The Secretariat of Economic Law is the "chief investigative body in matters related to anticompetitive practices, and it issues non-binding opinions in merger reviews." Martinez, *supra* note 167.

Law.<sup>171</sup> Beginning in 2003, the number of warrants served under the auspices of the SDE has increased every year.<sup>172</sup> Walking hand in hand with the leniency program adopted by Brazil in 2000,<sup>173</sup> dawn raids significantly improved the SDE's ability to generate direct evidence that has been used by public prosecutors in supporting criminal applications as well as by the judicial branch in their antitrust rulings.<sup>174</sup>

## 2. Leniency Program

The creation of Chile's first leniency program under Article 39 bis. represents Chile's most important reform.<sup>175</sup> According to the FNE, the new program provides an invaluable set of instruments that enables enforcement authorities to detect, investigate, and prosecute anti-competitive conduct on an international level.<sup>176</sup> Given the fact that

---

<sup>171</sup> *Id.*

<sup>172</sup> In the period from 2003 to 2005, eleven warrants were served. Then, in 2006, nineteen warrants were served. Finally, this number dramatically grew in 2007 when eighty-four warrants were served. *Id.*

<sup>173</sup> According to Martinez, the use of leniency and dawn raids has resulted in an upward spiral. *Id.* Due to the evidence revealed in leniency agreements, more searches and dawn raids are being conducted. *Id.* As a result, there are more candidates for leniency and more searches and dawn raids occur because more evidence is revealed. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Law No. 20,361, art. 39 bis. Although leniency programs have been very successful in countries that have implemented the policies, there is an objection to imposing these programs. Opponents contend that law enforcement agencies that use less vigorous action in prosecuting the violating parties are "shirking their duties." OECD, Report on Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 27 (2002), <http://www.oecd.org/dataoecd/49/16/2474442.pdf>. In addition, there is a concern about the injustice of promoting a policy that allows a violator to avoid the consequences of its action by confessing and shifting the burden to others. *Id.*

<sup>176</sup> Fiscalía Nacional Económica, *Guía Interna Sobre Beneficios de Exención y Reducción de Multas en Casos de Colusión* [Internal Guide on the Benefits of Immunity and Reduction of Fines in Collusion Cases] 2 (2009), [http://www.fne.gob.cl/?content=guia\\_delacion](http://www.fne.gob.cl/?content=guia_delacion), choose Descargar Guia de Delación [hereinafter 2009 Leniency Program Guide]. Pursuant to recommendations by the OECD, the 2009 Act incorporated a series of instruments, mechanisms, and measures that were more capable of efficiently prosecuting collusive agreements between competitors. *Id.* at 3.

the FNE has encountered significant obstacles in combating collusive conduct,<sup>177</sup> this tool will be especially useful in prosecuting hard-core cartel activities.<sup>178</sup>

Taking into account that competition law is meant to deter collusion, leniency programs achieve a more effective result by intensifying the risk that colluders will face by their own co-conspirators.<sup>179</sup> Since they have access to inculpatory evidence that can be used against one another, leniency programs undermine the very cohesion that keeps cartels operating and covert: trust.<sup>180</sup>

According to Article 39 bis., he who executes a foreseen conduct under Article 3 can obtain a reduction or exemption from a fine when he supports the FNE's investigatory efforts.<sup>181</sup> In order to obtain an exemption, the violating party<sup>182</sup> must:

- (1) provide a precise and truthful history that represents effective evidentiary support sufficient to bring a case before the Tribunal;<sup>183</sup>
- (2) abstain from divulging the

---

<sup>177</sup> Cruz & Zarate, *supra* note 6, at 170. The inability to prosecute collusion in Chile, and Latin America as a whole, is an extremely pressing issue. "Without significant increases in cartel detection, in the levels of expected fines or civil settlements, or expansion in the standing of buyers to seek compensation, international price fixing will remain rational business conduct for decades to come." Connor, *supra* note 80, at 58.

<sup>178</sup> "Hard core cartel activities, including price-fixing, market allocation, and big-rigging, have been recognized by national competition authorities and international economic bodies across the globe as the most egregious violations of antitrust law." Medinger, *supra* note 117, at 1439.

<sup>179</sup> *Id.* at 1441.

<sup>180</sup> *Id.*

[A] leniency programme creates a prisoner's dilemma for cartelists by providing a strong incentive for a member of a cartel to break ranks and escape punishment while the other members suffer high sanctions. This results in great uncertainty as none of the cartel members can be sure that another member will not report on their illegal activities, for example due to changes in management, thus maximizing the inherent instability of secret cartels. Such a risk, when viewed from the perspective of a would-be cartel member may thus provide an additional deterrent to engaging in cartel behaviour.

Kloub, *supra* note 8, at 5-6.

<sup>181</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17.

<sup>182</sup> According to article 39 bis., the violating party can either be a corporation or individual. Fiscalía Nacional Económica, *Preguntas Frecuentes de la Guía de Delación Compensada* [Frequently Asked Questions on the Leniency Program Guide] 2, [http://www.fne.cl/?content=guia\\_delacion](http://www.fne.cl/?content=guia_delacion), choose Preguntas Frecuentes [hereinafter *FAQs on Chilean Leniency*] (last visited Nov. 5, 2009).

application for those immunity benefits;<sup>184</sup> (3) immediately terminate his participation in the conduct after presenting the application; (4) be the first person to provide sufficient evidentiary support within the group responsible for the anti-competitive conduct; and (5) declare that he was not the organizer of the collusive conduct.<sup>185</sup>

If the violating party is not the first party to apply for immunity, then he may apply for a reduction of the fine.<sup>186</sup> To qualify for a reduction, the party must meet all of the immunity requirements, except for the requirement of being the first person to apply for immunity.<sup>187</sup> In addition, the party must provide additional evidence that supports the findings of the first party.<sup>188</sup> If the party is able to meet these conditions, then the FNE can choose to lower the fine by a maximum of fifty percent.<sup>189</sup> Once the party has met all of the conditions and the FNE has determined the fine reduction, the TDLC must affirm that the violating party has conformed to the requirements.<sup>190</sup>

Assuming that the TDLC finds that the party has established all of the requirements, the

---

<sup>183</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17. According to the FNE, sufficient evidentiary support includes: (1) written or verbal declaration confessing the soliciting party's participation in the collusion; (2) documents referring to the existence and participation of the collusion, such as documents pertaining to negotiations or coordination between competitors relating to fixing prices, production amounts, or other commercial conditions; (3) studies, reports, or statistics that refer to declared facts and that ratify the existence, participation, and/or effects of the collusion; (4) any evidence that aptly establishes the existence of collusion or justifies immunity. *2009 Leniency Program Guide*, *supra* note 176, at 9.

<sup>184</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17.

<sup>185</sup> *2009 Leniency Program Guide*, *supra* note 176, at 6.

<sup>186</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17.

<sup>187</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17.

<sup>188</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17.

<sup>189</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17. In determining how much to reduce the fine, the FNE will consider: (1) the amount of time between the first filing and the soliciting party's filing; (2) the degree to which the new evidence supports evidence submitted by the first party; and (3) whether or not the evidence leads to other investigations of collusion. *2009 Leniency Program Guide*, *supra* note 176, at 10.

<sup>190</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17.

TDLC loses the authority to apply any additional fines against the individual or increase the fine agreed upon by the FNE.<sup>191</sup>

In the event that the FNE rejects an application by a soliciting party, the FNE is prohibited from initiating an investigation where the evidentiary support is based upon the evidence brought forth by the soliciting party.<sup>192</sup> An investigation can only be brought against the soliciting party if the FNE has evidence that was obtained under a different method, otherwise the soliciting party may not be prosecuted.<sup>193</sup> To determine whether an applicant will receive immunity or a fine reduction, the Prosecutor's Office has established an Evaluation Committee<sup>194</sup> that is authorized to analyze the applications and determine whether the requirements have been met.<sup>195</sup>

Article 39 bis. establishes the requirements for both immunity from fines and a reduction of up to fifty per cent for latecomers who can provide additional evidentiary support that will contribute to the FNE's investigation.<sup>196</sup> Based upon OECD recommendations and analysis of other countries utilizing leniency programs, Chile decided to impose a policy that limited penalties to monetary fines, and permitted latecomers to receive a reduction in fine.<sup>197</sup> In order to better understand why Chile chose these specific policies, the next section will describe three programs that

---

<sup>191</sup> Law No, 20,361, art. 39 bis.; *Recent Challenges in Chile*, *supra* note 156, at ¶ 17.

<sup>192</sup> *2009 Leniency Program Guide*, *supra* note 176, at 10.

<sup>193</sup> *Id.*

<sup>194</sup> The Office of Conformity is in charge of reviewing the evidence and information submitted by the soliciting party. *Id.* at 4. Once the Office reviews the materials, it determines the amount of reduction that the soliciting party should receive. *Id.*

<sup>195</sup> *Id.* at 4. The committee is presided by the Manager of the Studies Division and a professional within the same division. *Id.*

<sup>196</sup> *Recent Challenges in Chile*, *supra* note 156, at ¶ 17; *FAQs on Chilean Leniency*, *supra* note 182, at 4.

<sup>197</sup> *2009 Leniency Program Guide*, *supra* note 176, at 2-3.

successfully implemented leniency policies: the United States,<sup>198</sup> the European Union,<sup>199</sup> and Brazil.<sup>200</sup>

## *B. Traditional Leniency Program Models*

### 1. United States' Leniency Policy

Dating back to 1978, the original US program provided that violators who reported their anti-competitive activity could only be *eligible* to receive immunity from criminal prosecution. The Antitrust Division did not, however, automatically grant amnesty.<sup>201</sup> In 1993, the Antitrust Division revised their policy, granting amnesty automatically if there was no pre-existing investigation.<sup>202</sup> Under the current policy,<sup>203</sup> colluders can obtain amnesty in two ways.<sup>204</sup> First, under Option A, pertaining to corporations, a cartel member will receive amnesty if it meets the following requirements:<sup>205</sup>

---

<sup>198</sup> See *infra* Part III.B.1 (evaluating the US' leniency program).

<sup>199</sup> See *infra* Part III.B.2 (discussing the EU's leniency policy and comparing it to the US' model).

<sup>200</sup> See *infra* Part III.B.3 (providing a Latin American example of a leniency program and highlighting the similarities to the US model).

<sup>201</sup> Scott D. Hammond, Director of Criminal Enforcement of the Antitrust Division for the Department of Justice, Detecting and Deterring Cartel Activity Through an Effective Leniency Program 2 (Nov. 21-22, 2000) (transcript available at <http://www.usdoj.gov/atr/public/speeches/9928.htm>).

<sup>202</sup> *Id.*

<sup>203</sup> "On June 22, 2004, President Bush signed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which enhances maximum penalties for criminal antitrust violations and offers financial incentives for informers-including de-trebling civil damages for cooperating corporations involved in cartel conduct." Glenn Harrison & Matthew Bell, *Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots*, 6 HOUS. BUS. & TAX. L. J. 207, 208 (2006).

<sup>204</sup> Medinger, *supra* note 117, at 1444.

<sup>205</sup> *Id.* The Department of Justice (DOJ) also offers an individual leniency policy which contains three requirements. First, the individual must come forward to report the illegal activity before the DOJ receives information about the activity. Second, the individual must provide complete and full cooperation to the DOJ's investigation. Third, the individual must not have coerced another party to join the activity or been the leader or originator of the activity. Department of Justice, Leniency Policy for Individuals, <http://www.usdoj.gov/atr/public/guidelines/0092.htm> (last visited Oct. 15, 2009). "Individuals who cooperate through this Program receive amnesty and a promise of non-prosecution for the anticompetitive activity they report." Scott D. Hammond, Director of Criminal Enforcement of the

- 1) At the time the corporation comes forward, the Antitrust Division has not received information about the illegal activity from another source;<sup>206</sup>
- 2) The corporation took prompt and effective action to terminate its part in the activity;<sup>207</sup>
- 3) The corporation reports the wrongdoing completely and provides full and continuing cooperation to the Division throughout the investigation;<sup>208</sup>
- 4) The confession of wrongdoing is a corporate act, and not just an isolated confession of individual executives or officials;<sup>209</sup>
- 5) The corporation makes restitution to injured parties where it is possible;<sup>210</sup> and
- 6) The corporation did not coerce another party to participate in the illegal activity and it was not the leader or originator of the activity.<sup>211</sup>

---

Antitrust Division for the Department of Justice, Cornerstones of an Effective Leniency Program (Nov. 22-23, 2004) (transcript available at <http://www.usdoj.gov/atr/public/speeches/206611.htm>). The crucial difference between the individual and corporate policy is that “[t]he real value and measure of the Individual Leniency Program is not in the number of individual applications we receive, but in the number of corporate applications it generates. It works because it is a watchdog to ensure that companies report the conduct themselves.” *Id.* For more information on Option A see Medinger, *supra* note 117, at 1444 (explaining the requirements under Option A) & Harrison & Bell, *supra* note 203, at 214 (discussing the 2004 revisions to Option A).

<sup>206</sup> Department of Justice, Corporate Leniency Policy,

<http://www.usdoj.gov/atr/public/guidelines/0091.htm> (last visited Oct. 15, 2009) [hereinafter US Corporate Leniency Policy]. See Laurence K. Gustafson, Brian M. Collins & Brian McKay, *Criminal Consequences of Anticompetitive Conduct*, 45 S. TEX. L. REV. 89, 100-102 (2003) (explaining the features and requirements of the Corporate Amnesty Program).

<sup>207</sup> US Corporate Leniency Policy, *supra* 189.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

If the applicant is unable to meet all of these requirements, the applicant has another chance to receive immunity under Option B.<sup>212</sup> To qualify for Option B, the applicant must meet requirements two through five in Option A and the applicant must meet the following criteria: (1) the corporation is the first one to come forward and qualify for leniency; (2) the Division, at the time the corporation applies, does not have evidence against the company that is likely to result in a sustainable conviction; and (3) the Division finds that granting leniency would not be unfair to others.<sup>213</sup>

While the ability to obtain immunity serves as the carrot, the threat of criminal enforcement, including both fines and incarceration, serves as the stick for the Antitrust Division. Under US law, hard-core cartel activity, which includes price-fixing, bid-rigging, and customer and market allocation agreements, is a felony violation.<sup>214</sup> Corporations run the risk of being fined \$100 million, twice the gross gain to the cartel, or twice the gross loss suffered by the victims of the conspiracy.<sup>215</sup> In addition, individuals can face up to ten years imprisonment.<sup>216</sup> This threat of criminal

---

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* For more information on Option B see Medinger, *supra* note 117, at 1444-45 (explaining the requirements under Option B) & Harrison & Bell, *supra* note 203, at 214 (discussing the 2004 revisions to Option B).

<sup>213</sup> *Id.*

<sup>214</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (1898).

<sup>215</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended in scattered sections of 15 U.S.C.) [hereinafter 2004 Reform Act]. "In order to determine the amount of a particular fine, there are three separate matters to be considered: (i) statutory maximum fine; (ii) Organizational Sentencing Guidelines; (iii) and alternate minimum fine." J. Anthony Chavez, *Prosecution of International Cartels and Compliance Programs*, 1371 PRACTISING L. INSTITUTE 805, 849 (2003). The Antitrust Division has successfully obtained several fines in excess of \$100 million, "including a Department of Justice record \$500 million criminal fine against F. Hoffman-La Roche in the Division's highly successful vitamins investigation." Harrison & Bell, *supra* note 186, at 213.

<sup>216</sup> 2004 Reform Act, *supra* note 215; Thomas O. Barnett, Assistant Attorney General of the Antitrust Division for the U.S. Department of Justice, *Perspectives on Cartel Enforcement in the United States and Brazil*, Address to the University of São Paulo (April 28, 2008) (transcript available at

prosecution has deterred a number of global cartels from operating in the United States.<sup>217</sup> The Antitrust Division has identified numerous cartels that operated in Europe, Asia, and other places, but never expanded “their cartel activity into the United States solely because it was not worth the risk of U.S. sanctions.”<sup>218</sup>

One additional program that the Antitrust Division implemented, which has increased the rollover effect<sup>219</sup> in investigations, is the Amnesty Plus Program.<sup>220</sup> Under this DOJ program, even if a corporation does not qualify in the initial case of the investigation, its assistance in uncovering a second collusive act can lead to immunity for the second offense and a significant reduction in the calculation of the fine for the company’s participation in the first offense.<sup>221</sup> Conversely, if a company knows of a second offense and chooses not to report it, and the conduct is later discovered and prosecuted, the Antitrust Division will request that the sentencing court impose a fine or jail sentence that is at or above the end of the Sentencing Guidelines range.<sup>222</sup>

“Amnesty Plus induces firms that are already under investigation to clean house and

---

<http://www.usdoj.gov/atr/public/speeches/236906.htm>). “The United States Congress recently raised the maximum jail term for cartel offenses, so members of cartels that began or continued their activities on or after June 22, 2004 now face a possible ten years in jail.” *Id.* The old maximum jail requirement was three years. *Id.*

<sup>217</sup> Hammond, *supra* note 201.

<sup>218</sup> *Id.*

<sup>219</sup> “[A] leniency program may lead to a rollover pattern where an administrative authority investigation, within the context of a single collusive practice, provides evidence related to other collateral collusive practices, thus multiplying the program’s beneficial effects.” Botana, *supra* note 106, at 53.

<sup>220</sup> Hammond, *supra* note 201. An amnesty plus program is a “two for one’ policy: if a firm is already cooperating with an investigation in respect of one cartel, and comes forward with information that entitles it to total immunity in relation to a second cartel, it may receive an additional reduction in the penalty to be applied in relation to the first cartel.” WHISH, *supra* note 2, at 407.

<sup>221</sup> Botana, *supra* note 117, at 53.

<sup>222</sup> Hammond, *supra* note 201.

report violations in which it may be involved in other markets.”<sup>223</sup> This program has been so successful that almost half of the Division’s international cartel investigations are initiated by evidence obtained by an investigation of a completely separate market.<sup>224</sup>

The United States’ model provides a well-rounded approach that employs both an incentive to report criminal conduct as well as a “threat of severe sanctions for those who lose the race for amnesty.”<sup>225</sup> While the US is unique in that few jurisdictions have adopted the use of criminal incarceration as opposed to only fines,<sup>226</sup> the Antitrust Division has been extremely successful in creating a transparent policy that truly deters anti-competitive conduct.<sup>227</sup>

## 2. European Union’s Leniency Program

Development of a leniency policy in the European Union can be defined as two sides of the same coin: on one side the EU policy closely aligns itself with the US,<sup>228</sup> and on the other side, it stands in stark contrast to it. Similar to the US, the EU policy automatically grants amnesty to the first cartel member to cooperate with EU

---

<sup>223</sup> Barnett, *supra* note 139, at 5.

<sup>224</sup> *Id.*

<sup>225</sup> Hammond, *supra* note 201.

<sup>226</sup> *Id.* Other countries that impose criminal sanctions include: Austria, Canada, France, Germany, Ireland, Japan, the Slovak Republic, South Korea, and the United Kingdom. Chavez, *supra* note 215, at 830; Wils, *supra* note 12, at 55.

<sup>227</sup> According to statistics compiled by the Department of Justice’s International Antitrust Program, between the years 1996 and 2003, the Division prosecuted international cartels and obtained fines of more than \$10 billion. Furthermore, in 2002 alone, the defendants in Division cases were sentenced to more than 10,000 jail days which equates to an average sentence of eighteen months. R. Hewitt Pate, Assistant Attorney General of the Antitrust Division for the Department of Justice, Criminal Enforcement of Antitrust Laws: The U.S. Model, Address before the American Bar Association Section of Antitrust Law (Feb. 6, 2003) (transcript available at <http://www.usdoj.gov/atr/public/speeches/200736.htm>).

<sup>228</sup> The new EU leniency policy was adopted on February 13, 2002. Medinger, *supra* note 117, at 1447; Dr. Alan Riley, *Beyond Leniency: Enhancing Enforcement in EC Antitrust Law*, 28 *WORLD COMPETITION* 377, 380 (2005). For more information on the European competition policy see generally WHISH, *supra* note 2.

competition authorities when: (1) there is no pending investigation of the relevant industry; (2) The confessing organization terminates its involvement in the cartel immediately; (3) the organization did not take concrete steps to coerce other conspirators to participate in the scheme; and (4) the conspirator agrees to provide continuing cooperation in the investigation and prosecution.<sup>229</sup>

In addition, the EU provides amnesty in cases that are equal to the United States' Option B where firms can obtain amnesty after an investigation has begun but before sufficient evidence has been obtained to establish a violation.<sup>230</sup> If the applicant is not the first corporation to qualify for immunity, the applicant can obtain a reduced fine if: (i) it presents significant "added value"<sup>231</sup> evidence with respect to evidence already obtained by the European Commission, and (ii) it ends its involvement in the collusive practice as soon as it submits the evidence.<sup>232</sup>

While these provisions are very similar to the US model, there are significant differences between the two policies. First, and most importantly, the EU does not employ criminal powers.<sup>233</sup> Instead, it deters cartels and allures amnesty solicitants by

---

<sup>229</sup> European Competition Network (ECN), ECN Model Leniency Programme 2-3, [http://ec.europa.eu/competition/ecn/model\\_leniency\\_en.pdf](http://ec.europa.eu/competition/ecn/model_leniency_en.pdf). The ECN Model Leniency Program sets out a framework for rewarding the cooperation of soliciting parties. The ECN members are required to use their best efforts to align their policies with the ECN Model Program. *Id.* at 1. For more information see generally Kris Dekeyser & Maria Jaspers, *A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on Work in the Leniency Field*, 30 *WORLD COMPETITION* 3, 16-23 (2007) (discussing the scope and application of the ECN Model Leniency Program).

<sup>230</sup> *Id.*

<sup>231</sup> "'Added value' refers to the extent to which the evidence provided strengthens, by its nature and its level of detail, the Commission's ability to prove the facts in question." Botana, *supra* note 117, at 66.

<sup>232</sup> *Id.*

<sup>233</sup> European Commission, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, at 1, [http://ec.europa.eu/competition/antitrust/legislation/fines\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/fines_en.pdf) [hereinafter EC Guidelines] (last visited Nov. 5, 2009).

imposing crippling fines.<sup>234</sup> Under the new Guidelines on the Method of Setting Fines, the Commission can provide fines that amount to: (i) a base amount, calculated as a percentage of up to thirty per cent of the annual sales of the infringing undertaking, and multiplied by the number of years the firm participated in the illegal conduct; (ii) an “entry fee,” between fifteen and twenty-five per cent of an undertaking’s value of sales, in addition to the base amount in section (i); and (iii) an increase of the fine of up to one-hundred percent for each prior infringement.<sup>235</sup>

Second, instead of employing the United States’ “race to the courthouse” policy,<sup>236</sup> the EU allows for soliciting parties other than the whistleblower to receive a fine reduction.<sup>237</sup> Some scholars prefer the EU system because it may still be necessary to investigate after the whistleblower has presented evidence.<sup>238</sup> The EU Commission can reduce fines for companies if they submit evidence that provides “added value” to

---

<sup>234</sup> *Id.* at 3-5; Hammond, *supra* note 201. The “EU does not provide a leniency program for individuals, since they do not fear imposition of fines.” Botana, *supra* note 117, at 62.

Many of the highest fines ever imposed by the Commission were in 2006, and this trend has continued in the early part of 2007. In January of this year [2007], Siemens was fined nearly € 397 million for its role in the gas insulated switchgear cartel, the largest fine ever imposed on a company for a single infringement. A month later, ThyssenKrupp was fined nearly € 480 million for multiple infringements in the elevator and escalator sector, eclipsing the previous record of € 462 million levied on Hoffmann-La Roche in 2001 for its role in the vitamin cartels.

Porter Elliott, *More Than an Ocean Separates US*, 16 AUG BUS. L. TODAY 55, 57 (2007).

<sup>235</sup> EC Guidelines, *supra* note 233, at 3-5; Botana, *supra* note 117, at 62.

<sup>236</sup> Hammond, *supra* note 201; Medinger, *supra* note 117, at 1444. The “winner-take all” approach may enhance the effectiveness of the leniency program because it “sets up a race, and this dynamic leads to tension and mistrust among the cartel members.” Hammond, *supra* note 188. The option of only one immunity establishes a higher level of tension because “[a]ny other second cooperating undertaking—even if by only a matter of hours—will *not* be eligible for immunity. Botana, *supra* note 106, at 63.

<sup>237</sup> Botana, *supra* note 117, at 63. “[W]hen the EU uses the term ‘immunity’ it refers to full immunity (or 100 percent reduction in fines), and a reference to ‘leniency’ includes cases where a company is not awarded full immunity, but earns a reduction in fine.” Hammond, *supra* note 201. According to the EU partial immunity policy, the first non-whistle blower can obtain a fine reduction of up to thirty or fifty percent, the second is eligible for twenty to thirty percent, and any subsequent applicants can receive a maximum reduction of twenty percent. Wils, *supra* note 12, at 31.

<sup>238</sup> *Id.*

the European Commission's investigation.<sup>239</sup> Although a formal policy does not exist in the United States, leniency applicants still may have the option to come forward and cooperate in an effort to obtain a plea agreement and receive a fine reduction, but this process falls outside of the US leniency program.<sup>240</sup>

The driving force behind allowing for a reduction in fines for applicants offering "added value" evidence is that the European Commission requires a higher evidentiary threshold.<sup>241</sup> EU law requires the Commission to provide a certain amount of documentary evidence in order to receive authorization for an investigation in a Member State.<sup>242</sup> In comparison to the EU, the US does not have to meet such a high threshold to obtain a warrant to investigate the colluder's premises.<sup>243</sup> Instead, a US investigator only needs to open a grand jury investigation.<sup>244</sup> Even though this distinction might seem subtle, the difference can upset the harmonization between the two models because applicants who are unable to meet the EU evidentiary threshold or

---

<sup>239</sup> Chavez, *supra* note 215, at 841. In order to receive a reduced fine, the applicant must: (i) submit evidence which represents "significant added value" with respect to the evidence already in the Commission's possession, and (ii) terminates its involvement in the collusive practice no later than the time at which the applicant submits the evidence. Botana, *supra* note 117, at 66.

<sup>240</sup> Botana, *supra* note 117, at 63.

<sup>241</sup> Medinger, *supra* note 117, at 1448-49. "[T]he EU Program requires that the leniency applicant come forward 'with decisive evidence proving the existence of the cartel.'" Hammond, *supra* note 201. This can include meeting agendas or memoranda from cartel gatherings. Medinger, *supra* note 117, at 1448-49. According to the US Antitrust Division, the high standard can be problematic because it automatically disqualifies potentially valuable leniency applicants. *Id.* In addition, "[b]ecause the standard is necessarily subjective, potential amnesty applicants may not be able to predict with significant certainty whether an antitrust authority will consider its proffer of evidence to meet the standard." *Id.*

<sup>242</sup> Medinger, *supra* note 117, at 1448.

<sup>243</sup> *Id.* at 1148-49.

<sup>244</sup> *Id.* "A low evidence requirement means that even peripheral layers in the cartel can blow the whistle, hence widening the pool of potential whistleblowers and increasing pressure on the major players." Riley, *supra* note 228, at 380.

who wish to make a hasty confession before the proper documentation could be gathered will likely confess to the United States first.<sup>245</sup>

Evaluating the EU's efforts to synchronize their policies with the US in 2002,<sup>246</sup> the EU model clearly maintains several policies that are worlds apart from the US leniency program.<sup>247</sup> The reluctance to impose criminal penalties upon individuals and a reduction in fines for latecomers represents opposing policies that are at odds with the method employed by the US.<sup>248</sup> While these approaches attack collusion from a different perspective,<sup>249</sup> their success in detecting and deterring collusion underscores the fact that collusive arrangements can be stifled by more than one method.

### 3. Brazil's Leniency Program<sup>250</sup>

The implementation of Brazil's leniency program can serve as a strong model for Chile to follow because of the country's ability to incorporate methods from both the US and EU policy.<sup>251</sup> Beginning in 1994, the first eight years of competition enforcement

---

<sup>245</sup> Medinger, *supra* note 117, at 1449; Riley, *supra* note 228, at 380.

<sup>246</sup> Chavez, *supra* note 215, at 841. The modifications to the old 1996 Leniency Policy were designed to create additional incentives for companies to divulge evidence of collusion by: "(i) increasing transparency; (ii) increasing the certainty of the conditions under which leniency will be granted; and (iii) providing closer alignment between the level of reduction of fines and the value of a company's contribution in establishing the violation." *Id.* See Riley, *supra* 228, at 377-81 (explaining how EU's 2002 Revision adopted a US style leniency program).

<sup>247</sup> See Elliott, *supra* note 234 (describing the differences in the US and EU approaches).

<sup>248</sup> EC Guidelines, *supra* note 233, at 1; Botana, *supra* note 117, at 63.

<sup>249</sup> Hammond, *supra* note 201; Botana, *supra* note 117; Chavez, *supra* note 215.

<sup>250</sup> According to scholar John M. Connor, "[b]y nearly all measures, Brazil has the largest and most effective anti-cartel authority in Latin America. Antitrust authorities employ almost 400 persons and have by far the largest budgets." Connor, *supra* note 80, at 47.

<sup>251</sup> Unlike the US and EU, Brazil's competition policy has only become relevant since the late twentieth century when the country became an open market economy. Gesner Oliveira & Thomas Fujiwara, *Competition Policy in Developing Economies: The Case of Brazil*, 26 NW. J. INT'L L. & BUS. 619, 619 (2006). This development provides a closer example to the Chilean experience. Similar to Chile, Brazil's competition policy is used as an instrument to promote the institutions of a market economy. *Id.* at 640-41. In contrast, the United States' competition policy was a consequence of the evolution of a market economy.

focused on merger review.<sup>252</sup> Then, in 2000, the Brazilian Congress followed recommendations by the OECD and adopted enhanced enforcement tools, including a leniency program and the authority to conduct dawn raids.<sup>253</sup> Under Article 35-B of the Brazilian Antitrust law, the federal government, through the Secretariat of Economic Law (SED), can enter into leniency agreements, by either granting immunity or reducing the fine by one-to two-thirds for individuals engaging in anti-competitive actions.<sup>254</sup> Since the enactment of Article 35-B, the SDE made cartel prosecution its top priority and its leniency policy has played a direct role in fighting collusive behavior.<sup>255</sup>

According to Law 8.884/94, directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity can receive some form of leniency.<sup>256</sup> To qualify for the program, the applicant must: (1) be the first organization to provide information to the government regarding a cartel that the government either does not know about or has insufficient evidence to prosecute; (2) terminate its participation in the cartel as of the date it applies for the immunity; (3) provide full

---

*Id.* at 640. The competition laws in Brazil and Chile arose out of external conditions in the 1980s and early 1990s. These included: “a return to democracy after a period of dictatorship, the abandonment of formal centralized planning and price controls, high rates of inflation, realization of the inefficiencies of many state-owned enterprises, abuse of dominance associated with privatized former monopolies, relaxation of import and foreign-investment restrictions, and the formation of customs unions.” Connor, *supra* note 80, at 21.

<sup>252</sup> Martinez, *supra* note 167.

<sup>253</sup> *Id.*

<sup>254</sup> Mauro Grinberg, *Leniency Program in Brazil*, in COMPETITION LAW AND POLICY IN LATIN AMERICA 147, 148 (Eleanor M. Fox & D. Daniel Sokol, eds., 2009).

<sup>255</sup> Paulo L. Casagrande, Head of Unit for the Secretariat of Economic Law in Brazil, Brazil’s Leniency Program (Sept. 2008); Martinez, *supra* note 167. Currently, seventy-five percent of the SDE’s resources are dedicated to cartel investigations. *Id.* The focus on cartels is due to the fact that “cartels impose enormous costs on consumers with no corresponding benefit to anyone but the cartelists. The fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification.” Barnett, *supra* note 216. “[A]ntitrust authorities in both the United States and Brazil properly regard cartel behavior as *per se* illegal or a ‘hard core’ violation of the competition laws.” *Id.*

<sup>256</sup> Grinberg, *supra* note 254, at 150.

cooperation and confession as to its role and knowledge of other members of the cartel; and (4) not be the ring leader of the cartel or have coerced another member to join.<sup>257</sup>

The amnesty agreement provides either full or partial immunity from the administrative and criminal penalties that are at the Brazilian judiciary's disposal.<sup>258</sup> Similar to the US, Brazil's leniency program employs a "race to the courthouse" provision in which full immunity will only be offered to the first cartel member to confess.<sup>259</sup> If the applicant is the first to confess, then no administrative penalties will be assessed to the corporation and the cooperating directors, managers, and officers escape both criminal and administrative penalties.<sup>260</sup> On the other hand, partial immunity will only be granted when the government already has substantial evidence.<sup>261</sup>

The maximum amount of fines that can be administered by the Administrative Council for Economic Defense (CADE) is thirty percent of the gross revenues of the company in the year before the initiation of the proceedings.<sup>262</sup> These penalties can equate to as much as US\$200 million to a single cartel.<sup>263</sup> The second enforcement

---

<sup>257</sup> Medinger, *supra* note 117, at 1451; Martinez, *supra* note 167; Grinberg, *supra* note 254, at 149; Casagrande, *supra* note 255. Individuals who approach the SDE seeking leniency, not as a part of a corporation offer or confession, can receive leniency if they meet the following conditions: (1) the SDE had not received information about the activity prior to the individual reporting the illegal activity; (2) the SDE did not have sufficient evidence to convict the corporation or individual at the time of the individual's disclosure; (3) the individual provides a full confession of his or her involvement in the illegal activity; and (4) the individual was not the leader of the activity. Grinberg, *supra* note 254, at 150.

<sup>258</sup> Grinberg, *supra* note 254, at 149; Casagrande, *supra* note 255.

<sup>259</sup> Barnett, *supra* note 216; Casagrande, *supra* note 255.

<sup>260</sup> Martinez, *supra* note 167.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* "CADE is responsible for the analysis of the cases and opinions issued by SEAE [Secretariat for Economic Monitoring] and SDE, and for the final decisions in all cases related to antitrust law."

Grinberg, *supra* note 254, at 148.

<sup>263</sup> Casagrande, *supra* 255.

prong involves incarceration.<sup>264</sup> Executives, directors, and managers engaging in illegal activity can face a jail term of two to five years, plus criminal fines.<sup>265</sup>

Two additional components of Brazil's leniency policy contribute to its increased effectiveness: (1) an Amnesty Plus Program, and (2) a Settlement Program. Similar to the Amnesty Plus Program utilized by the US DOJ, the Brazilian policy states that "[a]n applicant that does not qualify for leniency for the initial matter under investigation, but discloses a second cartel and meets the leniency program requirements, will receive leniency for the second offence and a one-third reduction in fine with respect to the first offence."<sup>266</sup> The purpose of the Plus program is to encourage companies already under investigation to completely report their antitrust violations.<sup>267</sup>

The second policy is the introduction of a Settlement Program for those who do not qualify for the leniency program.<sup>268</sup> Pursuant to this policy, CADE can settle with companies that participated in a collusive agreement but were not the first to apply for leniency.<sup>269</sup> The advantages of this program are that it saves public resources by fostering early cooperation by defendants, cuts down on litigation, enables early payment of fines, and provides more certainty and transparency to the business

---

<sup>264</sup> While the CADE imposes administrative penalties, criminal prosecution is conducted by state and federal public prosecutors. *Id.*

<sup>265</sup> Martinez, *supra* note 167.

<sup>266</sup> *Id.*; Barnett, *supra* note 216; Grinberg, *supra* note 254, at 151.

<sup>267</sup> Grinberg, *supra* note 254, at 151. One drawback to the program is that it has been difficult to persuade parties to enroll because "while SDE is in charge of granting amnesty, CADE is in charge of deciding whether any violations have occurred and the amount of fines to be imposed." *Id.* This creates a problem because the applicant is unable to gauge in advance the amount of fine that he or she will receive since fines range from one to thirty percent. *Id.*

<sup>268</sup> Barnett, *supra* note 216.

<sup>269</sup> *Id.*

community.<sup>270</sup> Furthermore, the opportunity to settle a case allows SDE to focus on other investigations.<sup>271</sup>

Since the new law's implementation in 2003, Brazil has seen a significant improvement in hard-core cartel prosecution.<sup>272</sup> Between 2003 and 2007, SDE handled 300 cartel investigations.<sup>273</sup> Furthermore, ten executives were condemned to serve jail terms between two to five years in 2006 and 2007.<sup>274</sup> Focusing solely on the leniency program, eight out of the ten main cartel cases handled by SDE were initiated with the signing of a leniency agreement.<sup>275</sup> Without this policy in place, "[m]any of these cartels would have remained undetected to this day."<sup>276</sup> The Brazilian case illustrates how a civil law country tackled the challenge of incorporating criminal sanctions, a traditionally common law principle, while at the same time utilizing principles from the EU model in an effort "to reap[] the benefits of a system that is predictable and offers incentives to cooperate."<sup>277</sup>

#### IV. ANALYSIS

##### *A. Comparing the Chilean Model*

Analyzing the two pillars of Chile's newly adopted leniency policy,<sup>278</sup> this Part will demonstrate how Chile's complete adoption of the EU's policy continues the trends

---

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Martinez, *supra* note 167. "In general, Brazil's anti-cartel enforcement is judged to be relatively and increasingly successful." Connor, *supra* note 80, at 23.

<sup>273</sup> *Id.*

<sup>274</sup> Casagrande, *supra* note 255.

<sup>275</sup> Martinez, *supra* note 167.

<sup>276</sup> *Id.*

<sup>277</sup> Medinger, *supra* note 117, at 1451.

<sup>278</sup> The two pillars are the use of administrative fines and a reduction in fines for latecomers.

in 1973 and 2003 where Chile implemented a series of half-measures that never adequately addressed their competition problems. While the reductions for latecomers represent a positive step for Chile,<sup>279</sup> the failure to incorporate criminal sanctions severely undermines the level of deterrence that Chile can achieve. Comparing the EU model with the policies of Brazil and the US, it will become evident that the introduction of criminal sanctions offers a more effective method of eliminating the same type of cost/benefit rationalizing that debilitated Chile's prosecution of collusions under the 2003 Act.<sup>280</sup>

### 1. Criminal enforcement versus fines

In establishing a leniency program, one of the most important factors is establishing the seriousness of the possible penalties,<sup>281</sup> and therefore the importance of relief that leniency can promise.<sup>282</sup> "If penalties are too weak or are applied too infrequently, then firms may disregard an offer to relax them. Firms or individuals with little concern about the risk of liability will have little incentive to annoy their co-

---

<sup>279</sup> See Part IV.A.2 (discussing the effect of expressly providing a reduction for latecomers in the leniency program).

<sup>280</sup> See *supra* note 138 and accompanying text (explaining the cost/benefit analysis performed by colluders and the elimination of criminal sanctions under the 2003 Act).

<sup>281</sup> The imposition of penalties, in general, provides several advantages.

First, the imposition of penalties may have a deterrent effect, in that it creates a credible threat of prosecution and punishment which weighs sufficiently in the balance of expected costs and benefits to deter calculating companies and individuals from committing antitrust violations. Secondly, in the case of collective violations such as cartels, the differentiation of penalties according to the role played by the different co-conspirators can have the effect of raising the cost of setting up and running cartels. Thirdly, the public punishment of those who violate the antitrust prohibitions may also have a moral effect, in that it sends a message to the spontaneously law-abiding, reinforcing their moral commitment to the antitrust prohibitions.

Wils, *supra* note 12, at 37.

<sup>282</sup> OECD, *supra* note 175, at 26. See Hammond, *supra* note 201 (discussing importance of establishing severe sanctions to create an effective leniency program).

conspirators by defecting from the cartel and informing on them.”<sup>283</sup> Instead, these companies can calculate the benefits that it will receive from violating the law, and weigh them against the costs of being caught.<sup>284</sup> Conversely, over-deterrence can injure the consumer because consumers end up paying the costs of overly oppressive criminal fines.<sup>285</sup> Therefore, countries are forced to walk the delicate tight rope between too much and too little deterrence.

Similar to the EU,<sup>286</sup> Article 39 bis. of Chile’s 2009 Act restricts enforcement to the imposition of fines by the TDLC.<sup>287</sup> The remedial provisions substantially increased the amount of fines for collusion cases from 20,000 units to 30,000 units, which equates to approximately US\$23 million.<sup>288</sup> According to the TDLC, the higher level of fines should contribute to dissuading anti-competitive conduct.<sup>289</sup> Unlike other models, however, Chile establishes a fixed maximum fine.<sup>290</sup> Brazil, the US, and the EU all impose fines that are based upon the profits gained by the violating party from the

---

<sup>283</sup> OECD, *supra* note 175, at 26. This situation is prevalent in Latin America. “[T]he fines imposed by Latin American antitrust authorities are pitifully low relative to either affected sales (4.9% on average) or to damages (less than 1%).” Connor, *supra* note 80, at 54.

<sup>284</sup> Eiszner, *supra* note 138, at 377.

If a company knows that it can gain a million dollars from an antitrust violation and will only pay \$100,000 in fines, penalties, and damages if it is caught, the company will decide to commit the violation even if there is an absolute certainty of getting caught. Assuming it is caught, it pays the \$100,000 and pockets a net increase in profits, harming consumer welfare by \$900,000. To the company, the fines, penalties, and damages are no more than a licensing fee to engage in a profitable transaction, the antitrust violation.

*Id.*

<sup>285</sup> *Id.* at 382.

<sup>286</sup> Medinger, *supra* note 117, at 1447; Hammond, *supra* note 201; Botana, *supra* note 117, at 62.

<sup>287</sup> Law No. 20,361, art. 39 bis..

<sup>288</sup> Law No. 20,361, art. 26; 2009 Leniency Program Guide, *supra* note 176, at n.2; FAQs on Chilean Leniency, *supra* note 182, at 1. The units are called *Unidades Tributarias Anuales* (UTAs). The amount of UTAs can be calculated by multiplying by twelve the *Unidades Tributarias Mensuales* (UTMs). While the UTA is based on an annual amount, the UTM refers to monthly quantities. *Recent Challenges in Chile*, *supra* note 156, at n.11.

<sup>289</sup> Miranda, *supra* note 155, at 18.

<sup>290</sup> Law No. 20,361, art. 26.

anticompetitive conduct<sup>291</sup> or the amount of pre-tax revenues by the party the year before the initiation of the proceedings.<sup>292</sup> Furthermore, the fine only applies to individuals involved in the collusive conduct, as opposed to fining the corporation.<sup>293</sup>

One explanation for their decision to only apply fines is the continuing debate in determining whether Chilean competition law falls in a civil or criminal category.<sup>294</sup> Although the 1973 Competition Act provided for criminal penalties,<sup>295</sup> the 2003 Amendment abolished the use of incarceration, and decided to significantly increase the amount of fines that could be assessed.<sup>296</sup> The 2009 Act took that policy a step further by expanding the fines from US\$15 million to US\$23 million.<sup>297</sup>

Several arguments have been proffered in support of restricting enforcement to fines. First, “[t]he US system, which includes both civil and criminal penalties, as well as treble damages,<sup>298</sup> may be too harsh for developing countries.”<sup>299</sup> Given the TDLC’s brief experience in competition law and the oligopolistic structure already present within the Chilean economy, the probability of falsely convicting an individual is a

---

<sup>291</sup> Hammond, *supra* note 201; Botana, *supra* note 117, at 62.

<sup>292</sup> Martinez, *supra* note 167; Casagrande, *supra* note 255.

<sup>293</sup> *Recent Challenges in Chile*, *supra* note 156, at ¶ 23. “The situations and incentives of individuals may differ significantly from those of the corporations for whom they work. Where the individuals may also be liable or responsible for the violations, their interests and those of the corporation may conflict.” OECD, *supra* note 160, at 23. One disadvantage to this program is that individuals that inform on their fellow conspirators can face the serious risk of commercial or personal retaliation. *Id.* at 24.

<sup>294</sup> Cruz & Zarate, *supra* note 6, at 179.

<sup>295</sup> Decree No. 211, tit. V, art. 31; OECD, *supra* note 2, at 209-10.

<sup>296</sup> Law No. 19,911, ch. II, art. 26; Cruz & Zarate, *supra* note 6, at 161.

<sup>297</sup> *Recent Challenges in Chile*, *supra* note 156, at ¶ 22.

<sup>298</sup> Treble damages exist in US civil suits where the plaintiff can receive three times the amount of damages if the court finds that the defendant engaged in collusive conduct. Connor, *supra* note 80, at 16. “In theory, these awards provide for compensation (the overcharge), for the costs and risks of private investigation and legal costs, and for a punitive component.” *Id.*

<sup>299</sup> Manisha M. Sheth, *Formulating Antitrust Policy in Emerging Economies*, 86 GEO. L.J. 451, 476 (1997).

substantial risk.<sup>300</sup> In addition, the imposition of a high penalty could deter foreign businesses from investing in the host country.<sup>301</sup> Second, although the perpetrator of the crime is the corporation, an individual criminal sanction is applied to an employee that is held responsible for all of the corporation's activities.<sup>302</sup> This occurs despite the fact that the individual who goes to prison might only be a single actor with a group of people who violated the competition law.<sup>303</sup> Therefore, the system becomes one of merely finding scapegoats.<sup>304</sup>

Scholars in favor of imposing criminal penalties focus on the need to remove the cost/benefit analysis from the equation and the relative success that the US program has achieved in relation to the EU policy. First, when colluding parties face the possibility of criminal incarceration, a simple cost/benefit analysis does not function because colluders must take into account the incalculable component of imprisonment.<sup>305</sup> Second, since cartels are continuing to be exposed, it is obvious that the penalties in place are not establishing a pattern of over-deterrence.<sup>306</sup> On the contrary, the fact that cartels continue to flourish would suggest that they are being

---

<sup>300</sup> *Id.* "If developing countries adopted a regime with excessive penalties and fines, the expected costs of a judicial error would be high as well." *Id.*

<sup>301</sup> *Id.* at 476-77. "[S]uch a high penalty in an area where there is much uncertainty because the law is just developing may deter foreign business from investing in the host country, and may deter efficiency-enhancing arrangements between domestic firms." *Id.*

<sup>302</sup> Claes Norgren, Director General of the Swedish Competition Authority, Address at the Fordham Law Seminar (Sept. 14, 2006) (transcript available at [http://www.konkurrensverket.se/upload/Filer/Press/Tal-artiklar/tal\\_cn\\_060907.pdf](http://www.konkurrensverket.se/upload/Filer/Press/Tal-artiklar/tal_cn_060907.pdf)).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* One mechanism to reduce the unequal treatment between the beneficiary of leniency or immunity and the other cartel participants is "to ensure that leniency is only granted to the extent that the company or individual has genuinely and effectively cooperated with the competition authority, thus objectively distinguishing its situation from the other cartel participants that have not done so." Wils, *supra* note 12, at 50.

<sup>305</sup> Botana, *supra* note 117, at 50.

<sup>306</sup> Harrison & Bell, *supra* note 203, at 222.

under deterred.<sup>307</sup> Third, cartels impose a serious harm on consumers.<sup>308</sup> According to some estimates, in Latin America, the volume of sales affected by uncovered cartels is between \$150 and \$250 million between the years 1990 and 2007.<sup>309</sup> “This translates into consumers paying \$15 to \$25 billion in overcharges.”<sup>310</sup> Finally, the relative effectiveness of the US policy in comparison to the EU model is illustrated by the fact that cartels are choosing to operate in Europe while at the same time refusing to extend into the US.<sup>311</sup> The US Antitrust Division uncovered cartels that operated profitably in Europe and Asia, but never expanded their cartel activity into the US.<sup>312</sup> According to the cartelists, they refused to enter the United States’ market because they did not want to take the risk of being incarcerated.<sup>313</sup> The increased effectiveness of the US model is seen in the margins where the threat of individual exposure tilts the balance just enough so that companies are persuaded to report their violations.<sup>314</sup>

In weighing the arguments for and against imposing criminal penalties, Chile decided to adopt the EU’s approach of restricting sanctions to administrative fines.<sup>315</sup> The failure to adopt criminal sanctions is reminiscent of the 2003 Act when the Chilean legislature failed to include serious enforcement tools to detect collusion.<sup>316</sup> Although

---

<sup>307</sup> *Id.* The rates of discovery of international cartels have increased greatly in the twenty-first century. Connor, *supra* note 80, at 38. “Almost 33 cartels were discovered each year during 2004-2007 – a rate five times higher than 1990-95.” *Id.*

<sup>308</sup> Kloub, *supra* note 8, at 4.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Hammond, *supra* note 201.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> Law No. 20,361, art. 39 bis..

<sup>316</sup> See *supra* Part II.B.2.a (discussing Chile’s decision to remove criminal sanctions).

there are strong arguments on both sides of the debate, the US model would provide a more effective tool to combat collusion.<sup>317</sup> This is primarily evidenced by the fact that executives thought twice about extending into the United States when they knew they could end up serving ten years for engaging in collusion in the US.<sup>318</sup>

## 2. Reduction in fines for latecomers

Unlike the failure to adopt the US' criminal sanctions, Chile's decision to incorporate the EU's reduction in fines for latecomers is an essential component that achieves a greater degree of transparency in the competition system. Under Article 39 bis., a violating party can obtain up to a fifty percent reduction in their fine if the party: (1) provides additional supporting evidence that accompanies evidence previously obtained by the FNE; (2) the evidence represents effective support and meets the constitutional requirements for sufficient evidence; (3) abstains from divulging the application for a reduction; and (4) terminates participation in the anti-competitive conduct immediately after presenting the application.<sup>319</sup> Similarly, Type Two reductions under the EU model allow for a decrease in fines by up to fifty percent.<sup>320</sup>

Although the US and Brazilian models do not formerly establish a fine reduction policy, each country has a system in place to address latecomers. In the US, there is a

---

<sup>317</sup> "Since the US program was revised in 1993 to make the scope of amnesty clearer and somewhat broader, the number of applications has multiplied to more than 20 per year and led to dozens of convictions and to fines totaling well over \$1 billion." OECD, Policy Brief: Using Leniency to Fight Hard Core Cartels 2 (Sept. 2001), <http://www.oecd.org/dataoecd/28/31/1890449.pdf>.

<sup>318</sup> Harrison & Bell, *supra* note 203, at 209.

<sup>319</sup> Law No. 20,361, art. 39 bis..

<sup>320</sup> ECN, *supra* note 229, at 3. In order to determine the appropriate reduction level, the European Commission will take into account the time at which the evidence was submitted and the Commission's assessment of the overall value added to its case by that evidence. *Id.*

settlement program for those who do not qualify for the leniency program.<sup>321</sup>

“Companies that come forward after the leniency applicant and offer to cooperate may have the opportunity to enter into plea agreements and have their fines reduced.”<sup>322</sup>

Brazil’s Cartel Settlement Program allows CADE to settle with companies that participated in a cartel but were not the first to blow the whistle on the collusion.<sup>323</sup>

The crucial difference between an external settlement program and a formal reduction included within a leniency policy is the potential loss of transparency in the system. The need for a transparency is crucial because cooperation from violators depends upon whether or not the violator is certain about how he will be treated if he decides to disclose the collusion.<sup>324</sup> “[T]ransparency must include not only explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies.”<sup>325</sup> The EU and Chilean models provide this level of transparency since the leniency policy directly includes an automatic fine reduction if the applicant meets the necessary requirements.<sup>326</sup> This differs from the

---

<sup>321</sup> Barnett, *supra* note 216.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* “Like U.S. plea bargaining, this new process of partial leniency [permits] rapid disposition of cases because trials and other judicial hearings are avoided. Brazilian antitrust authorizes prefer to term this process ‘direct settlement.’” Connor, *supra* note 80, at 24.

<sup>324</sup> Hammond, *supra* note 201. “Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. Uncertainty in the qualification process will kill an amnesty program.” Hammond, *supra* note 205. According to the US Antitrust Division, “Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency throughout our anti-cartel enforcement program so that a company can predict with a high degree of certainty how it will be treated if it reports the conduct.” *Id.* Several areas where the Division has tried to provide transparency include: establishing transparent standards for initiating investigations, providing transparent standards for when the Division will decide to prosecute, transparent policies on negotiation and plea arrangements, and transparent sentencing and fine guidelines. *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> ECN, *supra* note 229; Law No. 20,361, art. 39 bis..

settlement programs in the US and Brazil because there is far greater subjective prosecutorial discretion,<sup>327</sup> thus inserting increased uncertainty and lack of transparency in both systems.

Given the harm that collusive agreements have on consumer welfare and its broad impact on the economy,<sup>328</sup> Chile's adoption of administrative fines will not effectively deter future anti-competitive conduct. In order to overcome the FNE's failure in the collusion area, exemplified by the meager two percent increase in collusion cases in the period 2003 to 2008,<sup>329</sup> the competition authorities must have the power to incarcerate individuals for violations, thus removing the cost/benefit rationalizing that has hampered successful collusion prosecution.<sup>330</sup> On the other hand, the incorporation of the EU's fine reduction mechanism is a positive development because it will assist in the success of the leniency program by establishing transparency in the competition system, thus increasing the likelihood that colluders will report their violations.<sup>331</sup>

#### IV. PROPOSAL

This Comment proposes that Chile should finally take a full step in the development of their competition system by adopting criminal sanctions as well as an Amnesty Plus program. Prior to the 2009 Amendment, Chile struggled to successfully

---

<sup>327</sup> Barnett, *supra* note 216.

<sup>328</sup> Kloub, *supra* note 8, at 4. *See supra* notes 309-10 (explaining the economic harm that collusion inflicted between the years 1990 and 2007).

<sup>329</sup> Cruz & Zarate, *supra* note 6, at 170.

<sup>330</sup> Botana, *supra* note 117, at 50. *See supra* Part IV.A.1 (discussing the arguments for and against the adoption of criminal sanctions).

<sup>331</sup> Hammond, *supra* note 201.

prosecute collusion cases.<sup>332</sup> Between the years 1973 to 2003, collusion cases accounted for only 6.3 percent of the total number of competition cases.<sup>333</sup> Then, following the enactment of the 2003 Competition Act, Chile's prosecution of collusion cases increased a mere two percent.<sup>334</sup> Even worse, the Supreme Court overturned every decision of the TDLC in which collusion was found.<sup>335</sup> Instead of focusing on collusion, the most egregious type of anti-competitive act, Chile became known as a "quiet pioneer" for their successful enforcement in infrastructure services, such as telecommunications and electricity.<sup>336</sup> The 2009 Amendment signifies Chile's renewed effort to more effectively prevent and detect collusive acts.<sup>337</sup> As demonstrated by the case of Brazil, leniency programs can have a significant impact on a country's ability to prosecute collusion.<sup>338</sup>

However, to be successful, the model adopted by Chile must provide the FNE with the best tools to investigate and prosecute collusion. Chile's 2009 Amendment falls short in implementing the most effective policy in two ways: (1) the remedies at the Tribunal's disposal only provide for fines, as opposed to criminal penalties,<sup>339</sup> and (2) the leniency provisions in Article 39 bis. do not include an Amnesty Plus program.<sup>340</sup>

---

<sup>332</sup> Cruz & Zarate, *supra* note 6, at 166.

<sup>333</sup> *Id.* at 165.

<sup>334</sup> *Id.* at 170.

<sup>335</sup> *Id.*

<sup>336</sup> Khemani & Carrasco-Martin, *supra* note 5, at 78.

<sup>337</sup> 2009 Leniency Program Guide, *supra* note 176, at 2.

<sup>338</sup> Following the enactment of Brazil's leniency program, more than ten agreements were executed and in between the years 2006 to 2008, more than 150 warrants were served. Casagrande, *supra* note 255.

<sup>339</sup> Law No. 20,361, art. 39 bis.. It is important to note that "if a jurisdiction relies on fines alone to deter cartel activity, and it is not able to obtain fines of the same *relative magnitude* as the EU, then it may not be able to attract amnesty applicants. Fines must be sufficiently punitive that they will not be viewed simply as a tax or a cost of doing business." Hammond, *supra* note 201.

<sup>340</sup> Law No. 20,361, art. 39 bis..

“[A] jurisdiction without individual liability and criminal sanctions will never be *as effective* at inducing amnesty applications as a program that does.”<sup>341</sup> The best deterrent is imposing meaningful prison sentences against the colluders.<sup>342</sup> The effectiveness of criminal enforcement is evidenced by the fact that the United States’ policy has deterred a significant number of global cartels from extending their conspiracy into the US.<sup>343</sup> These cartelists did, however, choose to operate in Europe where there was only a threat of severe fines.<sup>344</sup>

Because cartelists are capable of making a cost/benefit decision that discounts a possible fine as merely a cost of doing business illegally, cartel penalties not only should be large enough to negate financial incentives to conspire, but also should include substantial jail time for responsible individuals. Nothing is a greater deterrent and nothing is a greater incentive for a cartelist, once exposed, to cooperate in the investigation of his co-conspirators than the threat of substantial incarceration in a U.S. prison.<sup>345</sup>

Not only do criminal penalties serve as a deterrent, they also increase the effectiveness of the leniency program.<sup>346</sup> When faced with the prospect of jail time, individuals engaged in cartel activities may well decide that it is in their

---

<sup>341</sup> Hammond, *supra* note 201.

<sup>342</sup> R. Hewitt Pate, Assistant Attorney General of the Antitrust Division for the Department of Justice, The DOJ International Antitrust Program – Maintaining Momentum, Address to the American Bar Association 2003 Forum on International Competition Law (Feb. 6, 2003) (transcript available at <http://www.usdoj.gov/atr/public/speeches/200736.htm>).

<sup>343</sup> Hammond, *supra* note 201. The Antitrust Division uncovered instances where global cartels chose to operate in Europe, Asia, and other places in the world but never entered into the United States because it was not worth the risk of U.S. sanctions. *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> Barnett, *supra* note 139, at 3.

<sup>346</sup> *Id.*

best interest to apply for amnesty and divulge incriminating evidence against their co-conspirators.<sup>347</sup>

Although Chile's competition institution has struggled to find its identity as a criminal or administrative body,<sup>348</sup> the use of criminal penalties would result in a higher number of violators divulging their illegal conduct, thus translating into better evidence and a greater likelihood that TDLC decisions would not be overruled by the Supreme Court.<sup>349</sup> The issue of insufficient evidence arose in three recent cases where they were dismissed by the courts either at first or at second instance because they were based on circumstantial evidence.<sup>350</sup>

The most difficult obstacle to adopting criminal sanctions is molding the "common law" enforcement tool to the intricacies of a civil law system. Brazil provides a strong example of how one Latin American country has adjusted the US criminal penalties to fit a civil law system. Furthermore, Chile can benefit from adopting Brazil's method of separating criminal sanctions from administrative because it would circumvent the debate as to whether Chile's competition system is founded upon criminal or administrative principles.<sup>351</sup>

---

<sup>347</sup> *Id.*

<sup>348</sup> Cruz & Zarate, *supra* note 6, at 178-79.

<sup>349</sup> One crucial component of the success of LPs [leniency programs] is the quality of evidence that is obtained by them. The great revelation of information on the working of cartels achieved by LPs...makes it easier to establish a case of illegal action before the courts by dispelling any ambiguity about the existence of a cartel. The better quality of information gives greater certainty to court rulings against explicit cartels. With the information revealed through LPs, the likelihood of errors in judgment about explicit cartels has virtually been eliminated.

González, *supra* note 114, at 189.

<sup>350</sup> *Id.* at 190.

<sup>351</sup> Cruz & Zarate, *supra* note 6, at 179.

In 2000, Brazil passed a law that provided for both fines and criminal penalties for anticompetitive violations.<sup>352</sup> Similar to Chile's specialized competition court, Brazil uses an administrative tribunal (CADE) which makes the final rulings in connection with merger reviews and anticompetitive practices.<sup>353</sup> However, when Brazilian authorities seek to impose criminal sanctions, state and federal prosecutors are used.<sup>354</sup> By implementing a similar approach, Chile could avoid the debate as to whether or not the competition tribunal has jurisdiction over criminal cases. Furthermore, since Chile has some experience in prosecuting anti-competitive conduct in the criminal arena under the 1973 Act, it would be far easier to adapt the competition system to meet these new sanctions.<sup>355</sup>

The second improvement that would increase the efficiency and effectiveness of Chile's leniency program is the use of an Amnesty Plus program. This type of policy is used by the United States<sup>356</sup> and Brazil<sup>357</sup> in an effort to entice colluders to divulge all of the information that they have on illegal activities. "Through Amnesty Plus, exposure of a single member of a single cartel has the potential to bring a series of cartels tumbling down like a house of

---

<sup>352</sup> Martinez, *supra* note 167; Grinberg, *supra* note 254, at 148-49; Casagrande, *supra* note 255.

<sup>353</sup> *Id.*

<sup>354</sup> Martinez, *supra* note 167; Casagrande, *supra* note 255.

<sup>355</sup> Decree No. 211, tit. V, art. 31; OECD, *supra* note 2, at 209-10. One issue that could arise in establishing criminal sanctions is the requirement for a higher standard of evidence in criminal cases.

<sup>356</sup> Hammond, *supra* note 201; Barnett, *supra* note 216.

<sup>357</sup> Martinez, *supra* note 167; Casagrande, *supra* note 255.

cards.”<sup>358</sup> According to the US Antitrust Division, roughly half of the Division’s international cartel investigations began as a result of investigations in unrelated markets.<sup>359</sup> Aside from expanding the number of investigations and evidentiary capacity of the FNE, the Amnesty Plus program preserves resources.<sup>360</sup> This includes cutting down on litigation, enabling early payment of fines, and providing more certainty and transparency in the business community.<sup>361</sup>

One question brought forth by opponents of Amnesty Plus programs is whether it is beneficial to grant more than one hundred percent leniency to a cooperating company.<sup>362</sup> Wouter Wils<sup>363</sup> contends that additional leniency is not necessary in the specific case of a company whose participation in a first cartel has already been detected.<sup>364</sup> Given that the probability of detection is higher, it is unnecessary to provide an additional financial award on top of complete immunity.<sup>365</sup> Furthermore, it has the potential to make it more attractive for a company already involved in a cartel to join other cartels.<sup>366</sup>

Although Wils presents a strong argument, the benefits that an Amnesty Plus Program brings to the table, as well as the relative ease in implementing the policy, should persuade Chile to take advantage of this policy. In comparison to

---

<sup>358</sup> Barnett, *supra* note 139, at 5.

<sup>359</sup> *Id.*

<sup>360</sup> Barnett, *supra* note 216.

<sup>361</sup> *Id.*

<sup>362</sup> Wils, *supra* note 12, at 60.

<sup>363</sup> Wouter Wils is a member of the Legal Service of the European Commission. Wils, *supra* note 12, at 25.

<sup>364</sup> *Id.* at 61.

<sup>365</sup> *Id.* Wils also points out that the statistics released by the Department of Justice stating that over half of their investigations were initiated as a result of leads generated by Amnesty Plus are misleading because they fail to note the instances when the cases would have been detected regardless of the leads. *Id.*

<sup>366</sup> *Id.*

Brazil and Mexico, the FNE has the smallest amount of resources at its disposal.<sup>367</sup> Given the FNE's constraints and failures in prosecuting collusion, it would behoove the FNE to concentrate on adopting policies that would mitigate its costs<sup>368</sup> and increase the likelihood of detecting and prosecuting collusions. An Amnesty Plus program will achieve these goals. Furthermore, limiting leniency to individuals who have fully and effectively cooperated with the FNE should address issues of unequal treatment between the cartel participants and the beneficiary of immunity or leniency.<sup>369</sup>

## VI. CONCLUSION

The 2009 Amendment represents one more step on Chile's path to establishing an effective competition policy that can deter all forms of anti-competitive conduct. Looking back to the 1973 Act, Chile's policies focused solely on monopolization cases, especially in infrastructure and regulated sectors. Today, the Chilean competition law now has the ability to effectively deter the most difficult and egregious violation in competition law: collusion. Given the dramatic impact that countries like the United States, European Union, and Brazil have seen following the introduction of a leniency policy, it is almost certain that Chile's ability to detect and enforce competition policy in the collusion sector will drastically expand. However, in order to maximize the FNE's success, Chile should re-establish criminal violations and implement an

---

<sup>367</sup> Connor, *supra* note 80, at 47, 49-50.

<sup>368</sup> Barnett, *supra* note 216.

<sup>369</sup> Wils, *supra* note 12, at 50.

Amnesty Plus program. Each of these policies provides two additional steps that will more effectively detect and deter future collusion in Chile.