ICC COMPENDIUM OF ANTITRUST DAMAGES ACTIONS

CHILE

Court proceedings in key jurisdictions

INTERNATIONAL CHAMBER OF COMMERCE

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Introduction

This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at [www.iccwbo.org](http://www.iccwbo.org).

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—-and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
Historically, Chile has used a system that has privileged the actions of the National Economic Prosecutor’s Office (“FNE”) to prosecute the conducts contemplated in the Competition Law (Decree-law no. 211 of 1973) without leaving much room for private enforcement. Before the modification of the law, the Chilean system provided an action for damages that had to be initiated after a condemnatory judgment issued by the Competition Court and that could only be brought before the competent Civil Court according to the general procedural rules. Before such Civil Court, only the loss and the causality had to be proved, since the facts and the legal qualification had been clearly established by the Competition Court Decision. However, the law also provided for another option to victims of anti-competitive practice, who could also go directly to Civil Courts, without a final judgment of the Competition Court, in which case, damages, causality, and the existence of the anti-competitive conduct had to be proven.

With Law No. 20,945 published in August 2016, a series of modifications were introduced, including a new system of compensation for damages for attacks against competition. In this regard, the reform contemplates two actions:

- an individual action incorporated in the new Article 30 of Competition Law; and
- a collective action in the new Article 51 of Law No. 19,496 on the Protection of Consumer Rights (both Articles modified as a result of the reform of the year 2016).

This increased the incentives for private parties to participate in proceedings before the Competition Court, and also the deterrent and corrective power of its resolutions, since in addition to the fines imposed by this authority, compensation for damages will also apply.

1. Jurisdiction

The Competition Court (“Tribunal de Defensa de la Libre Competencia”) has exclusive jurisdiction to resolve antitrust matters in Chile and to decide on public and private disputes.

Article 30 of Competition Law establishes that the damages actions arising from a final judgment of the Competition Court shall be filed before this Court. Thus, it is understood that currently there are no damages actions if there is no judgment issued by the Competition Court. Moreover, the only competent court to hear damages actions will be the Competition Court itself. Accordingly, the legislator sought both to contribute to the procedural economy and to allow the damage caused to be determined by the
same specialised tribunal that established the facts serving as antecedents. While stand-alone actions are possible according to general rules of non-contractual liability, in such cases all the elements of the liability must be proven. Therefore, the burden of proof and procedures have higher complexities than the process before the Competition Court.

Finally, it should be noted that the final paragraph of Article 30 provides that the Competition Court shall also be competent to rule civil actions arising from the criminal procedure contemplated in Title V of the law (these are collusion, or agreements or concerted practices involving competitors).

2. Relevant legislation and legal grounds

In the first place, the damages actions must comply with the general requirements established by the Chilean legislation, jurisprudence and doctrine, constructed principally from Article 2,314 of the Chilean Civil Code, and which would be the following:

- existence of fraudulent or culpable conduct;
- existence of damage;
- causal relationship between the conduct and the damage; and
- absence of liability exonerators.

Considering specific terms, the only norm regarding damages actions for anti-competitive conducts is found in Article 30 of Competition Law (without prejudice to Article 51 of Law No. 19.496, which enshrines the special procedure for the protection of the collective or diffuse interest of consumers).

The Competition Court shall base its decision on the facts established in its previous judgment about the anti-competitive conduct that caused the damage. Furthermore, the Court will evaluate the evidence according to Sound Criticism rules.\footnote{According to Sound Criticism Rules, the judge is free to appreciate the evidence, but always respecting the principles of logic, the maxims of experience, and scientifically sound knowledge. This system is different from the Legal or Assessed Evidence one, where it is the law that gives each evidence submitted a predetermined value or weighting, mandatory for the judge. In Chilean legislation, it is the legislator who establishes whether Sound Criticism Rules or Legal Evidence will apply in the procedure.}

The compensation for the anti-competitive damages shall include all damages caused during the period in which the infringement has been extended.

Article 30 establishes the procedure to be followed in the individual compensation actions filed before Competition Court, which is known in the legislation as the “summary procedure”, consists of a shorter and more efficient mechanism for obtaining compensation. According to Article 680 of the Chilean Code of Civil Procedure, the summary procedure will apply in all cases where “the action filed requires, by its nature, expeditious processing to be effective”. As it is a shorter procedure than the ordinary one, it allows to the victim to reduce costs. In general, in the Chilean system, the summary procedure is applied in cases that requires speed of processing for effective results. On the other hand, Article 51 of the Law No. 19.936, which provides actions for protection of the collective of diffuse interest of consumers.
consumer, states the procedure to be followed in such actions shall be the special procedure provided for in the same law, even if they are brought before the Competition Court.

3. **What types of anti-competitive conduct are damages actions available for?**

   The damages action is not limited to any anti-competitive agreements or abuses of dominant position. An enforceable judgment issued by the Competition Court is sufficient. In other words, a final ruling issued by the Competition Court condemning any antitrust conduct is enough. This judgment is the only but necessary antecedent to file an action for compensation for damages without being limited to any particular anticompetitive conduct.

4. **What forms of relief may a private claimant seek?**

   The law is clear in stating that damages actions “shall include all damages caused during the period in which the infringement has been extended,” without making distinctions as to consequential damages, lost profits or moral damages. However, as a general rule in the Chilean legal system, the only damages that can be compensated are the direct and not the indirect ones.

   The damages included in the compensation will be analysed below in paragraph 9.

5. **Standard of proof**

   Article 30 also establishes that the proof appreciation within this procedure will be evaluated in accordance with the Sound Criticism rules. This proof appreciation, which is more flexible than the one regulated by law, is consistent with the legislator’s idea of granting competence in damages actions to a specialised court, which has greater flexibility in the analysis and weighting of evidence with respect to such technical and complex matters.

   There has been no precedent to date as regards passing-on defence.

6. **Confidentiality, discovery, exhibition, leniency**

   In the trial before Competition Court, all documents and other records are public, with some exceptions established in the same Competition Law, such as commercially sensitive data of the companies. Nevertheless, other parties, and third parties such as consumers could review all non-confidential data to fund a damage action.

   Furthermore, claimants for damages could ask the Court to order companies to exhibit some documents, including those provided in the trial for anti-competitive infringement.

   Regarding leniency, the Chilean system does not include any benefit related to damages actions for anti-competitive infringements. The benefits of leniency are limited to the penalty of a fine and imprisonment. The publicity of the information and records—with the
above-mentioned exceptions—are one of the deterrents for potential leniency applicants, given the fact that mostly all information will be publicly available for civil claimants.

7. Limitation Periods

Regarding the individual action contemplated in Article 30 of Competition Law, the final paragraph of Article 20 of Competition Law states that civil actions arising from an antitrust conduct shall be exercised up to four years from the date on which the final judgment serving as antecedent to the civil action is found to be final and enforceable.

In the absence of an express provision, regarding the collective action contemplated in Article 51 of Law No. 19,496, the general rules established in Article 2514 of the Chilean Civil Code shall apply, which establishes that ordinary actions may be exercised within a five years term, starting from the date when the obligation became enforceable (which, in the case of damage claims, occurs once the final judgment serving as antecedent to the civil action is found to be final and enforceable).

Likewise, according to the general rules, the period for exercising the actions are naturally interrupted when the debtor recognises the obligation, either expressly or tacitly, and are civilly interrupted by the interposition of the lawsuit (Article 2518 of the Civil Code).

8. Appeal

Article 30 sets that the final judgment issued by the Competition Court, can only be subject to an appeal before the Supreme Court, that can review and reverse with broad powers on the merits of the case.

9. Class actions and collective representation

Class actions, under Chilean law, are contemplated in law No. 19,496, as a mean to protect the interest of the consumers. The class action is only for consumers matters and have no application in other areas. To file a claim for collective damages, the law requires the coordination of at least 50 people affected by the same illicit behavior, or the representation of the National Consumer’s Service (“SERNAC”) or consumers associations.

This action, in antitrust matters is found in Article 51 of Law No. 19,496. The first paragraph of said Article states the procedure “shall apply when the collective or diffuse interest of consumers is affected. This special procedure shall be subject to the following procedural rules. All the submitted evidence must be appraised in accordance with the sound criticism rules”.

The foregoing without prejudice to what is stated in No. 2 of Article 51 of Law No. 19,496: “The compensations determined in this procedure may not be extended to moral damages suffered by the claimants”. As a general rule in the Chilean system, the only damages that can be compensated are the direct and not the indirect ones.

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2 Ordinary actions have a different term than the executive ones, which shall be exercised within a three years’ term.
According to this Article, in the event of harm to the collective or diffuse interest of consumers through an anti-competitive conduct, the lawsuit may be processed in accordance with the previous special procedure before the Competition Court. This may be the case where, for example, collusion has led to an increase in the price passed on to consumers. Thus, it is possible to conclude that the Competition Court may hear individual claims through the summary procedure, and class actions through the special procedure contemplated in Article 51 of Law No. 19.496.

For example, the Competition Court established that even if the lawsuit is filed jointly, the damages are individual, so that each of the claimants must prove the respective damage suffered and there is not a kind joint and several liability among the defendants.

On the other hand, and since the law does not distinguish between individual and collective actions, it has been understood that the jurisdiction of the Competition Court to hear damages actions may be extended to the collective actions contemplated in Article 51 of Law No. 19.496 on the Protection of Consumer Rights (which contemplates a special procedure for the protection of the collective or diffuse interest of consumers). Such Article states that, “notwithstanding the provisions of Article 30 of Competition Law, and without prejudice to the appropriate individual actions, the damages actions filed before the Competition Court (on the occasion of violations of Competition Law), declared by a final enforceable judgment, may be processed through the procedure established in this paragraph when the collective or diffuse interest of consumers is affected.”

This change in legislation is very recent, so there is no precedent for its application, where compensation for damage for collective interest has been awarded. Notwithstanding this, it has been said by the chilean Supreme Court (in just one case at the moment) that Article 51 is an alternative procedure to Article 30 of the competition law, which will be applicable in cases of collective actions, with jurisdiction of the Competition Court.
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