

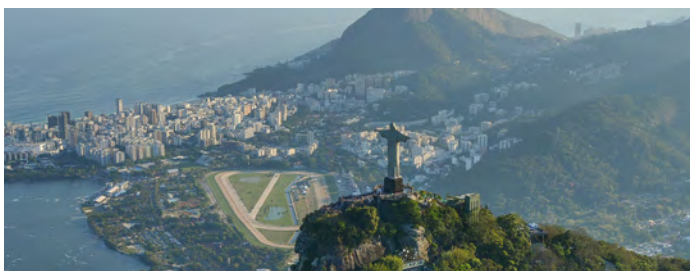


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# PRICE CONTROLS AND COMPETITION LAW

DURING COVID-19 IN LATIN AMERICA

2020





## INTRODUCTION

In light of the Covid-19 pandemic, goods such as hand sanitizers, face masks and other personal protective equipment have become first and basic necessities deemed essential to combat the health emergency. Many Latin American governments have stepped up to take measures to guarantee their stock, including price caps. In some cases, governments have extended -or already had measures in place to that effect- price and supply obligations to other type of goods. The response of competition agencies to the crisis and certain practices raising antitrust concerns has varied among jurisdictions, from no change from the pre-pandemic situation to allowing some flexibility to otherwise more rigid rules.

This report is the result of a collaborative work of renowned competition law experts from Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Peru, Uruguay, and Venezuela, consolidating their answers to a common set of questions covering price controls and competition law developments during Covid-19. The information is updated as of July 2020.



# INDEX

4

**Argentina**

Bomchil

12

**Bolivia**

Bufete Aguirre,  
Quintanilla, Soria  
& Nishizawa

17

**Brazil**

Mattos Filho, Veiga Filho,  
Marrey Jr. e Quiroga  
Advogados

28

**Chile**

Cariola Díez Pérez-  
Cotapos SpA

34

**Colombia**

Esguerra Asesores  
Jurídicos

45

**Ecuador**

Pérez Bustamante  
& Ponce

52

**Guatemala**

Mayora & Mayora S.C

57

**México**

Creel García-Cuéllar,  
Aiza y Enríquez

64

**Perú**

Bullard Falla  
Ezcurra +

72

**Uruguay**

Guyer & Regules

78

**Venezuela**

D'Empaire



**CHILE**

—

**Cariola Díez Pérez-Cotapos SpA**



## PRICE CONTROLS

### 1. Are there any laws setting maximum prices, or regulating supply?

#### **A-** Which sectors of the economy have been affected by those measures

In general terms there is no price regulation in Chile, with only a few exceptions (i.e. regulated markets like utilities). Therefore, prices are usually set by market forces. This is the case under normal circumstances, and it has remained largely unchanged in the current context of the Covid-19 crisis. Even in spite of the state of catastrophe (a state of constitutional exception that allows for the restriction of rights),<sup>1</sup> which enables the Heads of National Defense to distribute goods for free or for a determined fee, this power has not been exercised and prices of most goods continue to be freely set in the market. Of course, this does not rule out that, at some point, through these powers or others contemplated in the Chilean system, prices may be set.

Notwithstanding the above, the Ministry of Health has determined, as part of the series of measures it has taken to combat Covid-19, to set the maximum price of certain products directly linked to the health system's reaction to the pandemic. Thus, only the healthcare sector has been affected by price regulation.

#### **B-** Whether the restrictions reach all or part of the supply chain

The only goods and services subject to the price regulation are PCR tests<sup>2</sup>, rental of spaces to be used as emergency hospitals and the referral of patients from the public health system to private clinics. This is to say, prices have been set only for certain products, not including a whole supply chain but only very specific portions of it.

#### **C-** The enforcement agency and applicable sanctions

The above mentioned price regulations are not enforced by the antitrust agency (the Fiscalía Nacional Económica, 'FNE'), but by the Public Prosecutor's Office (Ministerio Público), since their infringement may constitute a criminal offense, according to Law No. 16,282, with penalties of imprisonment ranging from six months to three years.<sup>3</sup>

<sup>1</sup> The state of catastrophe was decreed by the President of the Republic on March 18, 2020.

<sup>2</sup> PCR (polymerase chain reaction) tests have been widely used to detect COVID-19 in the world and also in Chile.

<sup>3</sup> Law No. 16,282 (1965) establishing certain provisions of application in the case of natural disasters.

## INFORMATION REGIMES

### 2. Are companies obliged to report prices, production plans or other aspects of its operation to the authorities?

Along with the lack of price regulation, as a general rule there is no obligation for the companies to notify or report their level of production or prices to the public authorities, but several public authorities and public agencies have powers to request for information (i.e. Ministry of Health, Super Intendent of Health, FNE, National Consumer Service -Servicio Nacional del Consumidor, 'Sernac'-<sup>4</sup>, among others).

## COMPETITION ENFORCEMENT

### 3. Have authorities enforced competition laws against conducts that might be related to or have originated in the Covid-19 pandemic? If so, please provide details.

Although there has been an academic debate and some judgments issued well before the pandemic discussing the possibility of sanctioning excessive prices in Chile under the Competition Law (Decree-Law No. 211)<sup>5</sup>, we are not aware of any pending litigation before the Competition Court (Tribunal de Defensa de la Libre Competencia, 'TDLC'), or any current investigation led by the FNE for excessive pricing prompted by the Covid-19 pandemic. This statement does not rule out the possibility of proceedings under way in relation to this matter, as investigations by the FNE are usually reserved at the onset of the proceedings.

The same is true regarding other possible antitrust infringements committed on occasion of Covid-19: we are not aware of any kind of prosecution or investigation, but this does not necessarily mean that no investigation is being carried out.

In contrast with the antitrust authorities, Sernac has been very active regarding prices and has announced audits on price manipulation in the context of the pandemic, among other matters. Similarly, Sernac has reported that it has handed over the information it has received in relation to the infringement of the prices set by the health authority to the Public Prosecutor's Office<sup>6</sup>.

<sup>4</sup> It is worth mentioning that, unlike some jurisdictions, in Chile the protection of consumer rights and competition are entrusted to different agencies.

<sup>5</sup> There has been a debate about whether or not the wording of the Competition Law allows the prosecution of excessive pricing. According to Section §3 of the Law, 'any act, deed, or convention that prevents, restricts or hinders free competition' may be sanctioned. In turn, its subsection b) indicates as an anti-competitive conduct 'the abusive exploitation by an economic agent, or a group of them, of a dominant position in the market, fixing purchase or sale prices, imposing on a sale that of another product, allocating zones or market shares or imposing on other similar abuses'. See Centro Competencia UAI, '¿Es posible sancionar por precios excesivos en tiempos de Covid-19?', Investigaciones CeCo' May 11, 2020), available at: <https://centrocompetencia.com/es-posible-sancionar-por-precios-excesivos-en-tiempos-de-covid-19/>. [Last visited on June 16, 2020].

<sup>6</sup> See Sernac's press release 'SERNAC envió a Fiscalía reclamos, información y levantamiento de precios por Estado de Catástrofe', April 3, 2020, available at: <https://www.sernac.cl/portal/604/w3-article-58436.html> [Last visited on June 16, 2020].

Sernac also set up an online tool for quoting necessity goods<sup>7</sup>, which makes it possible to keep track of their prices by zone. This tool is not linked to products whose prices have been set by the authority, but seeks to help consumers in their purchasing decisions.

#### **4. Have any guidelines or comments being issued as regards the application of competition laws in the context of the pandemic?**

Besides price controls and excessive pricing, there has been a debate about the need for cooperation among competitors during the pandemic. According to the Competition Law, the TDLC may hear under a non-contentious procedure consultations by interested parties or the FNE about acts or contracts and its compliance with the Competition Law.

Under a regulation issued by the TDLC (Auto Acordado No. 5) consulting parties must suspend and therefore not execute the deal under consultation until the TDLC issues its decision. Nevertheless, under the current pandemic the TDLC issued a new regulation -Auto Acordado No. 21<sup>8</sup>- allowing consulting parties to proceed -despite the existence of a pending consultation- with cooperation agreements among competitors which may be needed to maintain the supply chain of goods or services which are essential.

Likewise, the FNE issued a public statement setting out the criteria that must be met to fulfil the requirements of a lawful cooperation among competitors.<sup>9</sup> The agency also stated its willingness to prosecute those who abuse of the current emergency context to undermine competition, whether by means of collusion or other conducts (that could potentially include cases of excessive pricing).

<sup>7</sup> See 'Cotizador de Productos Básicos por Coronavirus', publicly available at: <https://www.sernac.cl/portal/619/w3-article-58435.html> [Last visited June 16, 2020].

<sup>8</sup> Auto Acordado No. 21/2020 issued by the TDLC on April 7, 2020.

<sup>9</sup> See the Public statement issued by the FNE on April 3, 2020, available at <https://www.fne.gob.cl/wp-content/uploads/2020/04/Declaraci%C3%B3n-P%C3%BAblica-FNE-030420.pdf>, [Last visited on June 16, 2020].

## ONLINE PLATFORMS

### **5. Have the authorities enforced competition or price control laws in the context of digital platforms during the Covid-19 pandemic? If so, have online marketplaces taken measures against sellers using their online platforms?**

The lack of public statements by the antitrust authorities regarding price controls has been the rule, and this situation also applies to online stores and digital platforms, despite its relevance during the health crisis.

Nonetheless, Sernac has surveyed these platforms and in some cases has detected unreasonably high price increases for some necessity goods in the response to Covid-19, such as masks and gel alcohol, and has sent notices to the intermediary companies in charge of the online marketplaces ordering them to block sellers who offer this type of product in clearly disproportionate conditions.<sup>10</sup> Although these findings and measures may be an indication of excessive pricing, they are not directly related to the maximum prices set by the authority or to a possible prosecution under the Competition Law.

## LOOKING FORWARD

### **6. Do you expect the enforcement of the measures described above to continue after the Covid-19 pandemic?**

Given that the measures taken by the Chilean authorities to set maximum prices, in general, have been few and far between, we do not expect them to extend beyond the duration of the coronavirus-related health crisis. Regarding competition authorities we are not aware of any guidelines regarding excessive pricing that might be in the pipeline, and in general terms, antitrust authorities have been reluctant to become price regulators.

<sup>10</sup> See Sernac's press release, 'SERNAC fiscalizará fraudes, acaparamiento y eventual especulación de precios, dado decreto de Estado de Excepción', March 18, 2020, available at: <https://www.sernac.cl/portal/604/w3-article-58399.html> [Last visited on June 16, 2020].



## CARIOLA DÍEZ PÉREZ-COTAPOS SPA

Cariola is one of the most renowned and biggest full-service law firms in Chile, with highly qualified lawyers in a wide array of areas of expertise. In Competition Law, the firm has a vast experience in antitrust cases, merger control and compliance attending a large base of national and international clients.



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