

## Interview of Jorge Grunberg Pilowsky, National Economic Prosecutor of Chile

**Editor's Note:** Jorge Grunberg Pilowsky was appointed as the National Economic Prosecutor of Chile in 2022. He earned his law degree from the University of Chile in 2007, as well as LL.M degrees from Harvard University in 2010 and from New York University in 2011. Before being appointed to that position, he was a partner at Grunberg Puyol, a law firm specializing in competition law for five years. From 2014 to 2017, he was an advisor to the Minister of Economy, Development and Tourism on competition and consumer protection, playing an important role in developing major reforms to Chile's competition law. After working with the FTC's Office of International Affairs in 2011, he was a lawyer in the Litigation Division of the Fiscalía Nacional Económica. He has also served as a Professor of Economic Law and Free Competition Law at the Faculty of Law of the University of Chile since 2008.



**ANTITRUST SOURCE:** I wonder if we could get started out by telling us a little bit about yourself and your path to be head of the Fiscalía.

**JORGE GRUNBERG:** Thanks for the opportunity to be here.

My career as a lawyer has been always related to antitrust. I have had the opportunity to combine important experience in both the private and public sectors together with academia.

I worked for law firms in Chile at the beginning of my career, then I came here to the United States to study in an LL.M program at Harvard and in a more specialized program on antitrust and regulation at New York University.

Then, I can proudly say I had the opportunity to work at the FTC with the Office of International Affairs. Then I returned to Chile and worked in the Litigation Division of the Fiscalía Nacional Económica (FNE) for two-and-a-half years. Then I moved to the Ministry of Economy and I was in charge of an important amendment to our Competition Act that strengthened the enforcement in collusion by adding imprisonment, gave the FNE the power to carry out market studies, and created premerger notification.

Then I moved to the private sector during the last five years before becoming the head of the authority. I had my own firm, an independent law firm specializing in antitrust.

There was the opportunity in Chile to become the head of the FNE appointed through an open and competitive selection process conducted by the Civil Service. I participated in it. The Civil Service proposed four candidates and the President of Chile, Gabriel Boric Font, appointed me for the position in May of 2023.

**ANTITRUST SOURCE:** You have been on the inside as a case handler and now you are the head of the agency. How is the viewpoint different?

**JORGE GRUNBERG:** It is very different, but I think it is extremely relevant to know the agency. My last time here before becoming the head was almost nine years ago, but there are people who were my colleagues who I know well and now they have relevant positions in the agency. When a new head assumes office, it is important to know the philosophy of the agency, how things work at the FNE. Of course, I brought new ideas and priorities for the agency, but that previous experience is very relevant both for myself and for the agency.

A strong and sound agency is composed of both career servants and people who have previously worked in the private sector. There is in my opinion a virtuous cycle when people who in the past worked in the agency, then moved to the private sector or to other positions, and then returned to the agency. It is what I was able to see when I worked at the FTC.

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**ANTITRUST SOURCE:** You mentioned you are bringing your own priorities to the FNE. Can you tell us more about, what they are?

**JORGE GRUNBERG:** Sure. For us our highest priority, no doubt about it, is cartel enforcement. We have been improving the level of enforcement in a very relevant sense during the last fifteen years, and we have to take care of that. Of course, it is the highest priority, I think, for every competition agency.

But then I think we have to increase our presence in enforcing our antitrust law in abuse of dominant position, vertical restrictions, and unilateral conduct. Some things have been done in the past.

We have had vertical restrictions guidelines from the year 2014, but it is important that we develop more cases and use our whole toolkit to address the concerns created through unilateral conduct and vertical restrictions, including complaints filed before the competition Tribunal, to complement those guidelines, to give more certainty and more predictability, but also a more updated approach to address more sophisticated concerns that had not previously been addressed in Chile.

For example, last December for the first time we addressed most-favored-nation clauses with a very important investigation concerning digital platforms that deliver food from restaurants. There was a cumulative effect because the three relevant platforms all had these clauses.

After a reasonable amount of time and investigation, we concluded that there were serious concerns, we negotiated commitments with the parties and they dropped the clauses, both narrow and wide price-parity clauses. Now, the market is clear about the fact that we are going to address this kind of conduct.

The third priority is in digital markets. We are used to enforcing the laws in brick-and-mortar markets, but in our times digital markets are a reality and a priority. We have to address the effects that conducts carried out by these digital platforms are creating in our economy, so we are also concerned about this. The previous example about the digital platforms that deliver food is a clear one that shows we are concerned about digital markets and we are going to enforce the laws.

**ANTITRUST SOURCE:** I want to circle back to those areas later, but first can you tell us more about the competition law system in Chile? You have the prosecutorial agency and the Tribunal for the Defense of Free Competition, but can you explain a little bit more how it all works?

**JORGE GRUNBERG:** The institutional system in Chile is very singular. The FNE is a competition agency, but, as its name states, it is a prosecution office, so we are mainly in charge of investigating anticompetitive conduct.

We do not have adjudication powers but for merger control. We have to file complaints before the Tribunal, which is composed of two economists and three lawyers. It is an independent tribunal, an expert, very technical court. Its decisions can be challenged directly before the Supreme Court, which has the last word in the Chilean system regarding infringements.

The institutional system I would say is solid and is characterized by its independence and its strong technical background. Also, the presence of both the tribunal and the Supreme Court generates a good design in terms of checks and balances. I can say that it puts pressure on the FNE, on us, to carry out solid investigations and prepare cases very well because otherwise we will not succeed in court.

**ANTITRUST SOURCE:** How are the members of the Tribunal selected?

**JORGE GRUNBERG:** The members of the Tribunal—two of them, one economist and one lawyer—are directly appointed by the Central Bank of Chile. Why the Central Bank? Because in Chile the Central Bank is very well known as an expert and independent institution, so Congress decided it would make sense to involve the Central Bank in the appointments.

Then another lawyer and another economist are appointed by the President of the Republic, but before the appointment the Central Bank intervenes and proposes three candidates to the President for his decision.

The chairman or chairwoman of the Tribunal is appointed by the President of the Republic, but previously the Supreme Court carries out a public contest and proposes five candidates.

**ANTITRUST SOURCE:** Chile has probably the oldest competition system in Latin America, and I think most would say one of the best-respected ones. How did it come to be that way? How did it come to be such a successful and well-respected system over many years?

**JORGE GRUNBERG:** The Chilean system is considered as old when compared to our Latin American peers, but it is still a young system. Our first Competition Act is from the year 1959, but the system as it is today dates back to the year 2003 when the competition tribunal was created, the Tribunal de Defensa de la Libre Competencia.

I can say that probably the successful story of Chile is based, mainly, on the firm belief of the government and of Congress on the importance of caring about the strong functioning of a market economy and that it is important to have both independent and technical institutions in charge of the enforcement.

In the Competition Act you can see that there are provisions that seek to ensure the independence of the institutions, both in the appointment of the judges and of the head of the FNE, but also in its process of removal in the case of the head of the FNE. The Competition Act states very clearly: the FNE is independent from every public organ or service.

**ANTITRUST SOURCE:** Let's circle back to some of the substantive work. You talked about cartels being one of your top priorities. Has the leniency program been an important part of that and has that been successful?

**JORGE GRUNBERG:** Yes, definitely. The leniency program has been key to allowing strong enforcement toward cartels. I can say that we have cultivated a very serious system built on trust and predictability, and this is why I think the program is currently working very healthily.

In the year 2023 we had an all-time record in applications, which is important news considering the global reality where one can hear that the efficacy of leniency or the number of applications has diminished. So, it is good news that we are receiving more applications.

**ANTITRUST SOURCE:** Why is it working well in Chile when it is working less well in other places?

**JORGE GRUNBERG:** We do not have the smoking-gun evidence to make undoubtable conclusions, but one can guess that, on one hand, the incentives contemplated in the law, specifically the strong sanctions added in the amendment of the year 2016, such as imprisonment and deterrent fines, are playing an important role.

On the other hand, the efficacy of the FNE's prosecution of cartels, of course, increases the probability of being detected. The predictability and trust that the FNE has proved in the administration of the leniency program creates, I would say, a solid context to ensure the efficacy of the leniency program, and, in the end, of the combat against cartels.

**ANTITRUST SOURCE:** You have had criminal sanctions in place for some time, but one of your predecessors said that it had gotten off to a rocky start. How is it going now?

**JORGE GRUNBERG:** The criminalization of cartels was added to the law in the year 2016. In our opinion, it has been an extremely important deterrence factor and, as I was saying, possibly it can explain the increase in the number of leniency applications.

We have not had criminal cartel cases here because our system requires full administrative prosecution before we can bring a case for criminal prosecution. But the fact is that we do have cartel cases under litigation now before the competition tribunal that could later be prosecuted criminally. In the end we believe that making the threat of criminal prosecution real is a very important deterrence tool, and that is what we can see from the U.S. example.

**ANTITRUST SOURCE:** I read an academic article recently which suggested that in Chile the wrongfulness of cartels has been widely accepted by the general population. Do you agree with that statement; and, if so, what do you attribute it to?

**JORGE GRUNBERG:** This is a very interesting question. Chile is somehow peculiar on that front. Antitrust became a very popular subject long before the recent resurgence of popular interest. Everyone in Chile knows what cartels are. Our cases usually make the front pages of newspapers and are widely discussed on TV.

It is not obvious how this came to be, but it is undeniable that three particular cases brought by the FNE played a big role here, all involving products of mass consumption, household brands, and some of the most well-known and reputed business families in the country. These are the retail pharmacy case of the year 2008, the poultry case of the year 2011, and the tissue paper case of the year 2015.

What you were commenting on, according to a recent poll in an open question, more than 60 percent of the population spontaneously mentioned the three cases when asked if they know about any cartel case. The FNE has used the popularity of these three cases particularly to successfully advocate for legislative changes.

To give you just a couple of examples, in 2008 when we accused the three main pharmacy chains in the country of fixing prices, the FNE had no power to conduct dawn raids or wiretaps and our laws did not contemplate leniency. The case caught the attention of public opinion including

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both campaigns from consumers and street demonstrations. The public attention got traction among politicians, and six months after presenting the case our Congress approved the bill unanimously, granting us dawn raids, wiretaps and leniency.

In a similar fashion, the tissue paper case, the last one I mentioned, played a crucial role in the approval of the 2016 amendment where cartels were criminalized, fixed caps on fines were removed, and premerger notification was made mandatory.

**ANTITRUST SOURCE:** I would like to turn to interlocking directorates, which is an area that you have been focusing on recently. Can you tell us a little bit more about that effort and why you are focusing on it?

**JORGE GRUNBERG:** The provision on interlocking directorates was added to our Competition Act in the last amendment of 2016. It was drafted following closely the text of Section 8 of the Clayton Act.

This is essentially preventative legislation. The aim of the law is to, as the U.S. courts have said, remove the opportunity of temptations for anticompetitive violations through interlocking directorates. Of course, we are talking about collusion and exchanges of sensitive information. The provision was adopted considering that interlocking of directorates and relevant executives is intrinsically anticompetitive, so a per se rule applies to the analysis of the behavior. Additionally, the provision applies both to companies and individuals.

In December of 2021, the FNE brought before the competition tribunal the first two actions alleging infringement under this interlocking directorates provision. Both cases involved individuals serving at the same time on the boards of competitors in the financial industry. One of them specifically refers to the banking industry.

The second characteristic of both cases is that they are based on the fact that the provision applies regardless of whether the individual sits on the board of the companies that directly compete, or on the board of its parent companies. We are pursuing this interpretation of the provision in the sense that it should be read to forbid companies from doing indirectly what they cannot do directly, just like in the United States.

**ANTITRUST SOURCE:** I want to turn to your second two priorities, abuse of dominance and digital markets, and combine them.

As you know, the United States has had a number of cases against tech firms—Google, Apple, Amazon, and Facebook. Do you feel an impact from those cases in Chile? Do you see similar cases being brought in the tech sector in Chile?

**JORGE GRUNBERG:** We are following very closely what is going on in the United States in the cases you mentioned. We believe that the Competition Act and the toolkit we have allow us to preserve competition in digital markets, specifically in the Big-Tech sector.

I cannot comment on whether or not we have investigations regarding those big tech firms. The only thing I can say is that, as you mentioned, we are following what is going on abroad. In case national or multinational firms restrain competition in Chilean markets we will have full jurisdiction to act against them.

**ANTITRUST SOURCE:** Several jurisdictions have recently established specialized units to deal with the tech sector and have found it necessary to invest in ways to keep ahead of the technology. Has there been anything like that in the Fiscalía?

**JORGE GRUNBERG:** Yes. In the year 2020 we created our intelligence unit. Its main focus has been providing technical assistance in our cartel investigations. Their contributions have been really important in those investigations. It is a small unit comprised of two data scientists and one lawyer who is the head of that unit.

When I arrived to be head of the agency, I decided that this unit should not only contribute to our cartel division's investigations but also to other divisions of the FNE, such as the merger division or the enforcement division. This last division is in charge of enforcing the interlocking provision, and using big data to investigate breaches of the interlocking provision has proved very fruitful.

**ANTITRUST SOURCE:** Let's turn to mergers. I know you recently published new merger guidelines. Can you tell us what has changed?

**JORGE GRUNBERG:** In the year 2022 we updated our horizontal merger guidelines. The main purpose was to update our 2012 guidelines to the current state of merger enforcement and more specifically to include the experience of the first five years of the mandatory merger control introduced in the amendment of the year 2016.

These merger guidelines contemplate a chapter on digital platform mergers. Here the guidelines offer guidance for the analysis of dynamic competition and innovation, technological platforms, and digital markets.

As we know, in recent years innovations of technologies related to digitalization use and access to information have gained vital importance in the development of many industries, and so-called "digital markets" have emerged or deepened.

The guidelines highlight two possible theories of harm: one consisting of the possible network and tipping effects that may arise in these types of transactions; and the second regarding the use of data obtained by the services that the merging parties provide.

**ANTITRUST SOURCE:** As you know, FTC and DOJ recently adopted new merger guidelines here in the United States. Do you see them having any influence in Chile or in the region?

**JORGE GRUNBERG:** Yes. We have been following very closely the process of development of the new merger guidelines in the United States, and the aim of simplifying the enforcement of the antitrust laws toward mergers and applying the precedents issued by the courts is extremely interesting.

We have also been paying careful attention to the section on labor market power, since on our last Competition Day of December 2023 we announced incorporation of labor markets in our portfolio of priorities both in merger enforcement and cartel enforcement.

**ANTITRUST SOURCE:** It seems that a great deal of FNE's work has gone into getting firms to comply with your requirements. I am thinking of the *Disney/Fox* case where you obtained a fine for providing misleading information; and *Oxxo/Cadena* when the firms failed to comply with conditions and provided misleading information.

Can you tell us what that says about compliance issues and how the FNE is addressing them?

**JORGE GRUNBERG:** Compliance with the basic rules that structure merger control is key to achieving effective enforcement of the law.

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Let me first start by saying that our Merger Regulation and the way we carry out our competitive assessment are based on three principles: certainty, transparency, and predictability. In every merger we review, we always have in mind these principles.

Regarding compliance with the rules that structure merger control, I think there are three relevant aspects.

The first one is that usually, as a relatively small jurisdiction, in multijurisdictional transactions Chile tends to be left to the end when filing, and sometime this overlooks the fact that Chile is a highly concentrated economy and therefore we might require longer periods of analysis than other jurisdictions. Furthermore, in the case of remedies it should be considered that solutions that are appropriate for larger economies do not necessarily apply in our case. Then our invitation is to notify earlier to avoid potential delays and use our prenotification system.

Second, the parties should be diligent in submitting all the information required by our Merger Regulation. Especially internal documents related to a specific transaction or the affected relevant markets must be submitted within the filing as provided by the regulation.

We have recently done two cases you mentioned, *Disney* and *Oxxo*. If parties deliver false information, we will proceed against them by bringing action before the competition tribunal and requesting high fines.

Finally, in case parties have doubts whether to file a merger or not, they should use our prenotification system. We are actively monitoring compliance with merger control rules for the first time during the almost seven years since the premerger system started. We have just decided to initiate ex officio investigations for an event of gun-jumping in two transactions.

**ANTITRUST SOURCE:** There's clearly a lot going on. Do you see trends improving with compliance?

**JORGE GRUNBERG:** I can say that the private sector is more aware about the importance of complying with competition laws. We are making efforts to improve that status. We are preparing the launch of the update to our compliance program guidelines this year.

But there is a lot to do, and that is why we are very active on many fronts in trying to increase the level of enforcement.

**ANTITRUST SOURCE:** There is an ongoing discussion in many circles about whether it's better to seek remedies in merger cases where it's feasible, or if it's better to simply prevent them outright, as well as whether to consider behavioral remedies as opposed to structural remedies. How does the Fiscalía approach remedies in a merger case?

**JORGE GRUNBERG:** We have guidelines on merger remedies, and in the guidelines we have a clear preference for structural remedies instead of behavioral because they are much more efficient and easier to administrate, but we are open to receive offers of behavioral remedies if the case allows it.

**ANTITRUST SOURCE:** I would like to turn to competition advocacy for a moment. Do you feel that the larger Chilean government understands competition issues when thinking about regulation? Does the Fiscalía have a voice in commenting on such matters?

**JORGE GRUNBERG:** It is an interesting question. I would like to connect it to our market studies power in our toolkit. During the last seven years market studies have been critical for achieving

government policies to support competition in diverse sectors, such as public notaries, medicines, public procurement, and gas.

Our proposals have received the support of governments of different political sides. Governments have submitted bills before Congress based on our recommendations, and this has been extremely relevant for the FNE and for the consolidation of the market studies power that is thought to be a tool to advancing the achievement of more competitive markets and regulations.

**ANTITRUST SOURCE:** Do you have any particular success stories you would like to talk about?

**JORGE GRUNBERG:** I can say that, in general, we have been succeeding because as I said governments of different political sides have been very receptive of our proposals and have submitted bills and amendments based on these market studies.

We have one very successful story in public procurement where very recently, a couple of months ago, Congress approved a new Public Procurement Act based on many recommendations made by the FNE's market study.

**ANTITRUST SOURCE:** Many countries have started to see a relationship between competition and data privacy. Is that an area into which the Fiscalía is starting to look?

**JORGE GRUNBERG:** During the last years, in one of the most relevant mergers that we had the opportunity to review, which was the merger between Uber and Cornershop, we carried out an assessment of the importance of data through its impact on competitive aspects, such as quality and price. Additionally, in the past, Chile's competition system has considered the relevance of data in some industries as a potential barrier to entry.

That said, we are not a data protection agency. We are not in charge of enforcing data-protection laws. We are going to consider, as it has happened in the past, the potential impact of databases when they are connected to competition, to economic agents that have market power.

**ANTITRUST SOURCE:** You mentioned several sets of guidelines that the Fiscalía is considering. You have a very active process of consultation with both domestic and international stakeholders. Can you tell us about how that works and what benefits you have seen come from it?

*We have to remember that merger control came into force in Chile in the year 2017, so it is important to engage in a dialogue with international stakeholders.*

**JORGE GRUNBERG:** Whenever we issue guidelines, we put them out for public consultation. We have been very fortunate to receive comments from the private sector in Chile, practitioners; but also from international stakeholders, such as the American Bar Association Antitrust Law Section, and specifically in areas, such as merger control. It has been very fruitful and relevant to receive those comments.

We believe in convergence. We believe in considering the experience of jurisdictions that have dealt in the past with the problems that we are now facing. We have to remember that merger control came into force in Chile in the year 2017, so it is important to engage in a dialogue with international stakeholders.

That said, it is obvious we are in charge of enforcing the laws in Chile and we have to consider the effects of conducts in Chilean markets; but from an institutional perspective international experience, in our opinion, is very relevant and it is considered.

**ANTITRUST SOURCE:** That is a good segue to the topic I wanted to cover, which is to ask you to pull back and look beyond Chile to the South American region as a whole. In the last decade



or so, almost every country in Latin America now has a competition law—Ecuador, Paraguay, and Uruguay being the most recent. Does this represent a trend to more universal acceptance of the goals of competition law within the region?

**JORGE GRUNBERG:** I think it is a relevant signal that the region is seriously considering the value of protecting competition in its markets. From Chile's standpoint I can say that we have a successful story, and it is important that those changes we are seeing in some countries of the region are backed by Congress, by government, and that independence, expertise, and technical rigor are present to move forward with those changes. Otherwise, I believe it is not easy to move forward.

Besides that, I can see that in regional forums, such as for example the OECD Latin American Competition Forum, countries that have new or incipient competition systems are submitting their system to the assessment of peers with the aim of moving forward, which I can say is very positive.

**ANTITRUST SOURCE:** Have you had opportunities to share Chile's experience with new and developing authorities?

**JORGE GRUNBERG:** Yes. For example, in the Latin American Competition Forum in the year 2023 we took part in the committee that assessed the current status of the competition laws in the Dominican Republic. And, more specifically, we have a constant dialogue with Latin American agencies in particular cases in which we share experiences and approaches.

Every time a peer agency requires assistance from us we are fully available to collaborate because we understand the relevance of such collaboration. For us in this successful story, having had the opportunity to receive collaboration from the United States, from Europe, and from other Latin American agencies has been key.

**ANTITRUST SOURCE:** We would be overlooking an important step for you if we did not talk about your role as co-chair of the International Competition Network (ICN) Cartel Working Group. Can you tell us about what your projects there have been and what your experiences have been?

**JORGE GRUNBERG:** Being involved in the ICN Cartel Working Group has been extremely relevant for the FNE—not only being now co-chair, but long before we had the opportunity to collaborate with strong agencies to share experiences and to receive technical assistance from jurisdictions that were more experienced than Chile, and that has allowed us to improve very fast in the level of the enforcement of our anti-cartel laws.

During the last two years we have had the fortune to be co-chair of the Cartel Working Group and have been involved in several capacity building initiatives in cartel investigations, use of artificial intelligence and technology in cartel investigations, issues concerning leniency programs, and obstruction of investigations. All of these initiatives are very relevant to address the practical problems that agencies face in their enforcement.

**ANTITRUST SOURCE:** Last question: Like both of your immediate predecessors, you have been on both sides of the table, having previously been in private practice. Perhaps the stability and maturity of the system has something to do with the private competition bar. Can you share some observations with us about the state of the competition bar in Chile?

*I think that for the maturity of the system it is important to have not only public institutions—in our case the agency, the tribunal, and the Supreme Court—that work well, but also a private bar characterized by rigor and by strong ethical standards.*

**JORGE GRUNBERG:** The competition bar is composed of well-prepared professionals with relevant experience in antitrust. Of course, that challenges us in our investigations and in the debates that take place before the competition tribunal.

I think that for the maturity of the system it is important to have not only public institutions—in our case the agency, the tribunal, and the Supreme Court—that work well, but also a private bar characterized by rigor and by strong ethical standards. I think the Chilean bar has been an important actor in building the system.

One evidence of this is that, as it happens in the United States, there is a virtuous sort of revolving door. In the end, the system improves from the virtuous interaction between the public and private sectors, of course with strong compliance of regulations that solve conflicts of interest. I think that interaction is important.

**ANTITRUST SOURCE:** Thank you.

**JORGE GRUNBERG:** Thank you so much. ●