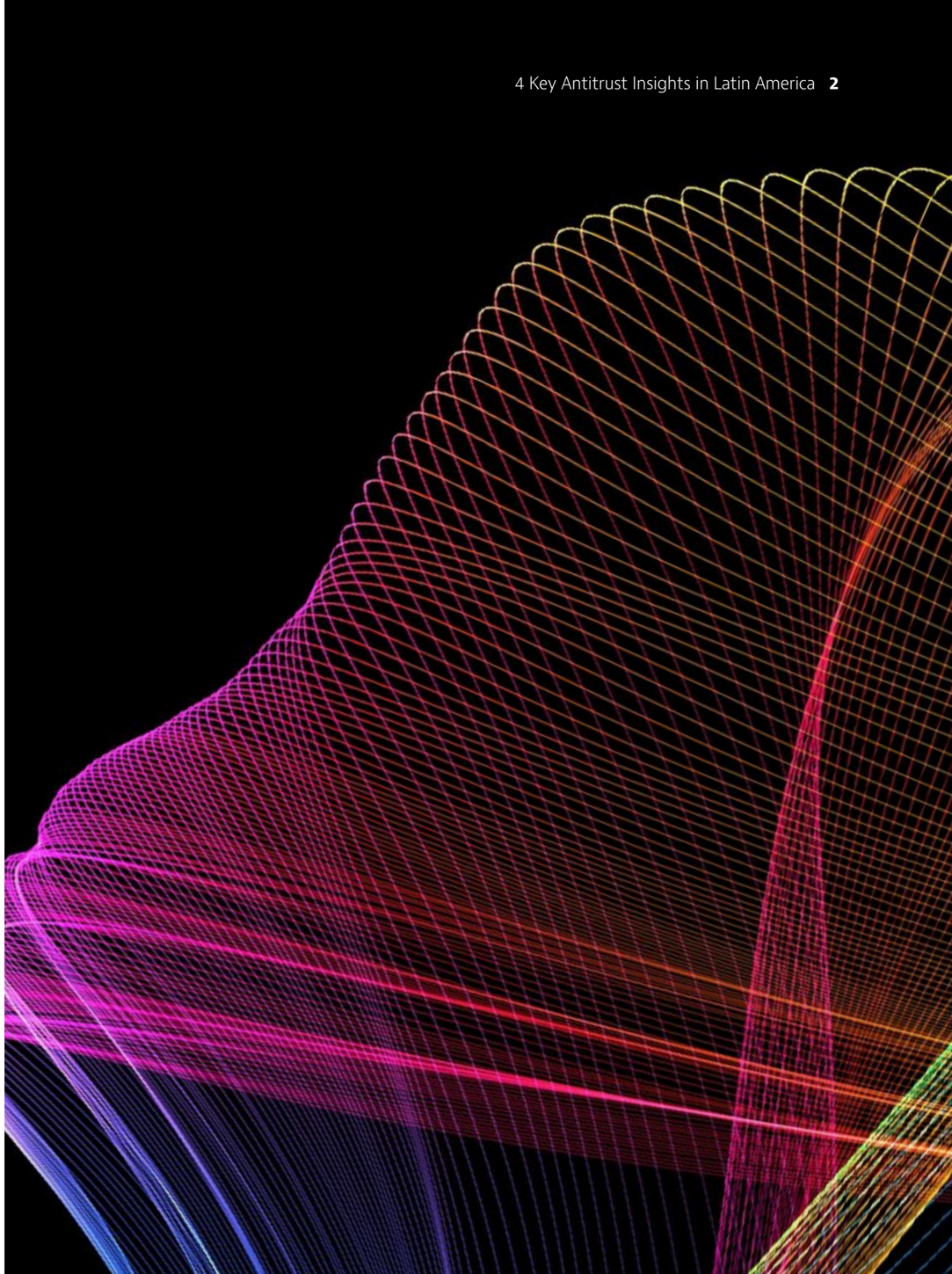
Baker McKenzie.

4 Key Antitrust Insights in Latin America

Contents



About Baker McKenzie

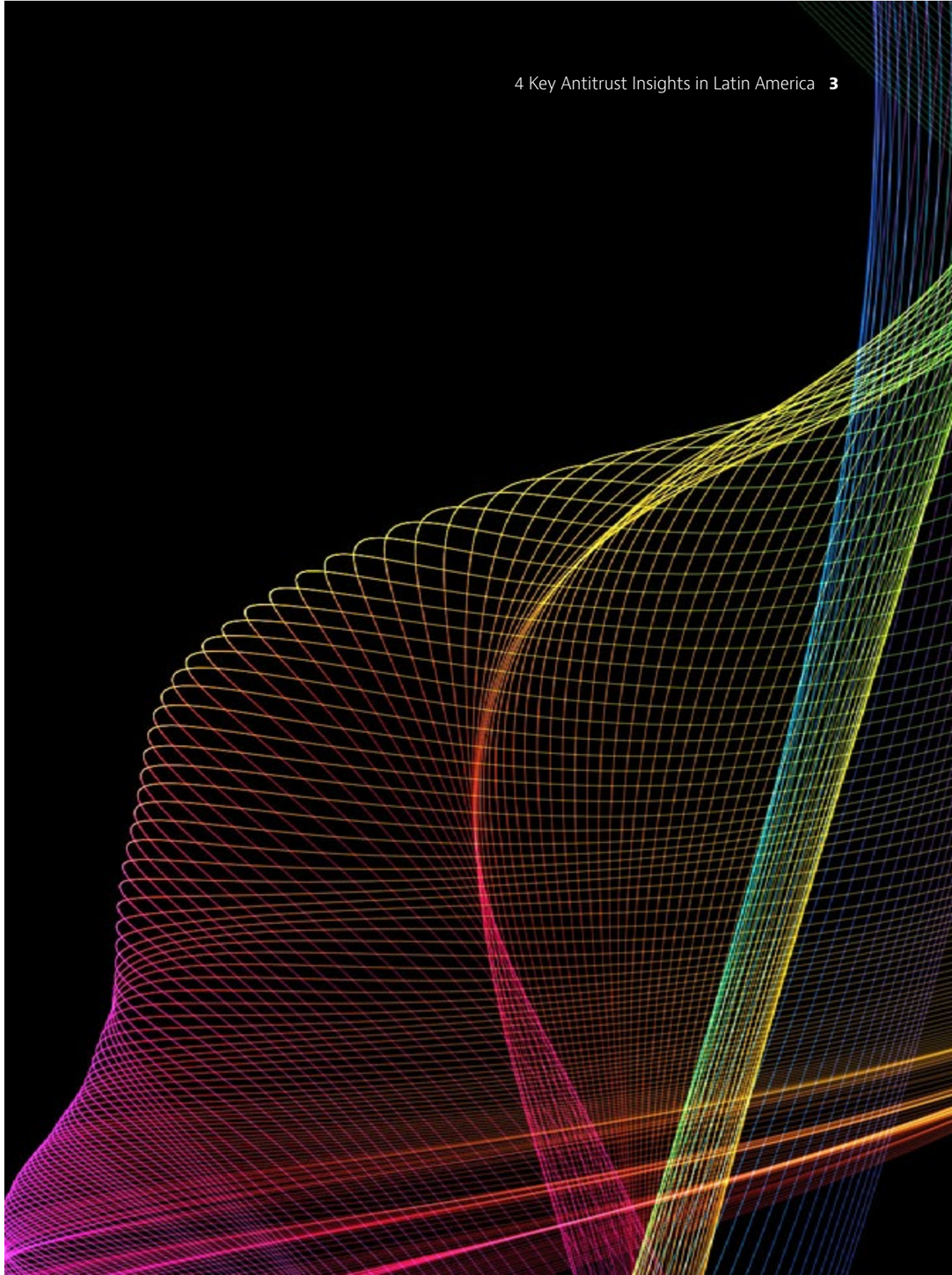
Baker McKenzie helps clients overcome the challenges of competing in the global economy. We solve complex legal problems across borders and practice areas.

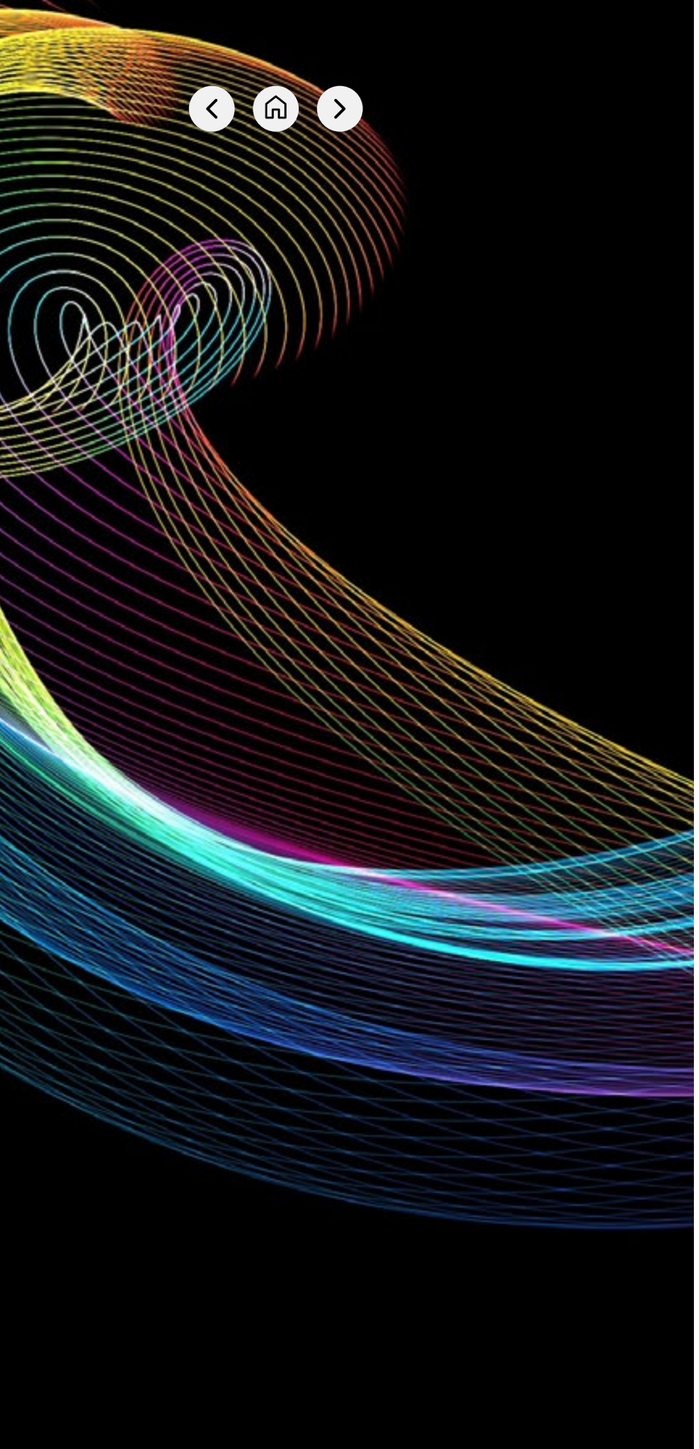
Baker McKenzie's unique culture, developed over 70 years, enables their 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in their clients.

In Latin America we offer broader market, industry and legal know-how than any other law firm. With more than 850 lawyers across 15 offices in seven countries, we advise on some of the most significant transactions and legal matters in the region. Working closely with colleagues across practice groups and offices, we help clients capitalize on business, trade and investment opportunities in Latin America and execute their global growth strategies.

Our lawyers not only advise on specific areas of law, but also have deep industry experience in healthcare, information technology, telecommunications, energy, mining and infrastructure. Our practitioners have well-established relationships with local business leaders, government officials and other organizations that enable them to provide clients with the insight they need to comply with the diverse regulatory regimes and laws across the region. No matter the business or legal issue, we are uniquely positioned to add value to any transaction or legal matter in Latin America.

www.bakermckenzie.com





Executive Summary

This whitepaper is intended to offer a concise overview of a complex topic: antitrust and competition law in Latin America, a region with more than 20 countries and regulatory schemes that vary from country to country.

While we do not expect it to address all the concerns that companies may have, we do hope it sheds light on the key issues and how the major jurisdictions in the region are handling them, both historically and with recent decisions, guidance documents or actions.

Here is a summary of the four major sections in this whitepaper:

1. **Is Leniency at Risk in Latin America?**

   We explain the leniency regimes in the region, the cost-risk equation associated with this, challenges due to confidentiality and how different jurisdictions have utilized leniency as part of their enforcement strategies in recent years.

2. **The Digital Dilemma for Antitrust Authorities**

   After tracing the growth of Latin America's digital market, particularly in areas such as e-commerce, we cover how different authorities have faced the competition challenges presented by the rapidly expanding digital market and offer some best practices suggestions for digital market companies to consider.

3. **Navigating the Merger Control Landscape:**

   In 2021, M&A deals exploded in Latin America, and after examining some of the driving factors behind this phenomenon, we explain the importance to proper premerger preparation, how different jurisdictions handle premerger control, filing considerations, and the three Cs that are crucial for companies involved in multi-jurisdictional mergers.

4. **Bridging the Antitrust Compliance Gap:**

   We examine the factors that stand in the way of implementing robust compliance programs, how different regulatory authorities have acted in antitrust cases with compliance programs, and how connected compliance can help companies succeed in this area, which is under ever-greater scrutiny by competition authorities.

In each section, we further deepen our discussion by presenting case studies for different jurisdictions and integrate insights from our senior partners in offices throughout Latin America.

To find out more about how Baker McKenzie helps clients in the area of antitrust, please feel free to visit our website, including our Practice Group Hub and Baker McKenzie InsightPlus page, where we post Global legal developments and regulatory updates by practice area and industry group. You can also learn more about our legal team and contact them by reviewing the Contributors section on page 36.

Introduction

As Latin America recovers from the damage wrought by the pandemic, several trends suggest that the recovery will have impacts on antitrust and competition law, such as:

- The digital market is growing rapidly worldwide, including in Latin America. The e-commerce market in the region is expected to grow in value by 29% between 2021 and 2024 to reach US$580 billion,[1] spurring growth not only in the digital market but also in the logistics market, which is projected to have a CAGR of 6.2% between 2020 and 2027.[2]
- During the first nine months of 2021, there were more than 2,000 M&A deals in Latin America, compared to 651 in all of 2020—an increase of more than 250%.[3]
- Projections that trade between China and Latin America will more than double between 2021 and 2025 as China purchases greater amounts of Latin American exports.[4]

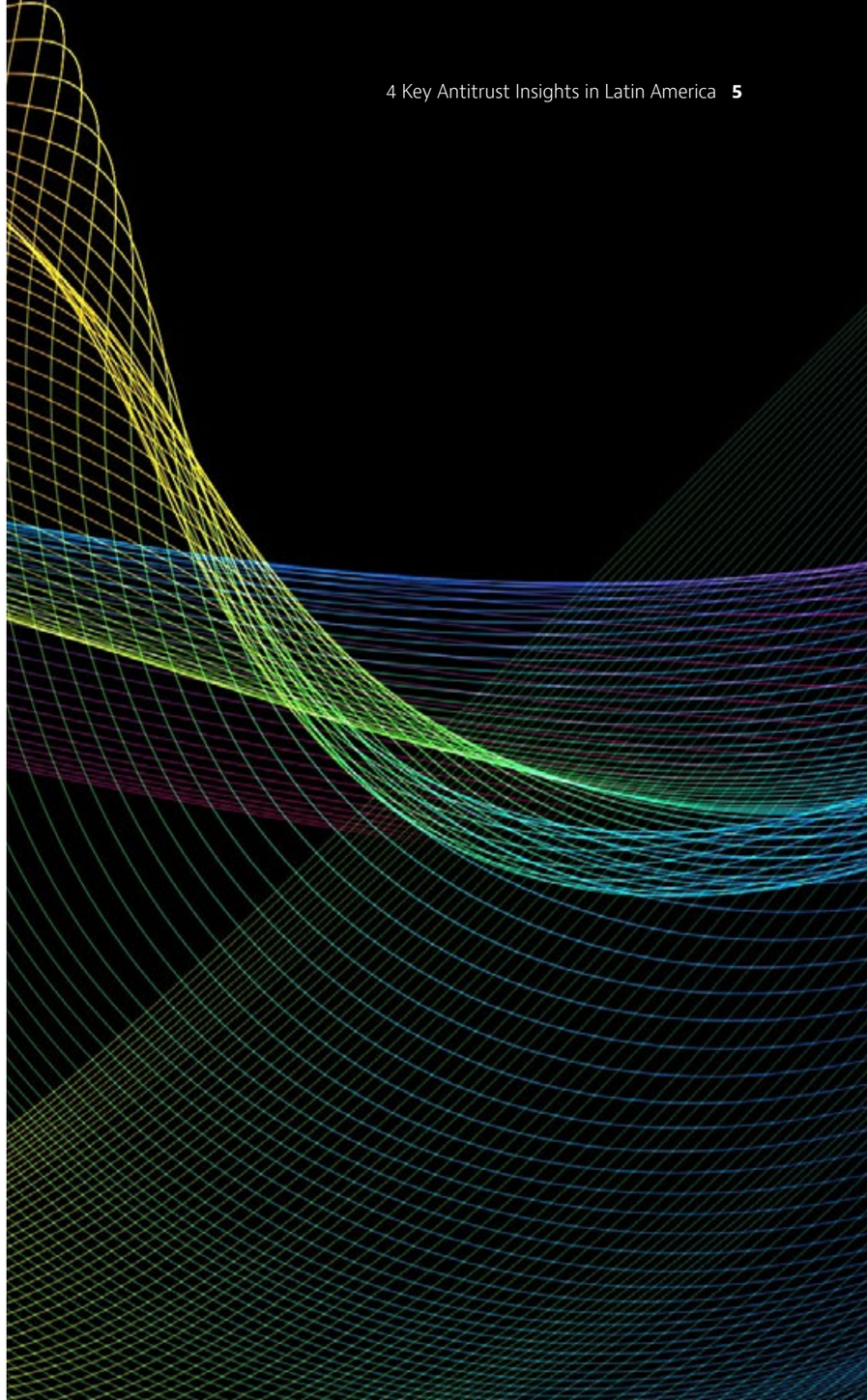
As a result of these growth trends, regulatory agencies in the region will face more challenges than ever with the digital market, mergers and acquisitions, price-fixing, cartelization and more.

We've prepared this whitepaper to offer companies greater guidance with regard to antitrust and competition law. Our goal was to offer an overview of the major topics and to incisively report on how different Latin American jurisdictions have handled competition issues, using recent cases and rulings as a guide. In addition, we have added the perspectives of our senior partners via in-depth interviews. Their extensive experience affords them a contextualized, broader view of the competitive regulatory environment, and we distilled some of their key insights in different sections of the report. Each chapter also features a sidebar section on case studies, featuring both breakdowns of multiple cases and analyses of specific single cases with larger implications.

We hope that you find this report to be illuminating and helpful in your understanding of Latin America's competition law ecosystem. But as you will see in our discussion of specific cases, expert legal guidance is essential for companies to ensure smooth mergers or acquisitions, avoid penalties and legal scrutiny and overall, to promote strategic growth for your business. Given that, if your company's concerns run deeper, please feel free to contact us to arrange for a consultation with one of our partners. We look forward to speaking with you and helping you successfully navigate Latin America's challenging competitive legal landscape.

Warm regards,
Antitrust & Competition Steering Committee
Baker McKenzie Latin America

1 2021-2024 E-Commerce Datapack, Americas Market Intelligence
2 Allied Market Research
3 Refinitiv, as reported by Reuters, 10/4/21
4 World Economic Forum, 6/17/21



01 | Cartel investigations: Is Leniency at Risk in Latin America?

01

Cartel investigations: Is Leniency at Risk in Latin America?

Key factors in participating in leniency programs, challenges with confidentiality and crucial cases to consider

In the battle against cartelism, leniency proceedings have become regulators' key mechanism for detecting and halting anticompetitive practices.

Leniency offers full immunity from criminal prosecution and fines to the first company to self-report involvement in a cartel to competition authorities. Other cartel members can receive reduced fines if they come forward — usually on a sliding scale.

Leniency is not generally granted to the organization leading a cartel, and it comes with conditions. These vary by country, but typically include:

- Admitting to infringements
- Cooperating fully with the investigation
- Providing evidence that adds value to the investigation and/or helps stop illegal conduct
- Maintaining the confidentiality

Over time, leniency has proved one of the most effective — and the most cost-effective — tools in the antitrust arsenal. As US Attorney General Makan Delrahim told the American Bar Association in 2019:

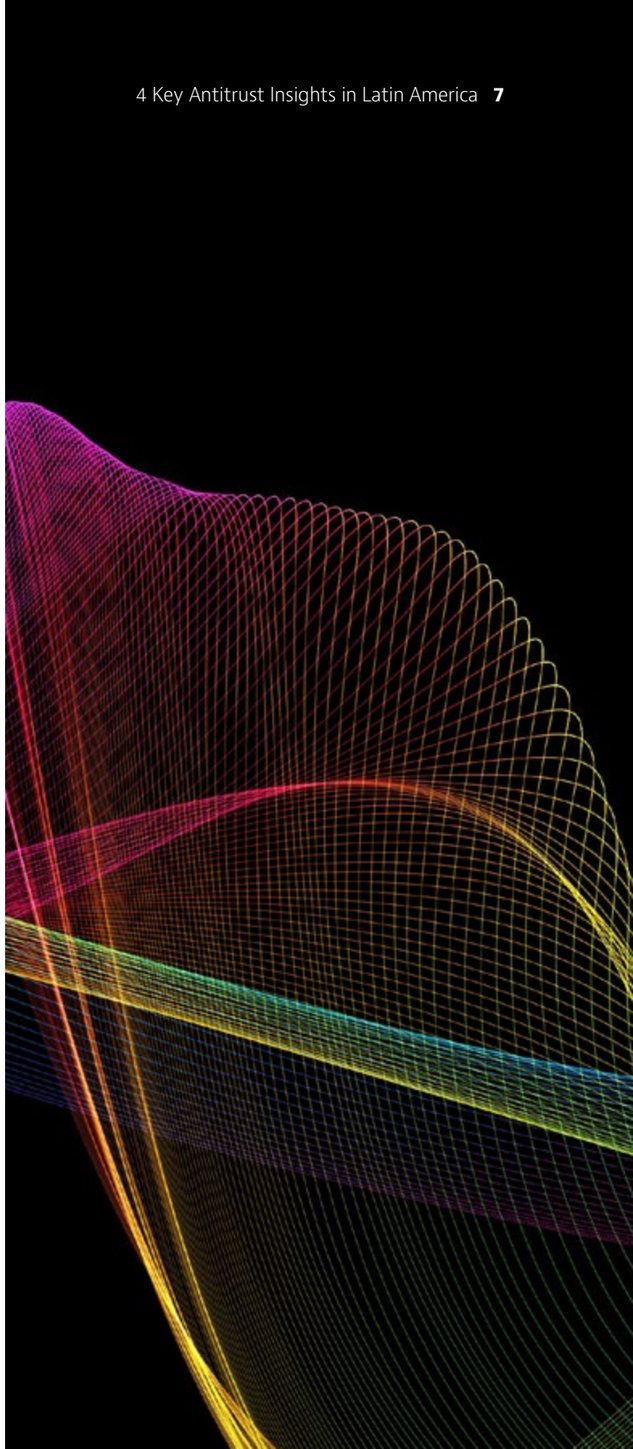
"The proliferation of leniency programs has undoubtedly contributed to our increased ability to detect and deter cartel activity worldwide."[1]

Proper legal guidance is critical for leniency applications, says Rodrigo Díaz de Valdes, Partner, in the Antitrust & Competition Practice Group of Baker McKenzie's Santiago office.

"When you apply for leniency, you are, for all intents and purposes, admitting to your involvement in the conduct…for that reason, it is necessary to properly assess what incurred in this infringement, and if the available information that you have will allow you the possibility to obtain the full leniency or a mitigation of the penalty." After applying for leniency, companies will obviously interact a great deal with a country's competition authority, and "you will need to have proper guidance in order to obtain the benefit of immunity or not," points out Díaz de Valdés.

> "Leniency creates a race among conspirators, where the winner is the first in line at the competition authority's door."
>
> Paulo Casagrande*
> Partner at Trench Rossi Watanabe
>
> *Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law.

1 Assistant Attorney General Makan Delrahim Delivers Remarks at the American Bar Association in Buenos Aires, US Department of Justice, 10 May 2019



Latin America: a leniency hotspot

Over the past two decades, most Latin America countries have adopted leniency programs, several of which have since undergone a first wave of reform. They have scored some notable successes, earning the region a reputation as a hotspot for cartel prosecution.[2]

Brazil

In 2000, Brazil became the first Latin American country to launch a leniency program. During the first fifteen years of this program, the Brazilian antitrust agency, known by the Portuguese-language acronym CADE, received almost 400 applications.[3] In 2016, CADE published the "Leniency Programme Guidelines," which included best practices and procedures, intended to provide transparency, accessibility, and legal certainty to the rules and procedures followed in these agreements. Then in 2017, CADE completed a record number of agreements, with 21 leniency agreements, and 12 leniency pleas.[4]

In recent years, much of CADE's leniency workload has stemmed from two high-profile cases:

- **The Car Parts Investigations:** From 2014 to 2017, CADE's Superintendence General (SG) opened 13 cartel cases related to different automobile parts (i.e. sparkling plugs, clutch facing, widescreen wipers, amongst others) based on the execution of leniency agreements.[5]
- **Operation Car Wash:** A series of large criminal investigations that exposed political corruption and collusion in Brazil, and in parallel involved more than 20 leniency agreements with the competition authority (see Case Studies: Key 2020 Leniency Agreements in Brazil on page 14).

CADE updated its leniency guidelines in 2018, a milestone for leniency in Brazil. The 2018 guidance distills the regulator's experience of leniency negotiations dating back to 2003, when the organization established its first leniency agreement with a company.[6] CADE's achievements reflect the maturity of Brazil's leniency program, the success of which has influenced the government's legislative agenda.

Most recently, CADE announced that leniency agreements in price cartel cases increased in 2021 versus 2020. This was due to the improvement with the pandemic crisis in the country, which allowed the agency to strike more deals. It is expected that leniency deals established in Brazil during 2021 will approach the amounts of deals in 2019 and 2018 (see more in "Leniency in decline on page 11"). In addition, CADE published a guide on evidence examination in leniency cases in September 2021.[7]

The guide indicates what constitutes evidence in antitrust cases, how to evaluate it and reference points for companies conducting their own internal investigations. Samples of cartel evidence based on cases heard by CADE's tribunal are also in the guide, along with excerpts of judgements that could serve as precedents for each type of evidence.[8]

Mexico

During its first ten years, Mexico's leniency program — which began in 2006[9] — prompted 113 applications. In two years alone, from 2014 to 2016, the number of applications from national economic agents significantly increased, reaching a 79.6% of the total applications.[10] In 2017, COFECE (Mexico's competition commission, as per its Spanish-language acronym) imposed its highest cartel fine ever for 1.1 billion pesos (US$54 million) in the pension fund administration market[11].

That same year, criminal charges were filed for bid-rigging in the health sector, the first time a criminal charge had ever been filed by the agency. However, since then, the amount of leniency applications in Mexico have been steadily decreasing (see "Leniency in decline" on page 11). Overall, in 2020, COFECE levied 115 fines for violations of the Ley Federal de Competencia Económica (Federal Economic Competition Law), a total of MX873.8 million (US$8.55 million).[12] This is more than double the total of fines imposed in 2019, which was MEX$307 millon.[13] In March 2020 COFECE published new regulatory provisions that affect the leniency program.[14]

2 Mena-Labarthe, Carlos et al: *The end of leniency programs in the Andean Region?,* Competition Policy International, 18 April 2018
3 Global Competition Review - The Antitrust Review of the Americas
4 Apresentação-Balanço - 2017.pdf

5 CADE, Superintendência-Geral do Cade investiga cartel internacional de módulos de airbag, cintos de segurança e volantes para automóveis, 6/2/17
6 Ministerio da Justiça e Segurança Pública, Programa de leniência do Cade completa 21 anos e se consolida como importante instrumento no combate a cartéis, 3/26/21

7 CADE launches guide with evidential recommendations for antitrust leniency — CADE
8 CADE, CADE launches guide with evidential recommendations for antitrust leniency, 10/12/21

9 COFECE, 2016, El Programa de Inmunidad de la Comisión Federal de Competencia Económica a 10 años de su implementación: ¿cuál ha sido el impacto?
10 Id.
11 COFECE, COFECE sanctions Afores for entering into agreements to reduce transfers of individual accounts, 5/4/17
12 COFECE, Informe de multas 2020, pg. 6
13 Latinus, Cofece impuso multas por 874 millones de pesos en 2020, 6/25/21
14 Diario Oficial de la Federación, Acuerdo No. CFCE-049-2020 , See also, COFECE-008-2020.pdf

Chile

In March 2020 a bill called Proyecto de Ley Anti-Colusión y de Fortalecimiento de la Fiscalía Nacional Económica (FNE, Chile's competition authority) was introduced[15], mainly seeking to strengthen the investigation, prosecution and punishment of cartels in Chile. It is meant to strengthen the existing anti-collusion law passed in 2016 (Decreto de Ley N° 211 or DL 211). The bill has 4 key goals:

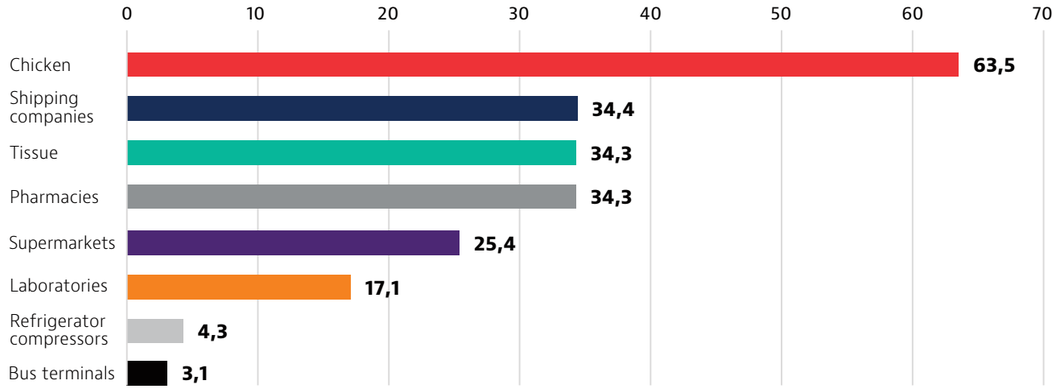
- Provide new tools to the FNE to strengthen the investigation and prosecution of collusive practices.
- Increase the penalty for cases of collusion when it involves basic goods and services, establishing a base of five years in prison.
- Incorporate anonymous whistleblowers into the Chilean legal system to report anticompetitive conduct.
- Add various amendments to strengthen the effectiveness of the FNE's actions.

Inaugurated in 2009[16], Chile's competition authority has entered into leniency agreements with firms in a wide range of sectors including pharmaceuticals, the seafood industry, refrigerator compressors, transport, asphalt, and tissue paper. In 2019, upon recommendation from the FNE, Chile's Tribunal de la Defensa de la Competencia (Tribunal for the Defense of Free Competition or TDLC) imposed fines of over US$9 million on shipping companies for entering noncompetition agreements.[17] Another key decision occurred in 2020, when Chile's Supreme Court ratified a sentence handed down in 2019. This involved large retailers who were accused of collusion with regard to the prices of a type of food. Ultimately, the fines were doubled, and the companies were fined more than US$21 million.[18]

Over the years, food has been the one industry segment that has had the largest fines imposed in collusion cases in Chile:[19]

Largest individual fines levied in Chile in collusion cases

(in USD millions)



Source: Fiscalía Nacional Económica/*La Tercera*

> "In the race for leniency, you have to act fast, and with a certain degree of preparedness... a company must be willing and able to cooperate to ensure a successful leniency application so as to effectively mitigate both soft and hard risks for the company."
>
> Rodrigo Díaz de Valdés
> Partner
> Santiago Office

15 Centro Competencia, El Proyecto Anti-Colusión del 2020 y su defensa por el Fiscal Nacional Económico, 5-20-20
16 On 13 July 2009, the Chilean Congress passed Ley No. 20.361, which strengthens the ability of the competition watchdog, the National Economic Prosecutor's Office (Fiscalia Nacional Economica (FNE)), to gather hard evidence on cartels.
17 TDLC aplica multa de US$ 9 millones a navieras que integraron cartel del transporte marítimo de vehículos hacia Chile, 4/24/19
18 La Tercera, Corte Suprema duplica monto de multas a supermercados y critica al TDLC, 4/8/20
19 La Tercera, Estas son las mayores multas que se han aplicado por casos de colusión, 7/1/21

Colombia

In Colombia, the leniency program is called Programa de Beneficios por Colaboración (PBC). According to the country's antitrust regulatory authority (Superintendencia de Industria y Comercio or SIC), there have been relatively few leniency applications in Colombia:[20]

- **2013:** 2
- **2014:** 6
- **2015:** 9
- **2016:** 8
- **2017:** 6

While data is unavailable for more recent years, results from recent cases suggest there is vigorous enforcement of competition law in Colombia. For example, in December 2019, approximately 6 companies were fined COL $2.4 billion (US$626,552) for their roles in a cartel for the purchase and delivery of fruits to schools.[21] In October 2019, 4 of the country's largest chemical companies were fined more than COL$125 million (US$32 million) because they were found to have participated in anti-competitive agreements in the chlorine and caustic soda markets.[22] The investigation was initiated after the request for immunity by one of the companies involved under the competition leniency laws. While the authority initially waived the fine for cooperating, the SIC unexpectedly reinstated the fines for participating in the cartel.

In June 2020, the competition authority fined the country's football federation and two ticket retailers over COL$18 billion pesos (US$4.6 million) for a conspiracy that inflated the price of tickets by up to 350%.[23] After an initial probe in 2018, one of the parties involved confessed to its role and applied for leniency. It received full immunity for its cooperation.[24]

In August 2020, SIC fined four food suppliers for rigging bids to provide the country's military with food for ration packs and, for the first time, imposed the maximum fine on an individual for violating competition law, and, for the first time, imposed the maximum penalty of COL$1.76 billion (US$456,000). The total fines were COL$8.3 billion (US$2.2 million) for colluding between January 2011 and March 2018.[25] The four companies were fined more than COL$6.5 billion and 10 individuals involved in the collusion were fined over COL$1.8 billion. While the competition authority did not consider the military logistics agency to be a part of the cartel, it admonished the organization for providing the cartelists with an opportunity to collect and share information.[26]

In December 2020, SIC fined several large construction companies and four individuals a combined COL$295 trillion (US$84.5 million) for rigging a tender to construct a highway project worth more than US$1 billion.[27]

In March 2021, SIC fined mining companies, their employees and a miners' association a combined more than 2 billion Colombian pesos (US$54 million) to eleven (11) mining companies and nine (9) individuals for fixing the price of construction materials and allocating supply quotas from 2011 to 2016.[28] In this case, several whistleblowers who used SIC's leniency program were crucial in the investigation to uncover the cartel.

In June 2021, SIC fined an oilfield services company more than COL$5 billion (US$1.3 million) for hindering its suppliers from marketing and selling invoices in the liquidity supply market.[29]

20 SIC, Informe de Rendición de Cuentas a la Ciudadanía, page 50
21 El Tiempo, SIC multa a 6 empresas por cartel de las frutas en el PAE en Bogotá, 12-19-19
22 SIC, Superindustria sanciona a cuatro empresas por cartelización empresarial en cloro y soda cáustica
23 SIC, Sanción de $18 mil millones a cartel de boletería en las eliminatorias al Mundial Rusia 2018
24 Global Competition Review - Colombia fines football ticket cartel
25 SIC, Superindustria sanciona con $ 8 mil millones cartel en venta de raciones militares
26 See, OECD, Annual Report on Competition Developments in Colombia, 2020
27 SIC, Superindustria impone sanciones por $295 mil millones por violar el régimen de libre competencia en la adjudicación y ejecución del contrato "Ruta del Sol tramo 2"
28 SIC, Superindustria impuso multas por más de $2.000 millones a empresas mineras de la región del Meta por cartelización
29 SIC imponen multa millonaria a Schlumber Surenco, 6/8/21

Argentina

The new Competition Law in Argentina entered into force in 2018.[30] It amended several provisions, including the introduction of a leniency program, following signals from the competition authority that cartels are its number-one priority. Since then, modifications to the law -including the abrogation of the leniency regime- were approved by the Senate and set to be discussed in the Cámara de Diputados (Chamber of Deputies). During and even in the aftermath of the pandemic, the competition authority has undertaken strong enforcement activities against exclusionary practices, and illegal pricing conduct (i.e., price-fixing, gouging). However, a possible impediment in the enforcement and strategy of the Argentine Competition Law, is that the country experienced a change in government. Originally, the country was expected to implement a National Competition Authority along with the implementation of many of the provisions in the 2018 Competition Law (including the leniency regime). However, this has all taken a back seat to other priorities in the country brought on by the health, economic and political crises.

30 Ley de Defensa de la Competencia, 27442

Peru

Two recent cases involving leniency in Peru are notable. In 2020, two publishing/printing firms were fined for developing an agreement with another firm to share the clients of the commercial printing services market between 2011 and 2016. These two companies acknowledged the accusation and disclosed their status as collaborators in the leniency program. As such, they did not face fines, whereas the other firm — which was not part of the clemency program — was fined PER$25 million soles (US$6.1 million).[31]

In 2021, these firms used INDECOPI's clemency program once again, in this case involving collusive practices involving bids and or abstentions for the distribution of items in bids, contests and other forms of public contracting or procurement. These companies were initially fined $32 million soles (US$7.8 million) but the fines were lifted because of their cooperation in the leniency program.

According to INDECOPI, between 2016 and 2020 it has sanctioned and dismantled 15 cartel/collusion cases in markets such as medical oxygen, hemodialysis, toilet paper, gas balloon, LPG vehicles, pharmacies, maritime and land transportation, among others.[32]

31 El Indecopi sanciona con más de S/. 25 millones a empresas que formaron cártel para repartirse mercado de impresión de textos escolares, 5/13/21
32 El Indecopi sanciona con más de S/. 25 millones a empresas que formaron cártel para repartirse mercado de impresión de textos escolares, 5/13/21

Leniency in decline

At the end of 2018, the countries of the Strategic Latin American Alliance reaffirmed their commitment to leniency in the Charter of Paris.[33] Signatories included Argentina, Brazil, Chile, Mexico, and Peru. However, despite this commitment and the immunity that leniency offers businesses, applications appear to be falling rapidly around the world, including in Latin America.

In Brazil, in 2015, CADE released a 60-page guideline[34] to encourage the practice of applying for leniency. According to Article 86 of Law No. 12,529/2011, CADE's General Superintendence may execute leniency agreements, when a violator make a commitment to cease the anti-competitive conduct. They must also confess to the wrongdoing and cooperate with the investigation; this includes providing applicable information and supporting material related to the conduct. If CADE is not previously aware of the conduct, it may waive all criminal and administrative penalties.

The number of signed leniency agreements have dropped significantly in the past few years:[35]

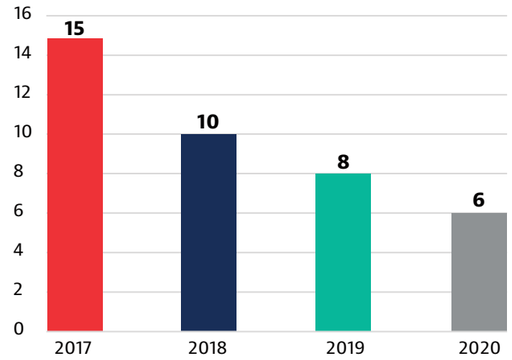
- **2017:** 21
- **2018:** 6
- **2019:** 11
- **2020:** 3

33 Latin Lawyer, Latin American enforcers commit to leniency principles, 12/10/18
34 An English version is available at http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf
35 Statistics — CADE

However, thus far there is projected to be an increase compared to 2020. According to Alexandre Cordeiro, president of CADE, the number of deals signed in 2021 is expected to approach those of 2018 and 2019.[36]

The picture is similar in Mexico, where there has been a 76.9% decrease between 2016 (26 applications) and 2020 (just 6).[37] As with Brazil, the steady decline has played out over recent years:

Leniency agreements in Mexico



Source: COFECE, 2020

36 "Challenges for the Defense of Competition in Brazil," Brazil, Oct. 13, 2021.
37 COFECE en números 2020, 6/21, page 11

"I think we are seeing less leniency applications for two main reasons," says Díaz de Valdés. "One is that in some countries, there are concerns with the confidentiality of the information provided during a leniency application. Also, companies are concerned with private actions, and that the information could be used in follow-on actions not only in their country, but worldwide," he explains.

Beyond this, other factors impeding leniency applications in Latin America could be:

- The cost of applications in multiple jurisdictions in cases where cartel activities extend beyond national borders.
- The risk of related infringements being investigated, under anti-corruption rules.
- Potential exposure to private damages if civil claims are brought against leniency applicants.

> "Some companies are choosing not to apply for leniency and take the risk, for fear that the information provided to the authorities will be used in follow-on actions, as well as other possible actions, such as debarment and other criminal actions."
>
> Carolina Pardo
> Partner
> Bogotá Office

A confidentiality crisis?

A breach of confidentiality in a recent, high-profile investigation may have dented organizations' trust in leniency in Latin America.

In the well-documented Tissue Cartel case, US multinational Kimberly Clark first signed leniency agreements for price-fixing with the Colombian and Peruvian regulators (SIC and INDECOPI respectively). Other firms involved in the cartel followed its lead, some of which applied to the Ecuadorian competition authority (SCPM).

After an 18-month investigation, SCPM referred its findings to the Andean Community (CAN), which is the free-trade bloc comprising Bolivia, Colombia, Ecuador and Peru. In doing so, the agency sent confidential documents and witness statements provided by Kimberly Clark to CAN. This contravened confidentiality rules in its agreement with Kimberly Clark — not to mention the "sanctity of basic leniency procedures."[38]

CAN disregarded Kimberly Clark's leniency agreements with national authorities. Despite objections from SIC and INDECOPI, the community imposed the maximum penalty — over $34 million — on the company and another cartel member, Grupo Familia.

It is a particular concern for CAN's Member States, particularly, for the relatively new leniency regimes such as Peru. Some commentators have warned of the potential for "serious harm to leniency throughout Latin America."[39]

In order to prevent what happened in the tissue paper cartel, a collaborated effort started at the International Competition Network (ICN) in 2018. The negotiations were aimed at establishing a definitive version of a new legislation in the Andean community. With Colombia spearheading the negotiations, the region is one-step closer to finalizing the Andean community legislation aimed at protecting the leniency program.[40]

To exacerbate companies' worries, Chile's Supreme Court a couple of years later revoked a leniency applicant's immunity. In a landmark ruling, the court decided that the antitrust tribunal had granted leniency based on too narrow a definition of coercion. This year, the Andean Community's competition enforcer once again fined Kimberly Clark and Productos Familia for price-fixing tissue paper prices. The CAN fined Kimberly Clark USD $17.5 million and Productos Familia USD $16.9 million on 19 November 2021 for colluding to artificially increase the price of toilet roll, tissues, napkins and paper towels from 2006 to 2013. The decision confirms the regional enforcer's original decision from May 2018.

The success of leniency programs depends on their reliability — which some experts feel SCPM and CAN undermined in its treatment of Kimberly Clark.

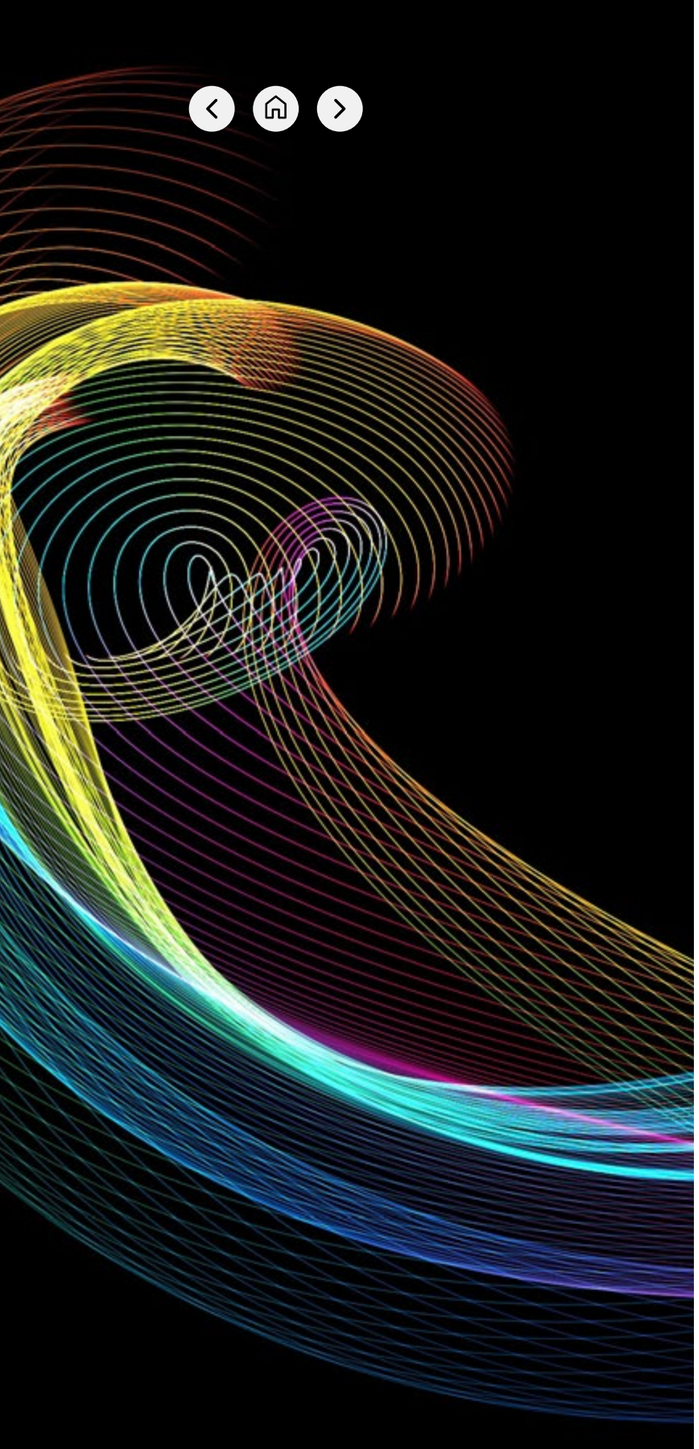
As a result, there are fears that uncertainty over what constitutes coercion may discourage potential applicants from participating in the country's leniency program.

> "If the authorities continue to protect the information received and safeguard its confidentiality, so as to ensure it cannot be used against them in another country, this would not only promote confidence with companies, but also encourage leniency applications in national cartels. However, it is important that companies understand this trust goes both ways."
>
> Paulo Casagrande*
> Partner at Trench Rossi Watanabe

*Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law.

38 Mena-Labarthe, Carlos et al, A Call to Arms to Protect Latin American Leniency Programs, Competition Policy International, 7/23/18
39 Ibid

40 Interview with Andrés Barreto González, Superintendent, Superintendencia de Industria y Comercio (SIC), Colombia (americanbar.org)



Ultimately, Latin American businesses will be discouraged from revealing illegal cartel activity if there is a risk that:

- Authorities in the region may discount their own rules, as SCPM did with Kimberly Clark's confidentiality.
- Self-incriminating statements produced for leniency applications could be disclosed in civil proceedings — possibly leading to severe damages being awarded against them.
- Disclosure of leniency documents leaves applicants worse off in such claims than non-cooperating firms — which undermines the whole point of coming forward in the first place.
- Immunity given to leniency applicants is revoked on legal technicalities, leading to fines being imposed which applicants were expecting to avoid.

> "Leniency is the most effective method to detect cartels, due to the risk of high penalties; a transparent leniency program creates a major incentive for companies to come forward."
>
> Carolina Pardo
> Partner
> Bogotá Office

The cost-risk equation

However, leniency proceedings are not entirely without cost or risk.

Being first to approach a regulator can remove the prospect of significant fines. However, there is a financial cost to preparing and submitting applications, as well as a drain on internal resources. Without regional harmonization of leniency rules and procedures, that cost is multiplied across several jurisdictions when cartel activity is cross-border.

For a multinational, these costs can mount up. There is no guarantee of immunity being granted in every — or, indeed, any — country.

What's more, leniency applications place a business' infringements in the public domain. That may damage its reputation and harm its commercial relations with customers affected by the cartel. It also raises the possibility of civil follow-on cases being brought against the organization, and private damages being awarded, irrespective of competition authorities' rulings.

When considering leniency applications, firms must weigh these costs and risks against the benefit of avoiding heavy fines.

As leniency programs mature, the balance between these factors alters, and the analysis becomes more complex. Firms may decide to file for leniency in some jurisdictions, but not others. They may simply calculate that it is better not to go down the disclosure route at all.

Ultimately, as *Competition Policy International* neatly put it, "confessing must be more attractive than staying quiet."[41]

The decrease in leniency applications suggests companies are questioning whether that is still the case.

Future prospects

So should we be concerned about the future of leniency in Latin America?

The short answer is no. Leniency is a potent weapon for authorities, and where the cost-risk analysis adds up, it offers enormous benefits to companies caught up in investigations.

The fundamental principles of a successful leniency program are the risk of fines and criminal penalties, the fear of detection, and the benefit of full immunity to first-in-line leniency applicants; including the protection of confidentiality of those involved. There is an underlying importance of transparency, regulators must reaffirm their commitment by setting out clear guidance on leniency conditions, which cover the rights and obligations of applicants.

Competition agencies in the Latin American region are continuing the fight against cartels, and so are emphasizing their support for leniency. Their message is clear: despite a changing landscape, leniency remains a central plank in their strategies.

41 Miriam C. Buiten, The Ambivalent Effect of Antitrust Damages on Deterrence, CPI Antitrust Chronicle, 6/4/19

Case Studies: Key 2020 leniency agreements in Brazil

Brazil's leniency program recently celebrated 21 years,[42] since it has been in place since 2000,[43] with the first leniency accord struck with a private security firm a case known as the Watchmen Cartel (Cartel dos Vigilantes). Since then, Brazil's CADE (antitrust authority) has established more than 100 leniency agreements in Brazil.[44] As of October 20, 2021, CADE approved 5 Leniency agreements in 2021 that spanned a variety of industry segments, compared to 12 in 2019, and 10 in 2018.[45] The drop was due to the pandemic and the difficulty in obtaining materials, since the information exchanged in these cases is obtained in person due to confidentiality. This was challenging due to the crisis. The number of deals is expected to increase as the pandemic situation in the country improves, according to CADE's president, Alexandre Cordeiro.[46] Another factor that could increase leniency applications is leniency requests being accepted via a new online platform: applicants seeking to report a cartel will be able to file a marker request by using this platform.[47]

Underground/submarine cable market

This investigation began with a leniency agreement signed with two companies that admitted to participating in a cartel in this market. CADE discovered that these companies were in collusion on prices due to emails and several multilateral meetings. This involved companies from several countries outside of Brazil and spanned 14 years. Three of the companies were fined BRL$20.9 million (US$3.9 million), while the two companies that received leniency only paid fines of BRL$1.6 million (US$310,637).[48]

International air/maritime freight

This investigation began with the signature of a leniency agreement. The administrative proceedings was originally initiated in August 2010, after a raid in the offices of three companies. In March 2021, CADE convicted four companies, seven individuals, and a business association for participating in the cartel for inducing collusion in the international air and maritime freight markets to and from Brazil. The fines totalled BRL $31.2 million (US$5.6 million).[49] With regards to the agreements fulfilled, the Tribunal of CADE granted the signatories immunity from sanctions related to the violation.

Subway cartel

In July 2019, CADE concluded one of the largest investigations in its history. The investigation began in 2013, resulting from the signing of a leniency agreement,[50] and based on the evidence, a raid was initiated which resulted in the collection of evidence crucial to the case. The evidence collected indicated the cartel was involved in government procurements for trains and metros, and had been involved in price-fixing, market allocation, and bid-rigging in procurement contracts. For anti-competitive practices, 11 companies were ordered to pay fines totaling BRL$515.6 million (US$135 million), and the 42 individuals were ordered to pay fines amounting to BRL$19.5 million (US$5 million).[51]

42 http://en.cade.gov.br/cade2019s-leniency-programme-completes-21-years-and-is-established-as-a-relevant-means-of-fighting-cartels
43 See Law 10149
44 Statistics — CADE
45 Cade Leniency Program Statistics - Portuguese (Brazil)
46 Brazil leniency deals increased in 2021 with improvement in Covid situation, CADE President Cordeiro says
47 Companies, individuals can apply for leniency on CADE's new digital platform

48 Cade applies BRL 20.9 million in fines for international cartel of underground and submarine cables — CADE
49 CADE convicts cartel in market of international air and maritime freight — CADE

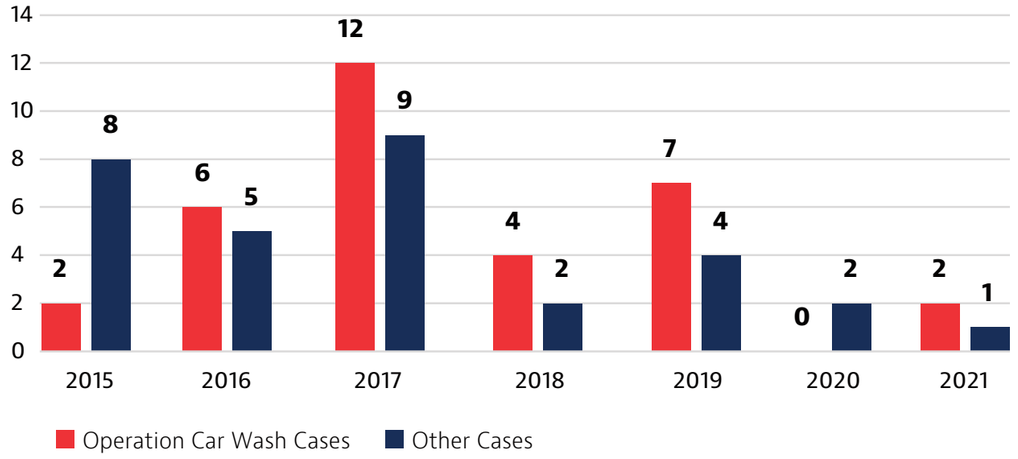
50 Brazil: CADE fines 11 companies over subway trains cartel (competitionpolicyinternational.com)
51 https://one.oecd.org/document/DAF/COMP/AR(2020)39/en/pdf

Infrastructure: Operation Car Wash:

The long-running Lava-Jato case (aka Operation Car Wash) was also a result of leniency agreements. The case has been recognized as one of the largest corruption and cartel probes in Brazilian history. In 2020, CADE still had several cartel investigations related to Operation Car Wash, some of which may be decided throughout the next years. In 2017, CADE executed the highest number of leniency agreements and settlement agreements (TCCs as per its acronym in Portuguese), many of which were related to Operation Car Wash. Operation Car Wash, which began in March 2014, involved the Brazilian state-owned oil and gas company, and several construction companies. Leniency applications in the Car Wash investigation has led to cartel investigations into other sectors, including the railway transportation[52] and engineering services for construction projects,[53] including large-scale infrastructure projects such as stadiums[54] and airports.[55] In 2019 alone, CADE opened four new cases as part of Operation Car Wash.

On the right, we break down leniency agreements that resulted from Operation Car Wash versus those that came from other cases, illustrating the wide-ranging impact of this investigation.

Leniency agreements (Operation Car Wash vs. other cases)



33 Total leniency agreements signed for Car Wash Operation cases (2015 - 2021)

31 Total leniency agreements signed for other cases (2015 - 2021)

The Car Wash investigations themselves are a result of a series of related leniency applications that were filed by companies allegedly involved in these schemes, and are clear examples of the importance of the leniency tool to detect cartel conduct and essential for deterring, divulging and collecting vital evidence to prosecute anticompetitive conduct.

While the amount of leniency agreements dropped from the peak in 2017, the fact that 5 had already been signed by June 2021[56] suggests that CADE is looking to employ leniency more frequently in its enforcement arsenal.

52 CADE investigates bid rigging in public bids subways and monorail infrastructure in seven states and in the Federal District — CADE
53 Operation Car Wash: CADE signs an agreement with the Andrade Gutierrez company in an investigation of cartel in port works — English (www.gov.br)
54 Latin Lawyer - CADE adds two more probes to Operation Car Wash
55 Global Competition Review - Operation Car Wash leads to yet another cartel probe

56 CADE: Statistics of Leniency programs

02 | The Digital Dilemma for Antitrust Authorities

02 The Digital Dilemma for Antitrust Authorities

Identifying killer acquisitions, the role of AI in possible price collusion, the use of data and other factors make it challenging for authorities to determine anticompetitive practices in this sector

> "Data are to this century what oil was to the last one: a driver of growth and change." The Economist

According to Internet World Stats, there are 782 million people in the 22 countries commonly considered to be part of Latin America[1]. Of these, Internet World Stats indicates that 556 million are Internet users — an overall penetration of 71%, compared to just 36% in 2011.

The annual **Digital 2021** report by Hootsuite indicates that worldwide, people spent an average of 6 hours and 54 minutes per day online, with TV a distant second in time spent at 3 hours and 24 minutes per day.[2] Several Latin American countries top the rankings for daily Internet use, such as:

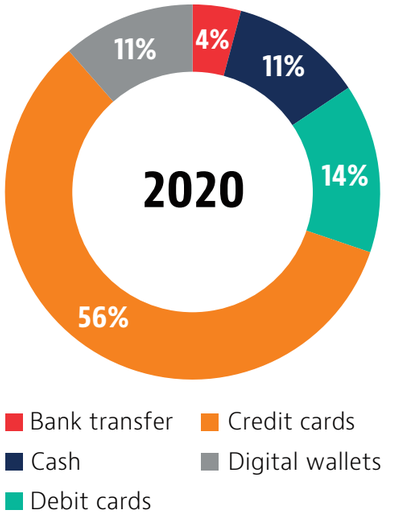
- **Brazil:** #2 in the world with an average of 10 hours and 8 minutes spent online per day.
- **Colombia:** #3 in the world with an average of 10 hours and 7 minutes spent online per day.
- **Argentina:** #4 in the world with an average of 9 hours and 39 minutes spent online per day.
- **Mexico:** #7 in the world with an average of 9 hours and 1 minute spent online per day.[3]

A massively growing digital market

As online access becomes embedded into the lifestyles of Latin Americans as they reach out to each other via WhatsApp, post on Instagram or share Tik Tok videos, the true impact is felt economically. One direct way to gauge this impact is to examine the growth of e-commerce in the region.

According to recent calculations from Americas Market Intelligence (AMI), the total volume of Latin America's e-commerce market in 2021 will be US$273 billion (compared to US$209.3 billion in 2020) and AMI projects that it will exceed US$500 billion by 2024[4].

While the COVID crisis lockdowns are part of what has fueled Latin America's e-commerce growth, other factors have been significant. COVID economic aid programs instituted by governments in several countries used electronic forms of disbursement, which helped bring in millions of Latin Americans into the financial system and facilitated digital purchasing. The rise of financial technology (fintech) companies in Latin America has become another factor, as fintech companies allow Latin Americans to use digital wallets for purchases. On the right is a quick breakdown of the share of different payment methods used in Latin America for e-commerce in 2020:[5]



Source: Americas Market Intelligence analysis

1 Internet World Stats
2 Hootsuite, Digital 2021 Global Overview Report
3 Hootsuite, Digital 2021 Global Overview Report
4 Americas Market Intelligence analysis
5 Ibid.

By 2024, AMI projects that credit cards and cash will have lower shares of the overall volume of e-commerce transactions, while digital wallets, debit cards and bank transfers will gain in share as more Latin Americans are integrated into the financial system.

Latin Americans buy a wide range of products via e-commerce and the popularity of different products varies according to country and methodology used to determine popularity. AMI analysis has identified three key categories of e-commerce purchases in Latin America:

- **Retail:** physical goods, such as groceries, electronics, books, etc.
- **Digital goods:** Non-physical goods such as music/video streaming, ride hailing, app downloads, online gaming, etc.
- **Travel:** All services related to travel such as plane tickets, hotels/accommodations, packages sold by travel agencies, etc.

AMI projects that the retail category will grow with a compound annual growth rate (CAGR) of 27% between 2019 and 2024, while digital goods will grow with a CAGR of 33%. Not surprisingly, travel will remain depressed through 2024 due to restrictions springing from the persistence of the pandemic.[6]

6 Americas Market Intelligence

Striking a balance

This massive digital growth may well be beneficial for Latin American economies, but at the same time, it presents challenges for regulators of competition. In this fast-changing climate, technology companies' influence on economies and industries is a growing challenge for competition regulators worldwide. For example, defining markets and assessing influence is complex when dealing with multisided, platform-based offerings. This has led some to question whether antitrust rules and procedures are fit for the digital age. In addition, actions by the competition authorities, if not balanced, could cause more problems than they solve. Under-enforcement of competition regulation within the digital realm could restrict competition as large digital brands acquire start-ups with popular (or potentially popular) products. However, if authorities are too strict in their regulatory efforts, they could end up affecting the business growth, innovation, and economic progress spurred by the digital sector. As they grapple with this new reality, authorities must strike a delicate balance.

The Latin American landscape

Latin America's antitrust agencies are still coming to grips with these challenges. Authorities across the region are examining competition regulation to update and adapt it as they see fit. This has led to several developments:

Mexico

In 2018, Mexico's Federal Economic Competition Commission (COFECE as per its Spanish-language acronym) published a report assessing the effects of the digital economy on competition law.[7] In a speech the following year, the Commission's president highlighted how digitization poses new challenges for the analyses conducted by competition authorities.[8]

In March 2020, COFECE published a new document on its digital strategy[9]. This report expressed several concerns of COFECE with regard to the digital market, generally with regard to competition, and proposed 4 key strategies it will carry out in the short term:

- Position economic competitiveness in the public agenda via a document containing public proposals so that digital markets can benefit Mexican consumers.
- Effectively apply economic competition regulations.
- Actively drive the prevention and correction of anticompetitive market structures via a forum with international experts and by strengthening its capabilities and technological infrastructure.
- Strengthen a leading-edge organizational model by establishing a Competition in Digital Markets Unit.

7 COFECE, Rethinking competition in the Digital Economy, 2018
8 COFECE, Digital market analysis, a challenge for competition authorities in the world today, 2019
9 COFECE, Digital Strategy, 2020

This report also highlighted several areas of concern with the digital market:

- **A "winner take all" dynamic.** A dominant platform can reach a critical mass of users and effectively shut out competitors.
- **New forms of collusion via algorithms.** Artificial intelligence could essentially fix prices without humans being directly involved.
- **Acquisition of potential competitors.** This is important for regulators to consider in terms of its impact on innovation and the difficulty in determining if an acquired company in fact would become, in time, a significant competitor for the acquiring firm.
- **Weighted behavior of consumers.** This refers to how customers of established digital brands may be unwilling to try new brands because they prefer to keep the status quo or the cost of migrating all their data to a new platform. A related concern is the difficulty of making choices amidst a plethora of products or the tendency of consumers to pick the first results that come up in an Internet search.
- **Exploitation of consumer data.** COFECE points out that digital companies can take advantage of consumer data. For example, (i) by preventing competitors from entering the market, (ii) by keeping other companies from using consumer data, and/or (iii) influencing consumer decisions, with the use of this data changing the market in a harmful way, such as creating higher prices for consumers.

Brazil

Among the recent developments in the region is a report from BRIC countries' regulators which outlines the dilemma facing authorities. The paper also described how certain online practices have come under scrutiny in Brazil recently, mostly for abuse of market power. Brazil's Administrative Council for Economic Defense (CADE, according to the Portuguese-language acronym) stressed the importance of balancing intervention to protect competition and consumers against the risk of hampering innovation.[10]

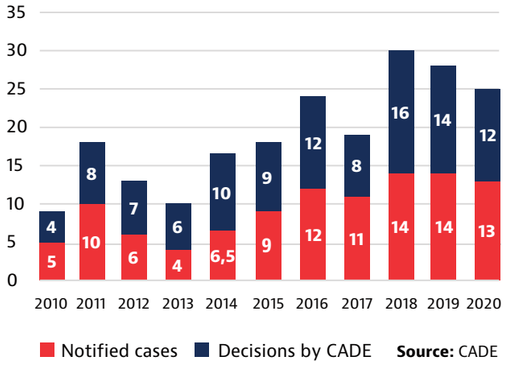
In August 2021, CADE produced a report entitled *Mercados de Plataformas Digitais* that examined the digital platforms market and competitive issues surrounding them.[11] The report observed that between 1995 and 2020, there were 143 mergers within the sector of digital platforms, with the following breakdown:

- 35% of digital platform mergers in 1995-2020 involved online advertising.
- 20% involved online retail (e-commerce).
- 10% involved online travel services.
- 10% involved online classified ads.
- 5% involved online ticket sales.
- 5% involved video on demand.
- 4% involved food delivery platforms.
- 3% involved price search/comparison services.

The other segments comprised a minimal amount of the merger issues that came before CADE, including ride hailing apps (2%), digital music (1%) and social media (1%).[12]

According to CADE, 2018 and 2019 were the years in which CADE had the largest number of notified cases and the largest amount of cases was decided in 2018 (a total of 16), whereas in 2020 there were slightly more than 12 notified cases before CADE and 12 decisions. The graphic below offers a look at this over the past decade:

CADE notifications and decisions 2010 - 2020



That said, it is important to note that of the 143 mergers in the digital sector that were reviewed by CADE in this period, 140 (97.9%) were approved without restrictions and 2 were approved with merger control agreements and 1 case was withdrawn by the applicant.[13]

The rest of the report is instructive in that CADE explains how it defines the relevant markets (such as digital music, online travel, sporting goods, booksellers, cosmetics, multiproduct retailers, etc.) and cites pertinent cases in which decisions were handed down. CADE also focused on defining what it considers to be barriers to entry, based on previous rulings.

In a *Documento de Trabalho* entitled *Concorrência em mercados digitais*, which was published in May 2020, CADE cited potential negative conducts in digital markets, such as:

- Privacy violations with customer data.
- Imposing unfair terms of access on customers whose business depend on platform access.
- Charging prices for platform access, as well as unfairly imposed commissions or contractual terms.
- Using reputational instruments to harm competitors or consumers.
- Removing potential rivals via acquisitions or exclusionary strategies.[14]

CADE cited a number of regulatory approaches employed by other entities or recommended by studies but did not explicitly express its own views on these issues: "This working paper sought to summarize the main international studies that analyze the competitive dynamics of digital markets. This is a review of this literature, which does not necessarily reflect CADE's view."

Brazilian competition authority President Alexandre Cordeiro said it is fundamental to look at the "business plan" of a company seeking to buy another in digital markets to understand the value the acquisition will bring to the company and the possibilities of long-term market foreclosure and consumer harm.15 Recent decisions from CADE show the increase in deals being reviewed in the digital sector, for example:

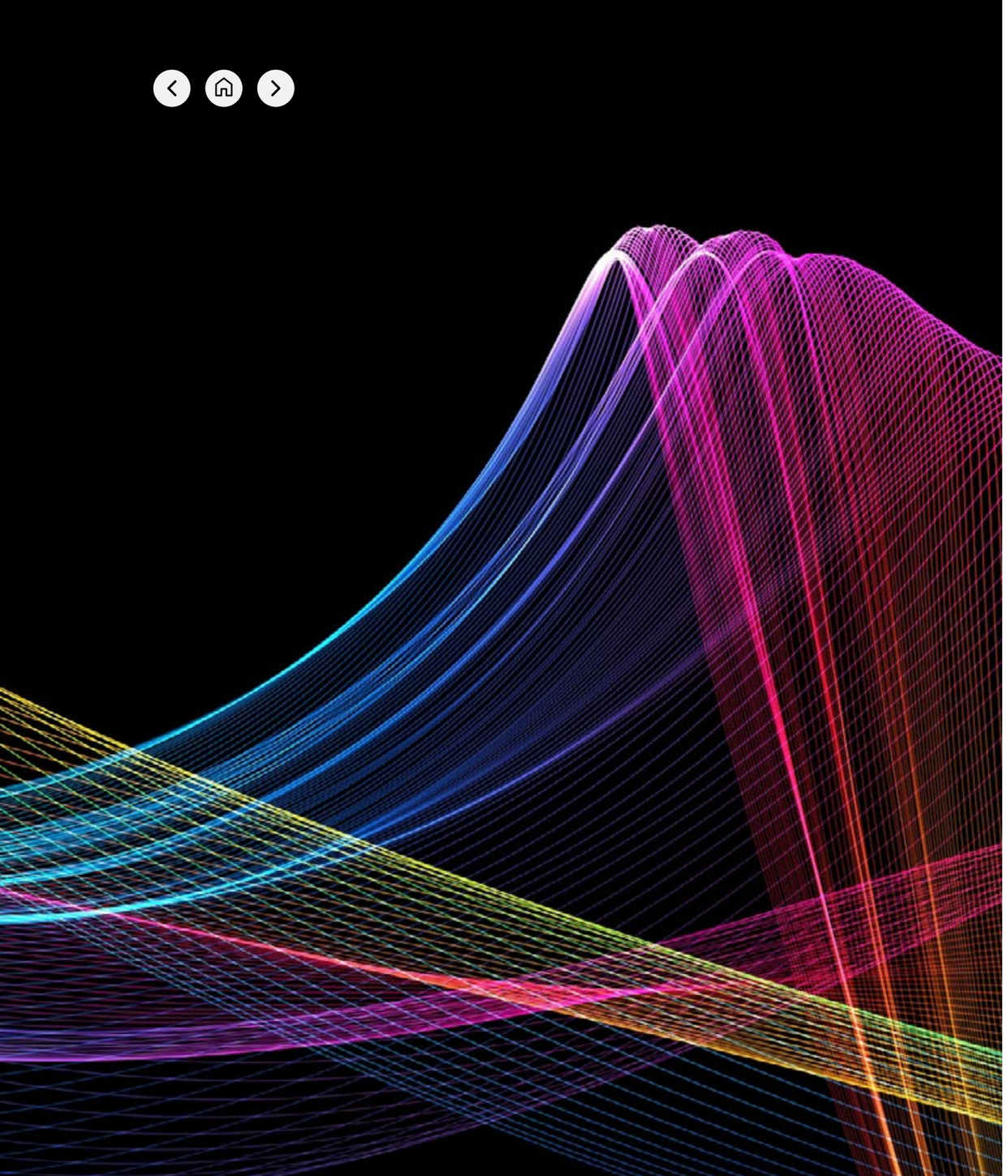
- In July 2021 Magazine Luiza was cleared by CADE to acquire fintech company Hub, despite a challenge from Mercado Livre.
- Other acquisitions by Magazine Luiza were also cleared by CADE during 2021, including its purchase of Joven Nerd and e-commerce company Kabum.
- Payments provider Stone's acquisition of software provider Linx was cleared by CADE in June 2021.
- Nubank —a digital bank— had its acquisition of digital brokerage Easynvest cleared by CADE in May 2021.

10 BRICS Competition Authorities' Working Group on Digital Economy, BRICS in the digital economy: competition policy in practice, 2019
11 CADE, Mercados de Plataformas Digitais, August 2021

12 CADE, Mercados de Plataformas Digitais, August 2021

13 Ibid
14 CADE, Concorrências em mercados digitais, 5/2020

15 'Business plan' should be at core of merger analyses in digital markets, says CADE president', MLEX, September 13, 2021



Peru

In 2018, the country's National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI as per its Spanish-language acronym) has developed a "Digital Agenda." Its objectives are to:

- promote public policies that strengthen Peru's technological competitiveness.
- ensure the proper functioning of digital markets.
- monitor and prevent practices that restrict free and fair competition in the digital economy.

Colombia

The Superintendency for Industry and Commerce (SIC, as per the Spanish-language acronym) has also recently focused on e-commerce and digital markets.
During 2019, SIC produced a digital market study about the hotel lodging (accommodations) industry. One of the market studies was for digital matching platforms for accommodation services in the tourism industry.[16] Many competition authorities globally have looked at these digital platforms, and some have considered them a possible restriction to competition, due to conduct such as price parity clauses. In some jurisdictions, these platforms have even had to adhere to certain conditions in order to continue to participate in the market.

As a result of the study, the SIC found a high concentration in the platforms market for tourist accommodation services, and price parity clauses might be reducing competitive pressures between platforms via commissions.[17]

SIC is also making e-commerce and digital markets a regulatory priority for 2020. The agency defined data and information as 'capital', and appears to be placing their protection at the heart of its efforts to safeguard consumers and competition.[18] Also, at the end of 2020, Colombia's competition authority contributed to an OECD report on abuse of dominance in the digital markets.[19]

While Colombia has not had many Big Tech antitrust cases compared to other jurisdictions, SIC has been active from the perspective of data privacy and consumer protection in the digital world, since the same authority is under one umbrella.

Unlike most competition authorities, Colombia is able to look at these markets from a competition perspective, as well as conduct digital market studies and analyze under the lens of data protection policies, and consumer protection, for any antitrust cases that arise in the digital market.

16 Superintendencias Industria y Comercio (SIC), Plataformas digitales de emparejamiento de servicios de alojamiento turístico, 12/19

17 Annual Report on Competition Policy - 2019 OCDE FINAL (1).pdf (sic.gov.co)
18 Colombia: SIC regulará a influenciadores el próximo año, America Economía, 28 November 2019
19 OECD, Abuse of Dominance in Digital Markets, 2020

A triple challenge

Broadly speaking, the digital economy throws up three key challenges for competition authorities:

1. Merger oversight

Data is the lifeblood of many digital offerings. Authorities worry that the scale and scope of significant data holdings will give some firms excessive market strength, creating a barrier to competition. As such, regulators are increasingly bringing data into their merger reviews, whether or not it is the core driver behind a deal.

That said, market power could be less clear-cut in digital markets, for several reasons:

- Digital business models are different. Many are platform-based, multisided, and/or free of charge to end-users (or partly so). Evaluating the effects of the non-price dimensions of such offerings is a challenge for regulators, whose analytical tools are not always designed for this.
- Deals may go under the radar. Acquisition targets may be pre-revenue, or offer some of their services free of charge. As a result, the deal value is unlikely to hit regulators' turnover or market share thresholds. Given the interconnections and overlaps between digital products and services, digital markets (and therefore market share) can be difficult to define.
- Given the "borderless" nature of digital platforms, it can be difficult to pin a transaction to any particular jurisdiction, and so apply that market's notification rules.

2. Killer acquisitions

So-called 'killer' deals are hard to spot in the digital space. When a dominant tech player buys a smaller firm, is it looking to foster innovation and produce better products and services for consumers? Is it just out to eliminate a potential competitor — or might that be the outcome, even if it is not the acquirer's motive?

Most deals will surely be prompted by the desire to enhance market offerings; but regulators have a responsibility to catch those aimed at restricting competition.

This is a challenge, as the distinction between the two strategies is not always clear. Many digital acquisitions will go unnoticed, as they fall below merger control thresholds.

It is an issue that has elicited some fairly radical responses. Some jurisdictions have considered lowering their notification thresholds. Some commentators have suggested reversing the burden of proof in such cases.[20] That seems unlikely, but it reflects the unease that the prospect of killer acquisitions is causing in some quarters.

3. Anticompetitive agreements

Inadvertently or otherwise, digital technology can enable collusion and price-fixing.

Platforms may act as hubs, coordinating competitors' strategies and pricing decisions. Algorithms, bots and artificial intelligence can automate collusive activity, without explicit instructions from human beings. Such infringements can be difficult to detect if carried out by technology rather than people.

These issues have sparked a debate over the effectiveness of antitrust measures around the world. Are the tools and resources available to competition authorities still adequate? Do they need overhauling given the demands of the digital economy?

Some commentators feel they are unsuited to assessing digital models' impact on competition, and need rethinking as a result. Others believe this is unwarranted, as current rules, procedures and enforcement powers have the flexibility to be applied to unconventional business models.

Business as usual

Like almost everything in the digital age, the future of antitrust is evolving.

There is not yet a consensus among the community on how to adapt its methods and measures to the realities of the digital economy. As such, it is too early to speculate on the approach agencies will take to protecting competition in tech markets.

Nonetheless, we can be sure that there will be changes and challenges along the way, for businesses and regulators alike.

For organizations, the challenge will be much as before; to vigilantly navigate an evolving regulatory landscape.

This will require:

- Robust digital compliance capabilities and processes.
- Global compliance strategies and coordination, given that digital platforms typically have global reach.
- Reminders to employees that conduct which is illegal offline is also illegal online.
- An understanding of your data and technology, and their impact in the marketplace.
- Up-to-date knowledge of enforcement rulings, and their implications and limitations – so that commercial opportunities are not sidelined unnecessarily.

For their part, authorities will continue to examine their mechanisms for defining markets, assessing influence, identifying illegality, and investigating new forms of anticompetitive behavior. Over time, landmark cases will provide much-needed clarity on how they intend to intervene in the digital domain.

All the same, change is unlikely to be sweeping. Existing antitrust frameworks will, in some areas at least, prove malleable enough to adapt to the digital world.

---

20 Jacquelyn MacLennan et al, Innocent Until Proven Guilty – Five Things You Need to Know About Killer Acquisitions, Competition Law, 3 May 2019

Case Studies:
COFECE ruled to have authority in digital cases

As of present date, while the Mexico's antitrust authority, Comisión Federal de Competencia Económica, COFECE, is investigating possible relative monopolistic practices in the market for digital advertisement services,[1] it has not announced fines or judgments against digital market companies for violation of antitrust or merger laws. Instead, the most recent developments with digital market companies in Mexico have focused on its scope of authority.

Uber-Cornershop merger

In late 2019 there was a dispute between COFECE and Mexico's Instituto Federal de Telecomunicaciones (Federal Institute of Telecommunications or IFT) over which had the authority to assess the proposed acquisition of Cornershop (a grocery delivery app) by Uber (a ride-hailing/delivery app). The case came before the First Circuit Collegiate Court and in 2020 the Court ruled that the Uber-Cornershop acquisition falls into COFECE's scope of powers.

Two main reasons were because of Uber and Cornershop: (1) The parties are not telecommunication concessionaires but rather rely on them for the provision of their services through digital platforms; and (2) The parties use the internet as an input to offer their respective services, with the internet not being the actual service offered nor the source of their revenues.[2] Ultimately, in December 2020 COFECE approved the acquisition of Cornershop by Uber.[3]

Digital market investigation

In October 2020 the IFT announced it had begun an investigation into online search services, mobile operation systems and cloud computing services.[4] COFECE disputed IFT's authority in this area and petitioned the latter to send its investigation files over to COFECE. This is turn led to the Poder Judicial de la Federación declaring in June 2021, that COFECE had the authority in cases involving online search services, social media and cloud computing.[5]

In August 2021, after receiving copies of the files related to the investigation by the IFT, COFECE announced that after analyzing the information in the files, that it was insufficient for it "to conduct an official investigation, at this time, in the [digital] markets."[6]

These decisions set an important precedent for defining the scope of powers when it comes to antitrust cases involving the digital market and offer a clearer interpretation of which authority will assess future mergers of digital companies that do not provide broadcasting or telecommunications services.

1 COFECE-033-2020_ENG.pdf, Investigation has been extended and is still in process, IO_003_2020_2_AcuerdoDeAmpliacion.pdf (cofece.mx)

2 COFECE, The Judiciary reaches the decision that COFECE is the competent authority to resolve the concentration between Uber and Cornershop

3 COFECE Approves Uber's Cornershop Purchase, Mexico Business News, 12/14/20

4 Instituto Federal de Telecomunicaciones press release, 10/22/20

5 COFECE, El Poder Judicial de la Federación resuelve que la COFECE es la autoridad competente para conocer de los mercados de servicios de búsqueda en línea, redes sociales y de cómputo en la nube, 6/18/21

6 El Economista, Cofece desiste de investigación sobre mercados digitales iniciada por el IFT, 8/18/21

03 | Navigating the Merger Control Landscape

03 Navigating the Merger Control Landscape

Mergers and acquisitions are a go-to strategy for firms seeking growth and competitive advantage, particularly in today's disruptive digital economy.

In Latin America, the M&A market has rebounded powerfully in 2021. Some key numbers in this area include:

- A total of 2,449 M&A deals struck in Latin America during the first 9 months of 2021, with a total value of US$113 billion.[1]
- This is a sharp 275% increase from 2020, during which there were only 651 merger deals in Latin America with a total value of US$68 billion.[2]
- The biggest jump may have been between January-June 2021, when there were 812 announced M&A deals with a total value of US$80.5 billion: a 431% increase compared to the same period in 2020.[3]
- Brazil leads Latin America in M&A in 2021, with 1,716 deals struck between January-September.[4]
- Mexico is #2 in LatAm M&A deals in the first nine months of 2021, with 261, followed by Chile (246 M&A deals), Colombia (155), Argentina (134) and Peru (77%).[5]
- In Q3 2021, according to Refinitiv, the combined value of Latin America's M&As reached US$105.5 billion, which represents a 178% increase compared to the first nine months of 2020[6] and is the highest M&A volume reached by the region in a decade.[7]

Among the biggest deals struck thus far in 2021 include the merger of Notre Dame and Hapvida, two Brazilian healthcare companies, along with the Petrobras' (Brazil's state oil company) purchase of oil fields. Outside of Brazil, large 2021 deals thus far include the US$4.8 billion merger of the Mexican Televisa network with Univisión (a Spanish-language news network based in the U.S.), along with the US$1.3 million acquisition of Procaps (a Colombian pharmaceutical forms manufacturer) by Union Acquisitions, a blank check company (i.e. a firm created for the purpose of acquisitions) based in the U.S.[8]

> "The first thing that foreign investors must take into consideration is that merger control regimes are very disparate throughout the region."
>
> Teresa Tovar
> Partner
> Lima Office

What is driving this surge? According to Esteban Rópolo, partner at Baker McKenzie and Chair of the Antitrust & Competition Group in Latin America based in Argentina, it may be due to the devastating effect of the COVID pandemic on the LatAm economy. "As a consequence of the economic crisis, we are seeing a devaluation of assets in the Latin American economies, which ultimately represents an opportunity for potential investors, both local and foreign. This should create the opportunity for an uptick in local M&A activity, and this increase, of course, will result in more merger filings, but not just in the individual countries, but also in the entire region," he explains.

While much of the M&A activity in January-June 2021 has been in traditional sectors such as finance and energy, the tech sector is also starting to surge in this respect. For example, according to Transactional Track Record, in Q1 2021 there was a 56% increase in M&A, private equity, VC and asset acquisition transactions among tech companies in Brazil.[9] This activity could lead to greater regulatory scrutiny, observes Rópolo. "We have seen in Brazil and in Argentina, for example, a few investigations against tech companies, and this may result in heightened scrutiny by the local competition authorities when dealing with, and analyzing, potential M&A activity in the tech sector," he explains.

1 Forbes, citing Transactional Track Record, Mercado de M&A in América Latina alcanza aumento de 40% en 2021, 10/15/21
2 JD Supra, LatAm M&A Rebounds, 8/18/21
3 Latinvex, Latin America: M&As Jump 431%, 7/14/21
4 Forbes, citing Transactional Track Record, Mercado de M&A in América Latina alcanza aumento de 40% en 2021, 10/15/21
5 Ibid

6 Latinvex, Latin America M&As Jump 178%, 10/7/21
7 Reuters, Latin American M&A booms to 10-year high of $105 bln so far this year, 10/4/21
8 Ibid

9 Tech sector fuels growth in Brazilian M&A activity, Bnamericas, 4/20/21

> In the first half of 2021, M&A transactions in Latin America went up by 431%.

Although this steep increase in M&A will undoubtedly bring economic benefits to Latin America, the rising complexity of premerger regulation in the region will provide challenges for organizations on the acquisition trail.

Proper premerger preparation

Premerger control rules stipulate that businesses involved in deals affecting a national market must notify its competition authorities — if the transaction exceeds a certain threshold.

More than 100 nations worldwide now have premerger control regimes in place, including many in Latin America. Therefore, as deal volumes rise, the need for multi-jurisdictional notifications will follow suit.

Merger control is thus adding considerable complexity — and cost — to the process of completing an acquisition. Merging entities must ascertain:

- Which markets their deal will affect.
- Whether merger control regimes exist in each of those markets.
- Whether their transaction meets the notification threshold for each regime.

As Ropolo points out, "Thresholds vary between countries according to size; type (turnover, market share etc.); and the commercial activities of the companies concerned. As a result, notification may be necessary in some jurisdictions, but not in others."

An increase in M&A activity throughout the region presents both legal and economic challenges that multinational companies from the region or operating in Latin America have to face when dealing with multijurisdictional filings.

Where it is needed, regulators will ask for detailed information about the merger, competitors, customers, suppliers and entry conditions in all markets where the merging firms operate. As expected, each jurisdiction requires different filing requirements and fees. "You may have jurisdictions where a review could take between 30 to 40 days, and another jurisdiction where a review may take three months; you do not have a standard level of merger review throughout the region," observes Rópolo. Due to our extensive experience with multi-jurisdictional filings, this is why we recommend carefully consulting with external counsel to understand the requirements per jurisdiction and allow proper guidance of the process to ensure an expeditious and efficient filing.

Three takeaways for companies to consider in multi-jurisdictional merger filings:

- Each jurisdiction establishes distinct thresholds, requires specific filing requirements, schedules, rules, and may vary considerably in waiting periods, or require a second review. Consulting with experts to manage this process is critical to the deal.
- Many of the merger filing forms are lengthy, and the information requested may differ per jurisdiction. For this reason, it is key to align the timing of the mergers and thus properly facilitate the multiple submissions.
- Multi-jurisdictional filings will require proper coordination with each national competition authority in particular, including responses to requests for information, which will include document production.

Increased scrutiny of M&A deals

Despite the disparate nature of approaches in different Latin American countries, they do seem to have one thing in common: their competition authorities' desire to review deals is intensifying. Many are opting to review transactions that fall below notification thresholds, but still give them cause for concern.

> "An increase in M&A activity throughout the region presents both legal and economic challenges that multinational companies from the region or operating in Latin America have to face when dealing with multijurisdictional filings."
>
> Esteban Rópolo
> Partner
> Argentina Office

What's more, national regulators are increasingly collaborating — and sharing information — when looking at cross-border mergers. For example, Brazil's competition commission (CADE) worked with 36 foreign counterparts on 21 mergers in a single year (2017). It also became an associate member of the OECD competition committee in 2019.[10]

CADE is stepping up its efforts of merger oversight, which covers both domestic and international mergers. In 2020, CADE analyzed 454 mergers, compared to 433 in 2019, 404 in 2018, 337 in 2017 and 390 in 2016. In its Anuario CADE, the agency reported 76 instances of international cooperation in 2020[11], versus 33 in 2019 — a 130% increase. Based on recent data, it appears that CADE will continue this merger scrutiny: in the first half of 2021, CADE analyzed 245 mergers, 20% more than in the same period during 2020.[12]

Given these trends, there are certain pitfalls that companies need to keep in mind as they enter into a deal in any of the Latin American jurisdictions:

- Companies that fall foul of premerger rules risk seeing their deals reviewed by the authorities, which can have far-reaching repercussions.
- At the very least, reviews can delay transactions. They may also lead to remedies being imposed before a deal can gain approval (more on these below), or in some jurisdictions, the merger may be blocked altogether.

10 Ministério da Justiça e Segurança Pública, Cade lança caderno sobre cooperação com OCDE, 10/21/20
11 Anuario CADE 2020, p. 20
12 Anuario CADE, 2019 and 2020

- In addition, financial penalties can be imposed for late or incorrect filing, or for "gun-jumping" — i.e. completing a merger without regulatory approval (an action that can attract huge fines). In the worst-case scenario, companies may be ordered to unwind mergers after the fact.

Premerger control in Latin America

Most Latin American countries now have premerger control regulation in place.

Argentina's antitrust authority, which reviews around 350 cases each year, is transitioning from post-merger to pre-merger oversight. The new rules introduce a range of remedies, as well as fines for filing infringements. "We are expecting that pre-merger control may be introduced in the near future," says Rópolo.

Peru's pre-merger control law, N° 31112, went into effect on June 14, 2021.[13] INDECOPI, published also Guidelines for Notification Thresholds, and Standard Notification Form and Simplified to support the new pre-merger control regime.[14] It will be applied to both domestic and international borders that are connected to economic agents doing business in Peru. Previously, the scheme only applied to the electricity sector but now can be broadly applied, as long the deal exceeds 118,000 unit investment trusts (519.2 million soles or US$127.2 million) or 18,000 UIT (79 million soles or US$19.3 million).[15] Failure to file a notification and application for authorization of the transaction, could result in a penalty of a fine up to 500 UIT (approx. USD $550,000), up to a maximum of 8% of the gross income received by the offender or its economic group from the year prior to the resolution imposing the fine.

If a company executes the deal before submitting proper pre-merger notification, it can sanctioned with a fine of up to 1 000 UIT (approx. USD 1.1 million), up to a maximum of the 10% of the gross income received by the offender or its economic group the year prior to imposition of the fine.

Brazil has the region's most mature premerger oversight — and has been strengthening its powers. Reforms brought in during 2012 introduced notifications with suspensory effect; restructured the review process; and established higher filing thresholds. They also gave CADE the scope to:

- review deals that don't meet its notification criteria, if it believes they could harm competition.
- reopen investigations into previously approved transactions.

CADE has also made gun-jumping a priority, forcing the country's corporate culture to adapt. The commission reviewed 20 mergers for suspected gun-jumping between 2013 and 2019.[16] One of the largest fines ever imposed by CADE for gun jumping was R$57 million (US$16 million) in the IBM/Red Hat case in 2019.[17]

Chile's competition authority is also greatly focused on strengthening their merger control regime, which has been in force in Chile since June 2017.[18] The National Economic Prosecutor (FNE) issued two internal guidelines with the objective of providing legal certainty to economic agents who intend to merge, and who must require prior authorization from the FNE for such purposes, to provide predictability to such process and a rapid response.[19] Chile can also review non-notifiable deals, where lower secondary thresholds are met. It has not shied away from blocking mergers or handing down fines for gun-jumping. One such penalty, imposed on Minerva's acquisition of JBS, totaled US$3.8 million. A new pre-merger notification system has been implemented in Chile on Nov. 2, 2021.[20] Companies will be able to notify the Fiscalía Nacional Económica, or FNE, of their deals using a simplified mechanism.

Mexico has focused premerger scrutiny on certain key sectors, including energy, public health, transport, finance, agri-food and agro-chemicals. Its regulator demanded carve-outs before clearing the billion-dollar merger of ChemChina-Sygenta, Boehringer-Sanofi and Dow-Chemical-DuPont (more on carve-outs below). These were designed to allay concerns over the market power of the combined entity.

Countries such as Colombia and Argentina[21] have respectively increased- their fees and thresholds for merger control in the past two years.[22]

Ecuador, El Salvador, Honduras, Nicaragua and **Uruguay** have also established pre-merger control regimes.

Crossborder challenges

Given the divergence between countries' pre-merger controls, it is not uncommon for deals to be approved in some jurisdictions but blocked by others.

An example of high-profile transactions in Latin America:

- **LATAM Airlines**

  In a case that went to the Supreme Court, Chile blocked LATAM Airlines' proposed joint venture with American Airlines, British Airways and Iberia Airlines, citing price concerns. Uruguay, Colombia and Brazil had all approved the deal.

13 Peru: New Merger Control Regime Enters into Force on 14 June 2021 - Baker McKenzie InsightPlus, see also, Peru: Merger control regime receives final approval - Baker McKenzie InsightPlus, Latin America: New Merger Control Regime in Peru - Baker McKenzie InsightPlus
14 Peru: INDECOPI approves guidelines for the calculation of notification thresholds and notification forms - Baker McKenzie InsightPlus

15 La República, Fusiones entre empresas pasan desde hoy por control previo, 6-14-21

16 Global Competition Review, Brazil: Merger Control, 9/19/19
17 Centro de Competencia, A written podcast on competition law enforcement in Brazil, Centro Competencia, 12-19-19
18 Diario Oficial de la República de Chile, Aprueba reglamento sobre la notificación de una operación de concentración, 3/1/17
19 Chile: National Economic Prosecutor Updates and Strengthens Merger Control Regime - Baker McKenzie InsightPlus
20 Fiscalía Nacional Económica, Nuevo Reglamento de Notificación de Operaciones de Concentración del Ministerio de Economía, que entra en vigencia el 2 de noviembre, será abordado en charla de la FNE, 9/16/21

21 Baker McKenzie, Argentina: Antitrust merger filing thresholds raised, 1/27/20
22 Colombia: The Superintendence of Industry and Commerce sets the filling fees to be charged for Merger Control during 2021 - Baker McKenzie InsightPlus

Remedies proposed for the Chilean market by the airlines were not enough to appease competition concerns surrounding the deal, which ultimately did not go through.

In this case, the transaction was cleared, but only after significant challenges:

- **Walmart and Cornershop**

  Mexico's antitrust authority blocked US retailer Walmart's acquisition of grocery shopping app Cornershop, as it felt the deal would give Walmart excessive market power. Following the decision, Cornershop entered the Peruvian (and Canadian) markets.

  Subsequently, Uber acquired majority ownership of Cornershop. Ultimately, this transaction was approved by FNE (Chile's antitrust authority) in May 2020[23] and by Mexico's COFECE (Mexico's antitrust authority) in December 2020.[24]

Filing considerations

Given the complexities of international premerger control, Latin American firms doing cross-border deals must work seamlessly and efficiently across jurisdictions.

When filing information, careful coordination will be necessary in several areas:

1. Market and impact analysis

Two crucial components of pre-merger filings are market definitions (by geography and product); and an economic analysis of the deal's impact.

There can be no contradictions here between the submissions to each jurisdiction, unless they have a sound economic justification. With enhanced collaboration between national authorities, inconsistencies will be spotted and challenged.

> "While we have seen an increase in cooperation amongst competition authorities in the Latin American region and beyond, there is still a need for investors to educate themselves in the need to be consistent with the information provided to the different local authorities on many of these complex multijurisdictional transactions."
>
> Esteban Rópolo
> Partner
> Argentina Office

2. Data gathering

Merger filings demand significant amounts of extremely detailed information. For each entity involved (i.e. the purchaser and target, or the joint venture's parent companies), data must be provided on:

- the value of sales, net of VAT and rebates, plus other revenues, related taxes and group internal revenues for the most recent financial year — by jurisdiction, and audited where possible.
- subsidiaries, branches and assets, and the value thereof — worldwide, and in specific jurisdictions where required.

Centralizing this information will be crucial to filing quickly and efficiently, and within tight regulatory deadlines. Firms may only have around 30 days to file once they notify authorities of a proposed merger. Missing deadlines can delay transactions by many weeks, so it is advisable to have the data pooled and ready to go at the outset.

3. Remedies

If regulators fear a transaction might threaten competition, they may demand certain actions from the firms involved before giving the green light.

They may insist on structural remedies, such as carve-outs, in which assets belonging to the acquirer or target must be sold off as a condition of approval. A seminal example would be the Bayer-Monsanto merger in 2018. To gain clearance for this deal, Bayer had to divest all assets related to the selling of soybeans and herbicides to BASF for around €5.9 billion (US$7 billion).

Authorities may also demand behavioral remedies, which CADE imposed on the Bayer-Monsanto transaction. These included transparency over commercial policies, a ban on exclusive sales channels, and widespread, non-discriminatory product-licensing practices.

The three Cs

When mulling over transactions, companies must be prepared to navigate a highly complex, multi-jurisdictional merger control landscape. Success in this climate will come down to the 'three Cs':

- Coordination of notification and filing activity between jurisdictions.
- Cooperation with competition authorities in multiple countries.
- Consistency of information in all submissions.

Coordination, cooperation and consistency are key to the ability to interpret notification thresholds; assess the risk of deals triggering notifications; file information promptly and accurately; and prevent integration planning from becoming gun-jumping. In doing so, businesses can avoid challenges and delays — or worse, fines and red lights.

23 Fiscalía Nacional Económica, FNE aprobó sin condiciones la adquisición de Cornershop por parte de Uber, 5-29-20
24 Forbes, México aprueba la compra de Cornershop por parte de Uber, 12-14-20

Case Studies:
Chile cracks down on mergers — with mixed results

In June 2017, a new premerger control scheme took effect in Chile[25] and within a month, the Fiscalía Nacional Económica (FNE, the country's antitrust regulatory agency) had a challenging case on its hands. A baked goods company – which is part of one of the world's largest baked goods consortiums — sought to purchase a local baked goods company. In 2018, FNE blocked the sale, concluding that the "merging of both companies would have reduced the competitive intensity in the affected markets and that this would not have been sufficiently compensated by the efficiencies of the operation argued by the companies, nor by the mitigation measures they offered."[26] However, the acquiring firm appealed to the Tribunal de Defensa de la Libre Competencia (Tribunal for the Defense of Free Competition or TDLC), which allowed the merger to go through in late 2018.[27]

In 2018, in the first gun jumping case in Chile, the FNE accused the two companies of infringing Chilean competition legislation by implementing a concentration operation without prior approval. Although the companies notified the FNE of the transaction that would lead to market concentration, the transaction was finalized before the FNE provided a final approval.

The parties argued that they did not breach competition law since they entered into a carve-out agreement that prevented the operation of having effects in Chile. However, the FNE argued that the implementation of a transaction between foreign companies that has global effects and that must be submitted to the authorization of the Chilean authorities, cannot be implemented without prior authorization from the FNE. Such prior authorization is required even when the parties have executed an agreement to prevent the operation from generating effects in Chile. The FNE requested the imposition of a fine up to approximately USD $1.9 million to each company. The case was finally settled in court, whereby both parties agreed to pay a fine of approximately USD 1.0 million, although they did not recognize that they breached the competition law.

In December 2019, the FNE blocked a third merger. This case involved two chains of clinics which sought to merge. The FNE blocked the merger because "it would have created a monopoly in private hospitalization services" in a particular region of Chile. The parties did not appeal the decision in this case.[28]

More recently, in September 2020 the FNE asked the TDLC to fine an entertainment company more than 3.5 million euros (US$4.1 million) for providing false information during the investigation of the company's acquisition of another entertainment company.[29] In June 2021 the TDLC approved a settlement in which the parent company would pay a fine of 280 annual tax units (CHI$174 million or US$213,000), but the FNE indicated that this does not consider an injunction filed against a subsidiary of the parent company for filing false information when applying for the merger in 2019. The FNE has asked the TDLC to fine the subsidiary more than US$3 million.[30]

25 Fiscalía Nacional Económica, Hoy empieza a regir sistema para el control de operaciones de concentración, 6/1/17
26 Reuters, Fiscalía antimonopolios de Chile prohíbe a mexicana Bimbo comprar Nutrabien, 5/16/18
27 *La Tercera*, TDLC revoca resolución de la FNE y autoriza venta de Nutrabien por parte de CCU a Grupo Bimbo, 11/27/18

28 FNE, FNE prohíbe operación de concentración entre las dos únicas clínicas privadas de Iquique, 12/9/19

29 Centro de Competencia, FNE busca multa por infracción a régimen de fusiones, 9/28/20
30 Centro de Competencia, Conciliación parcial Disney/FNE, 6/9/21

04 | Bridging the Antitrust Compliance Gap

04 Bridging the Antitrust Compliance Gap

Why compliance programs are crucial resources in LatAm's current regulatory environment

Keeping pace with competition law is a key corporate priority for the year ahead: according to Baker McKenzie research, two thirds of business leaders and legal advisers involved in M&A see this as their most challenging compliance issue.

Yet in our experience, a surprising number of firms lack robust antitrust compliance programs. This could leave them exposed to illegal conduct, prompting lengthy investigations and hefty fines from competition authorities.

"I think the main obstacle behind the implementation of a robust compliance program is the gap in the culture of compliance," says Jesús Dávila, a partner with Baker McKenzie in the Venezuela office. "I believe many companies have a culture of looking at compliance as a "check the box" — which is not enough … Once companies achieve an understanding that compliance not only entails basic right and wrong conduct, but rather it requires an in-depth analysis of its individual business risks, that is when we will reach a point where everyone will understand that antitrust compliance programs are indispensable, and should be not only developed robustly but also implemented effectively," notes Dávila.

Teresa Tovar, a partner in Baker McKenzie's Peru office, expresses a similar view to Davila's: "I think the main objective should be to create a culture of prevention rather than taking a reactive approach toward compliance, and instead of thinking about the immediate cost, [companies should] look at the future possible harm of both soft and hard costs to the company if a violation occurs," she says.

Changing the business culture to help companies see compliance not as a cost center, but actually as a strategic asset with an impact on profits, will be more of a challenge in the near term as 2021 as countries in the region are approaching economic recovery.

The effect of an uncertain present — and future— on compliance

A key factor that could spark challenges to compliance could be the uncertainty that plagues Latin American economies as they recover from the effects of the pandemic. Despite COVID cases falling in recent months,[1] Latin American economies are not fully back to normal, and added to that, there has been political instability in certain counties. This could lead to illegal practices, says Tovar. According to Tovar, these challenges "creates uncertainty for investors and encourages anticompetitive behaviors. Companies may be faced with difficult decisions and may contact their competitors looking for a way out together…Because the economic situation in the region is complicated, companies truly convince themselves and often believe everything is justified," explains Tovar. "The incentive could be to collude, to set prices, conditions; to divide up the market, and that will be a challenge for compliance departments in general," she says.

Rewarding compliance

Authorities are increasingly demanding firms to implement and maintain effective global compliance programs. In this context, systematic compliance will help an organization to detect and minimize antitrust risks and prevent misconduct. What's more, should infringements occur, it will unearth them at an early stage. This can put the business in the best position to cooperate with authorities and potentially avoid fines by applying for first-in-line leniency (see page 00 for a more detailed discussion of leniency).

> "I think the main obstacle behind the implementation of a robust compliance program is a gap in the culture of compliance."
>
> Jesús Dávila
> Partner
> Venezuela Office

As authorities evolve their antitrust strategies, additional advantages are coming into play. Regulators are beginning to treat efforts to instill a culture of compliance as a mitigating factor when deciding financial penalties for violations.

Indeed, the US surprisingly signaled what amounted to a paradigm shift in its approach to antitrust enforcement by announcing its first tangible incentives for credible compliance practice.

1 NBC News, Covid-19 infections and deaths are dropping across Latin America, 10/27/21

Significantly, in July 2019 the US Department of Justice (DOJ) said it would give credit for good compliance at the charging stage of investigations,[2] as well as the sentencing stage. This means firms could avoid criminal proceedings altogether…or see significant reductions in fines if they are prosecuted. The DOJ also announced revisions to its manual and published an *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*,[3] which was meant to guide prosecutors' evaluation of corporate compliance programs at the charging and sentencing stage. A year later, June 2020, the DOJ updated the guidelines,[4] focusing on due diligence for mergers and acquisitions, third party relationship management, and the importance of tracking and utilizing data to measure a compliance program's effectiveness, amongst other nuances.

The shifting of the Latin American landscape

Jurisdictions around the world tend to take note of such major policy shifts from influential regulators like the DOJ. Throughout Latin America, antitrust authorities are already moving towards rewarding strong compliance programs. "You can certainly see as international counterparts develop more modern regulations, competition authorities in Latin America tend to adapt to trends and regulations that are being enforced in Europe or the US," says Raymundo Enriquez, partner at Baker McKenzie Mexico office.

2 The United States Department of Justice, Antitrust Division Announces New Policy to Incentivize Corporate Compliance, 7/11/19
3 https://www.justice.gov/atr/page/file/1182001/download
4 https://www.justice.gov/criminal-fraud/page/file/937501/download

> "I believe regulatory agencies are learning that they may benefit from sharing information, including best practices. The OECD has indicated very clearly with examples, that international cooperation results in effective and efficient enforcement of competition law globally."
>
> Raymundo Enriquez
> Partner
> Mexico Office

In addition, antitrust authorities in different countries are not as siloed as before, perhaps due to the pandemic, which forced more online interaction and outreach at a global level. "Even though each agency has its own rules, regulations and legislation, it's clear that they share information," says Raymundo Enriquez. "Companies need to really assess in advance what obstacles they are going to face in each jurisdiction and be prepared. Companies should expect an increase in international collaboration between competition authorities, and be aware that information may be shared, particularly during an investigation, and this may affect the company in another jurisdiction, which might not have been problematic at first," points out Enriquez.

Here's a look at how Latin American authorities in specific countries have acted in antitrust cases with compliance components in recent years.

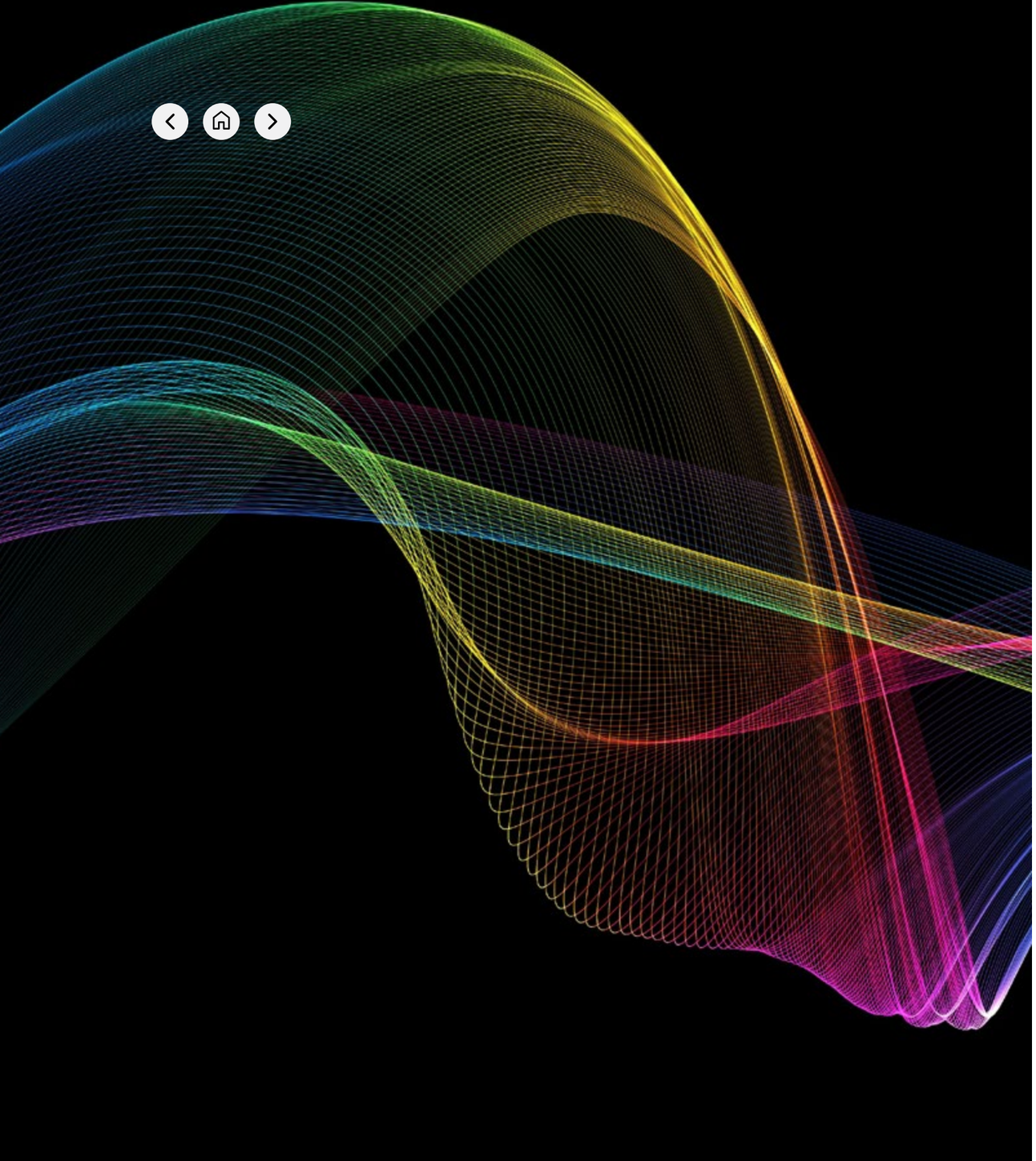
Chile recently saw a landmark case in this area. Its competition tribunal reduced a fine imposed on Walmart for fixing chicken prices, citing its compliance program as a mitigating factor. It was the first such award in the country. The antitrust tribunal went further, suggesting firms with proper compliance programs could be exempt from liability for anticompetitive behavior altogether. However, Chile's Supreme Court had a ruling that rejected this assertion, at least in the case of Walmart. As part of its ruling, the Court said: "That, in sum, the background information presented is not sufficient to exempt Walmart from liability considering its compliance and ethics program, mainly due to its incipient state of implementation and design (which does not allow us to sustain that such program actually existed) at the time the alleged events occurred."[5] These comments suggest that the Court was not arguing that compliance programs in general could be a mitigating factor in these cases, but rather that in this instance, available evidence did not make it clear that Walmart had a compliance program in place when the collusion took place. In another portion of the ruling, the Court says: "In general terms and in line with comparative law, the chances of recognition will always be greater for a firm that has a serious, credible and effective pre-existing program than for one that waits for an investigation to begin before implementing or improving its program."[6]

5 República de Chile, Tribunal de Defensa de la Libre Competencia, SENTENCIA N° 167/2019, 2/28/19 (above quote translated from Spanish)
6 Ibid p. 96, above quote translated from Spanish

Brazil's competition commission has published guidelines on establishing compliance programs[7]. These set out the benefits, the steps companies should take to avoid infringements, and the key components of an effective program. Significantly, the guidance states that firms seeking to implement "robust" compliance programs, comprising "proportionate and good-faith measures," will be eligible for penalty reductions. No such reductions have been awarded as of yet, however.

Peru is in a similar situation. Its competition regulator has prepared *Guidelines on Competition Compliance Programs*[8], setting out the benefits of antitrust compliance, as well as recommendations for building an effective program. The 2020 guide states when if a company's compliance program satisfactorily meets the established criteria, "[t]he Commission may grant a reduction of 5% to 10% of the fine that would have been applicable." Again, there have been no such rulings so far. According to Tovar, "The Peruvian authority will consider mitigating penalties for a company that had a compliance program in place, versus a company that did not implement a compliance program. One important thing, which INDECOPI (the Peruvian antitrust authority) does mention is that they will consider whether the senior managers of the company were involved in ordering, authorizing or promoting the anti-competitive behavior. If that is the case, the compliance program cannot be considered adequate, and as a result no benefit (credit) will be awarded."

7 CADE, Guia Programs de Compliance, 1/2016, See English version, compliance-guidelines-final-version.pdf (cade.gov.br)
8 INDECOPI, Guía de Programa de Cumplimiento, See English Version, Guidelines on Competition Compliance Programs, 3/20



"If you look carefully at the recent development of the regulations regarding compliance credit, such as Peru, this shows us that competition authorities understand the importance of compliance, and if companies have an effective antitrust compliance program, and an investigation occurs, they could be rewarded," observes Tovar.

Mexico's antitrust authority has not yet proposed penalty reductions for compliance efforts. However, the Mexican competition authority (COFECE) has actively promoted the importance of compliance programs, and encourages the development, implementation and actively promotes the benefit of such. Similar to its Brazilian and Chilean counterparts, COFECE has published guidelines[9] to that effect, encouraging companies to establish compliance program by promoting their mitigating effects. These include: (i) avoiding risks and sanctions; (ii) protecting employees; (iii) protecting the company´s reputation; (iv) creating security and certainty; (v) protecting commercial interests.

COFECE recently demonstrated exactly how seriously it takes non-compliance: in June 2021, it imposed a fine of MX$237 million (US$11.5 million) on a chemical and gas company due to its noncompliance with several commitments it made following an antitrust investigation. This case dates back to 2014, when COFECE investigated alleged anticompetitive acts, consisting of displacing its competitors and impeding their access to the market. The anticompetitive conduct was focused on the distribution and commercialization of oxygen, nitrogen and liquid argon in bulk. These gases are used in various industries, including aerospace, aeronautics, automotive, food, chemicals and more. In 2018, the company requested that COFECE's proceedings against it be closed, based on their agreement to adhere to various commitments which would address the anticompetitive practices. However, after monitoring the company's actions, COFECE determined that it did not honor the commitments in five major areas, including modifying customer and supply contracts, submitting information about the verification process in a timely manner, and other obligations it had agreed to. In addition to the fine, COFECE granted a term of 45 business days for the company to prove compliance with all the commitments. "Otherwise, fines may be imposed as an enforcement measure of up to the equivalent of 1,500 times the daily value of the Unidad de Medida y Actualización (UMA) for each day that elapses without complying with the order," according to COFECE.

Colombia's Superintendent of Industry and Commerce (SIC) recently declared: "If they (companies) engage in conduct that could be investigated by the authority, [compliance programs] could be considered as a mitigating factor for sanctions."[10] Colombia is another jurisdiction that has expressed the importance of an effective compliance program. The SIC has described the foundations of a sound compliance culture, are policy and process, training, audit, incentives and disciplinary action.[11]

9 COFECE, Recomendaciones para cumplir con la Ley Federal de Competencia Económica, See English Version, Recommendations for complying with the Federal Economic Competition Law, 8/19

10 Rubio, Claudia, SIC multaría a las empresas según un porcentaje de sus activos, Portafolio, 10/15/18

11 SIC, Libre Competencia Económica, 8/20/17

A connected approach

So how can organizations establish compliance programs amid a shifting antitrust landscape and mounting scrutiny?

Compliance should not be a standalone activity or carried out by individual functions in silos. It affects every part of the business and demands a holistic approach.

What is required in today's climate is a single, integrated compliance policy that:

- Recognizes common risks across the organization; and
- Fosters open collaboration between business functions to mitigate them

We call this connected compliance.

It is an approach that puts compliance at the heart of the business. Connected compliance entails best practice; clear policies and procedures; training, education and communication; rules for reporting misconduct; and a strong sense of accountability throughout the company.

Components of connected compliance

- Policies and procedures: Clearly laid out for employees to follow, and tailored to the rules of each country in which the business operates.
- Communication: Measures to communicate the program and policies to all staff, and set out what's required of each business unit.
- Training and education: Especially important for employees in functions or roles with a higher risk of infringements (e.g. bid management, sales, HR).
- Monitoring and audit: Periodic reviews of the program and its effectiveness.
- Program updates: Regular modifications in response to legal developments, market dynamics and changes to the business (such as entering a new market).
- Reporting and response mechanisms: Guidelines for reporting suspected violations, and a process for responding to such reports.
- Prevention: Steps to ensure violations do not reoccur.
- Rewards and incentives: Designed to encourage good compliance performance.
- Disciplinary measures: For employees who engage in illegal conduct or fail to comply with the compliance program.

> "I believe regulators are beginning to understand that rewarding compliance programs, implementing leniency programs, and becoming more of a strategic partner for companies in developing these programs, rather than being just a sanctioning body that imposes fines and penalties, is the proper way to address many antitrust issues that we have in our region."

Jesús Dávila
Partner
Venezuela Office

Creating a compliance culture from the top

Embedding a connected compliance culture starts at the highest level of the organization — i.e., with the senior leaders' words and actions.

Authorities want to see strong commitment, meaningful collaboration, and concrete actions from a firm's leadership team that will encourage the right ethos and behaviors, as well as discourage misconduct.

The board, C-suite and senior management tiers must therefore set the tone, emphasizing the value and importance of antitrust compliance, and underlining it with the appropriate budget and resources. They also need to know how the firm's compliance ethos is being followed on the ground, while ensuring that employees feel safe to report concerns.

This means clearly communicating and promoting compliance standards, sticking to them unequivocally, and disseminating them through the organization.

In summary

Latin America's antitrust climate is changing.

Enforcement is intensifying across the region, and regulators are demanding more from organizations seeking approval for deals. Yet at the same time, they are underlining the importance of compliance; and in some cases, showing a willingness to reward those that follow it.

Against this backdrop, the benefits of robust compliance cannot be overstated. Especially, with competition authorities promoting what they consider best practices, the way forward is clear.

We believe firms should go further, however. A holistic, connected approach to antitrust compliance achieves much more than mitigating risk and reducing penalties. It enables smarter decision-making, ultimately driving greater strategic value for the business.

Case Studies:
A costly case of non-compliance in Colombia

In 2003, Colombia's Superintendencia de Industria y Comercio (SIC) opened an investigation into whether Holcim Colombia S.A. and Cementos Paz del Río reduced cement prices by 30% for their Gancem and Hércules brands.

To avoid further investigation and possible sanctions, Holcim agreed to not enter into any more price-fixing agreements, so SIC closed its Holcim investigation in December 2005. Holcim's compliance with the agreement was backed by a performance policy underwritten by Seguros Comerciales Bolívar S.A. The insurance was for COL$763 million (US$199,000 at current exchange rates).

SIC continued to monitor Holcim for compliance and found that the cement maker modified cement prices between January and May 2006 — but did not provide sufficient documentation for how it calculated these price changes.[12] As a result, SIC fined Holcim's insurance provider for the total amount of the insurance policy.

Holcim filed a lawsuit, indicating that there was no stipulation for the presidency of the company or the competent body to submit in writing the criteria used to modify prices. Seguros Bolívar also filed a claim that alleged that SIC violated Holcim's right to due process. The insurance company argued that "since it was proven that the company complied with its commitment not to enter into anti-competitive agreements or conduct, for the insurer it is clear that it complied, and therefore there was no loss that would give rise to the policy being enforced."[13] Seguros Bolívar further argued that the insurance policy did not cover compliance with the monitoring scheme of the commitments made by Holcim.

The Administrative Court of Cundinamarca denied the claims made by both plaintiffs in 2012, but Holcim appealed this decision. "It insisted that the monitoring scheme that gave rise to the alleged noncompliance was never offered by the cement company, so that, in its opinion, it is impossible that there was a commitment in that sense."[14] The court also held that the commitments required Holcim to properly documenting its pricing policies. However, in 2021 the Council of State denied these claims, ruling that the insurance policy did include a provision whereby Holcim had to inform the SIC in writing about the criteria to modify prices.[15] It also accepted SIC's contention that it is entitled to monitor compliance, so Holcim's right to due process was not violated. Decisions by the Council of State are final and cannot be appealed.

12 Global Competition Review, Colombian court finds Holcim violated predatory pricing commitments, 8/19/21
13 Consejo de Estado de Colombia, En firme decisión de la SIC, que hizo efectiva póliza por incumplimiento de compromisos asumidos por Holcim S. A. para no ser investigada
14 Ibid.
15 Consejo de Estado de Colombia, Sentencia en Segunda Instancia, 7/9/21

Contributors

Argentina

Esteban Rópolo

Partner – Latin America Chair
Buenos Aires
Esteban.Ropolo@bakermckenzie.com

Esteban Rópolo is a member of the Buenos Aires Bar Association. He was a professor in leading universities in Argentina — including University of Buenos Aires, Argentina Catholic University and Universidad del CEMA — where he taught political economy, foreign trade legal regime and private law. He has written a book on competition law and also contributed articles related to his areas of practice.

Esteban routinely advises on foreign trade, antitrust and general practice matters. He has extensive experience in litigating complex customs valuation issues, including the defense of customs values resulting from the adoption of transfer pricing strategies by foreign multinationals. He is the Chair of Baker Mckenzie´s Latin America Steering Committee of the Antitrust & Competition practice group and member of the International Commercial & Trade Steering Committee as as the representative of Argentina.

Trench Rossi Watanabe in Brazil

Paulo Casagrande*

Partner, Trench Rossi Watanabe
Sao Paulo
Paulo.Casagrande@trenchrossi.com

Paulo Casagrande joined the Firm in early 2020 as the partner in charge of the Antitrust & Competition group. Mr. Casagrande has 20 years of professional experience, both in the private and the public sectors.

At the federal government, he was the first ever Head of the Bid Rigging Unit at the Secretariat of Economic Law of the Brazilian Ministry of Justice (SDE), the agency then in charge of investigating cartels before the reorganization of the Brazilian Competition Defense System in 2012. During his stint with the government, he conducted several investigations together with other enforcement agencies, and also represented the Secretariat at the meetings of the Competition Committee of the Organization for Economic Cooperation and Development (OECD) in Paris (France).

While in the private bar, Paulo was a partner at leading international and Brazilian Law firms, and has a deep knowledge of several industries and a broad business vision. He has been especially active in the representation of clients before CADE (the Brazilian antitrust agency) in complex merger reviews and investigations of alleged anticompetitive practices. Paulo also accumulates extensive experience in assisting infrastructure and tech companies active in dynamic digital markets.

*Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law

Chile

Rodrigo Díaz de Valdés

Partner
Santiago
Rodrigo.DiazdeValdes@bakermckenzie.com

Rodrigo Díaz de Valdés heads the Dispute Resolution and Antitrust practice groups of Baker McKenzie's Santiago office. He has represented the Chilean State, as well as major transnational and local companies in a broad range of cases, ranging from long-term energy contracts and construction projects to investment protection matters. He is ranked among the most recommended lawyers for dispute resolution, antitrust and public law by Chambers & Partners.

Rodrigo serves as arbitrator of the Center of Arbitration and the Chamber Commerce of Santiago, and is a professor of constitutional and civil law at the Catholic University's School of Law. He has written articles for various publications, particularly on constitutional law, civil liabilities and arbitration matters.

Rodrigo focuses his practice on litigation as well as domestic and international arbitration, particularly in the areas of civil, administrative, constitutional, commercial, regulatory, insurance, securities, finance, insolvency and bankruptcy matters. He has extensive experience in complex disputes and has appeared in cases under major domestic and international arbitration rules.

Colombia

Carolina Pardo

Partner
Bogota
Carolina.Pardo@bakermckenzie.com

Carolina Pardo joined Baker McKenzie in 1994 and is a partner of the Firm since 2008. She is currently a member of the Global Steering Committee for the Firm's TMT industry group and of the Global Steering Committee for the Firm's Compliance & Investigations Group. She was a member of the Global Steering Committee for the Firm's Global Antitrust and Competition from 2016 and until 2020 and is currently a member of the Latam's Antitrust Steering Committee.

She graduated as a lawyer and a specialist in International Contracts Law from Universidad de los Andes in Bogotá. She obtained a LL.M. with emphasis in International Private Law and Competition Law from the London School of Economics and Political Science.

Over 25 years, she has advised major national and international clients on matters related to compliance with data protection, competition and consumer law rules. She has represented clients in investigations and submissions related to data protection and competition matters in Colombia and has successfully coordinated and prepared white paper proposals to national authorities on behalf of major industrial groups in Colombia.

In 2016 *Global Competition Review* selected her as one of the 100 most influential women in antitrust. The last two Superintendents of Industry and Commerce have selected Carolina as a Non-Governmental Advisor to the Colombian Antitrust Regulator.

Mexico

Raymundo Enriquez

Partner
Mexico City
Raymundo.Enriquez@bakermckenzie.com

Raymundo Enriquez is currently the managing partner of the Mexico offices and the lead partner of Baker McKenzie's Antitrust Practice Group in Mexico City. He was a member of the Firm's Executive Committee and a previous chairman of the Latin America Regional Council where he also served as the Latin America chair of the Global Diversity and Regional Pro Bono Committees. Raymundo is recognized as a leading lawyer for competition / antitrust and for business by Chambers Latin America. He served as a board member for several Mexico companies. In addition, he was a visiting lecturer at the Mexican Bar Association and a part-time tax and foreign trade law professor at Universidad Iberoamericana, where he obtained his JD from the university's School of Law.

Raymundo focuses his practice on foreign trade and competition law. He advises and represents clients in proceedings before the Mexican antitrust authority. He also has extensive experience assisting clients in a wide range of issues involving merger control, compliance programs, cartel investigations and antidumping proceedings involving WTO.

Peru

Teresa Tovar

Partner
Lima
Teresa.Tovar@bakermckenzie.com

Teresa Tovar regularly sponsors companies in proceedings before INDECOPI in matters of free competition, consumer protection, unfair competition and the elimination of bureaucratic barriers. She is a representative of business associations before the National Council of Consumer Protection of INDECOPI. Teresa is recognized in competition law by diverse prestigious international publications such as Chambers & Partners, PLC Which Lawyer? and Who's Who Legal?

Teresa is experienced in matters related to the application of the norms of free competition and the regulation of public services and transport infrastructure, both in administrative processes and in consultancy.

Venezuela

Jesús Dávila

Partner
Caracas
Jesus.Davila@bakermckenzie.com

Jesús Dávila joined Baker McKenzie in 2002 and became partner in 2009. He is recognized as a leading lawyer in Venezuela by Chambers Latin America and IFLR1000. Jesus advises domestic and multinational companies on the full scope of corporate transactions, including mergers, acquisitions, takeovers, joint ventures and a variety of other corporate work. He has a strong track record providing insightful advice to companies on matters of antitrust, foreign investment and technology transfer, IT/Communications, and trade and commerce. Jesus has been a professor in various renowned universities in Venezuela.

Jesús has assisted several national and multinational clients and has vast experience in corporate reorganizations, helping clients adapt to the challenging Venezuelan environment. Additionally, he manages global technology agreements, procurement and major IT transactions. Jesús has handled important outsourcing and telecommunications matters with a high level of proficiency recognized by his clients. Other areas of expertise in which his experience can be highlighted are marketing, regulatory and public issues.

Mexico

Natalie Flores | Co-Author

Knowledge Lawyer for Antitrust & Competition
for North America and Latin America
Mexico City
Natalie.Flores@bakermckenzie.com

Natalie Flores is currently the regional knowledge attorney for North America and Latin America in the Global Antitrust & Competition Group in the Firm's Mexico City Office. She has over ten years of experience as an attorney, and manages and executes regional and global legal content projects, training and client initiatives for the Competition Group within the context of the Firm's knowledge strategy across the region.

Natalie oversees all regional knowledge for the antitrust and competition group for the Americas, including develop thought leadership, client training, and publications, amongst other antitrust initiatives for the region, and advises a diverse range of industry clients in multijurisdictional competition matters.

Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 65 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

bakermckenzie.com