Special Edition
No-Poach Agreements:
A Threat to Labor Mobility in Latin America
Foreword

Antitrust law in Latin America is evolving. Stronger cooperation among regulators and the growing influence of the OECD — to which Chile, Colombia and Mexico are already members, and Brazil is an active partner — are giving rise to more stringent and sophisticated enforcement.

In the last few years, we have seen authorities in the region take a tougher stance – from imposing steep fines on companies engaging in cartel activity in Brazil, Colombia, Chile, Mexico and Peru, to pursuing criminal action to penalize bid rigging. Furthermore, the Colombian authority has imposed fines on a company for paying the fines of individuals in a cartel investigation. Governments in the region have likewise recently taken the following steps to strengthen policy and enforcement:

- Argentina’s Competition Commission has stepped up both its enforcement and merger control activities, although the competition law enacted in 2018, and the Senate approved a proposed bill in 2021 to make certain amendments, it has not been fully implemented in key areas such as the leniency program, the creation of a new competition authority and the introduction of a pre-merger control system.

- Peru implemented a new regimen on merger control that applies to all sectors, which entered in force in June 2021. Since then, the antitrust authority issued guidelines related to threshold calculation methodology, types of business concentration operations, among other aspects. On the other hand, the authority also issued Guidelines on no-poaching and wage-fixing agreements and issued draft guidelines on antitrust infringements through collaboration agreements in tenders.

- In Colombia, a draft Bill of Rights “through which the right to participate in the market is guaranteed, the collective right to free competition is protected and other provisions are issued” was proposed in July 2020. However, it seems that the draft has not been debated at the legislator branch of the state.
In March 2020, the Chilean president submitted a bill to Congress to increase enforcement against cartels. The main aspects of the bill include: (i) new techniques for the investigation of cartels, such as surveillance techniques to obtain banking records (such as deposits and transactions) of companies or individuals under investigation; (ii) criminal sanctions for opposing dawn raids; (iii) the increase to five years of the minimum imprisonment sanction for cartels that affect goods or services of first necessity; and (iv) the protection of whistleblowers.

A consistent and coordinated approach to antitrust issues, plus understanding the differences in the legal environment, is key to achieving deal values while avoiding costly delays, investigations and penalties.

This handbook offers guidance on antitrust and competition regulations in seven Latin American countries. It was developed to provide clarity on the merger control regimes, cartel enforcement practices, rules on abuse of dominance, and investigation standards and methods applied by authorities in each jurisdiction. We envision the handbook to be a practical resource for multinationals trying to harmonize their approach to antitrust compliance in different countries, as well as for local companies that are bringing their compliance programs up to international standards.

Antitrust and competition professionals from Baker McKenzie’s Latin America offices contributed to the development of this handbook. These professionals are local practitioners experienced in collaborating with counterparts in Europe, the US and Asia, and offer a broad perspective on policy, local and international investigations, and leniency. Some of our lawyers have also advised governments in the development of laws in their respective jurisdictions and can provide insight into regulators’ approach to antitrust issues.

We hope you find this handbook helpful. If you have questions about adopting antitrust compliance programs or handling investigations, our lawyers, whose contact details are provided in this handbook, would be happy to discuss these with you.

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Argentina
Merger control

What is the merger notification criteria and timeframe?

Notification is triggered upon a change of control. "Control" is defined as rights, contracts or other means, which either separately or in combination, and in all the factual and legal circumstances, confer on the acquirer the ability to exercise decisive influence on an undertaking. Control may be held by one party alone (sole control) or by several parties acting jointly (joint control). There is no strict percentage required to meet the shareholding test, though control was found to exist in the Telefónica/Telecom case on the basis that the minority stake purchased by Telefónica allowed it to have a significant presence on the board of directors of its main competitor, and thus to have knowledge of its commercial policies.

Filing must take place within seven calendar days after the closing of the transaction. However, under Argentina's Competition Law No. 27,442 ("Competition Law"), one year after the new competition authorities, envisaged by the Competition Law, are appointed, a pre-merger system will enter into force by means of which filing must take place before control is acquired. There is no sign yet if, and when, the new authority will be finally appointed.

In May 2023, Resolution 905/23 of Commerce Secretariat ("Resolution") introduced important changes to the merger control procedure. These changes should enter into force 30 days after the publication of the Resolution in the official gazette (i.e., 15 June 2023).

The main changes introduced by the Resolution are the following:

Creation of a new summary procedure (shorter and requiring the submission of a smaller volume of information) for the analysis of those mergers that do not create competition concerns. The Resolution instructs the Competition Defense Commission ("Commission") to determine those concentrations that will qualify for such summary procedure.

Creation of new notification forms: Form F0 for those transactions that qualify for the summary procedure; Form F1 (to be jointly filed with Form F0) for those transactions that do not qualify for the summary procedure; and Form F2 for more complex mergers.

Greater information requirement in the forms, as well as the need to justify why the parties do not have the information required by the Commission.

The parties may justify the transaction based on additional arguments such as employment generation, increases in income, import substitution, investments, environmental issues, diversity, etc.

In the current post-merger control regime, these changes would not have a substantial effect on the procedures (especially on the Commission's rather long review process).
However, if the pre-merger control regime is introduced sometime in the future, we believe that the Resolution may become an important obstacle to the expedite analysis and approval required by such premerger regime.

**Filing threshold**

The Competition Law prohibits any merger that may have as a purpose or effect the limitation or distortion of competition in a way that is detrimental to national economic interest. Any merger that meets the definition of “merger” under the law and the filing thresholds described below must be notified to the Argentine Antitrust Commission ("Commission").

The Competition Law establishes that any of these transactions must be reported to the authorities when the cumulative annual turnover in Argentina of the parties involved exceeds 100 million adjustable units (currently, AR$ 8,345,000,000). This amount is updated on a yearly basis based on the Consumer Price Index ("CPI"). For the purposes of this calculation, the annual turnover in Argentina of the acquiring group plus the acquired company or companies must be taken into account, explicitly excluding the seller’s turnover. For the purposes of the Competition Law, “cumulative business volume” means the total gross ordinary sales of goods and services (locally and through exports) of the companies mentioned during its latest fiscal year, less any discount on sales, value-added tax and any other taxes directly related to the business volume.

The cumulative business volume is calculated by taking into consideration the sales of the following:

- **a.** The acquired entity

- **b.** The entities in which the acquired entity has, directly or indirectly: (i) more than one-half of the equity; (ii) the power to exercise more than one-half of the votes; (iii) the power to appoint more than one-half of the members of the supervisory committee, the board of directors and any other governing body of the entity; or (iv) the right to direct the activities of the entity

- **c.** Any entity that enjoys any of the rights listed in (b) with respect to any of the affected entities

- **d.** Any entity in which any of the entities listed in (c) has any of the rights listed in (b)

- **e.** Any entity in which any of the entities listed in (a) through (d) can exercise any of the rights listed in (b)

**Transactions exempt from a merger notice filing**

The following are transactions exempted from a merger notice filing:

- **a.** The acquisition of entities in which the buyer has had more than 50% of the equity (exceptions may apply, resulting in the need to analyze the obligation to notify on a case-by-case basis)

- **b.** The acquisition of bonds, debentures, shares without voting rights or any other debt security of the entity

- **c.** The acquisition of one entity by one foreign group of companies that has had no assets or shares in other Argentine entities (exceptions may apply, resulting in the need to analyze the obligation to notify on a case-by-case basis)

- **d.** The acquisition of liquidated companies that did not operate in Argentina during the year prior to the acquisition

- **e.** Transactions exceeding the AR$ 8,345,000,000 threshold may still be exempted from notification if they have the following cumulative characteristics:
  - The total value of the assets transferred in Argentina does not exceed 20 million adjustable units (currently AR$83.45 per unit).
  - The total price for the transaction in Argentina does not exceed 20 million adjustable units.
The acquiring group has not entered into any other transaction exceeding the total amount of 20 million adjustable units in the previous 12 months and 60 million adjustable units in the previous 36 months in the same market.

Main characteristics of the merger clearance process

Currently, the notification to the authorities must be filed within the following timeline, whichever occurs first:

a. Within one week from the date the agreement is executed
b. Within one week from the date of publication of the purchase offer
c. Within one week from the date of acquisition of a controlling participation

Executive Order No. 89 clarifies the law on the issue of when the one-week filing period starts. In the case of an acquisition of shares in a company, one week starts to run as of the date when the acquisition of the ownership rights over the shares becomes effective, per the relevant document (in fact, when the transfer of the shares is notified to the target company pursuant to Article 215 of the Commercial Companies Law). This means that the notification may take place up to one week from the closing of the transaction.

In a consultative opinion, the Commission has established that transactions subject to the obligation to file may be closed before approval, but they will not have any effect between the parties or vis-à-vis third parties until approval is granted. From a practical standpoint, it is difficult to determine the effects of this interpretation in the case of a transaction that has already been closed and for which authorization is later denied. However, in controversial cases, it is advisable not to close before approval is obtained to avoid these uncertainties. It takes approximately one year to obtain clearance of a transaction due to the many questions raised by the Commission, which interrupt the 45-day approval period set forth in the Competition Law.

Filing must be made, as applicable, by:
(i) the acquiring party or its immediate or final controllers;
(ii) the merging and merged parties or its immediate or final controllers; or
(iii) the company that acquires substantial influence in the competitive strategy of another company, or its immediate or final controllers. In all cases, the notification will be optional for the selling party. However, the competition authorities may require the participation of the seller or assignor, as appropriate, in the notification process.

The Competition Law includes the obligation to pay a filing fee, the exact amount of which shall be determined by the National Executive Branch and which will be adjusted on a yearly basis. However, until the new competition authority is appointed, no filing fee applies.

However, according to the Competition Law as explained above, one year after the new competition authorities are appointed, a pre-merger system will enter into force by means of which filing must take place before control is acquired. Because there is no indication that the new authority will be appointed, the pre-merger regime is not expected to become operative in the foreseeable future.

In this regard, if and when such pre-merger system enters into force, filing must take place prior to any agreement or action that may constitute an acquisition of control. Specifically, according to the Competition Law, filing must occur prior to the following events:

a. Mergers between companies, before signing the definitive merger agreement
b. Bulk transfers, prior to the registration of the sale document in the corresponding Public Registry of Commerce

ARGENTINA
c. Acquisitions of ownership or of any right over shares, equity participations or debt securities, prior to the day in which the acquisition of such rights is completed, in accordance with the agreement or acquisition contract.

d. In all other cases, prior to the enforcement of the legal act (according to the applicable legislation), to the fulfillment of the suspensive condition to which said act is subject, or to the events or facts that imply the takeover of control or the acquisition of substantial influence in the decision-making process of the company.

Finally, the Commission has issued a Guideline for merger controls that summarizes the case law and decisions taken by the Commission in the past.

**Notification duty failure and legal consequences**

Failure to perform the notification duty may trigger fines of up to 0.1% of the consolidated Argentine annual turnover of the economic groups involved, per day of delay registered during the last fiscal year until the required notification is filed. If the previous criterion cannot be applied, the fine may be up to 750,000 adjustable units per day of delay. The days will be computed from the day in which the obligation to notify the economic concentration became due or since the taking of control is completed.

**Cartels and other anti-competitive agreements**

**Prohibited agreements by object and effect**

In Argentina, there are no *per se* antitrust violations. All commercial policies must be analyzed under the “rule of reason.” This means that all the competitive and anti-competitive effects of a policy must be considered before reaching a conclusion on whether it violates antitrust regulations. Issues such as whether the company imposing the policy has a dominant position in the market and the existence of effective competition in the market must be taken into account before reaching a definitive conclusion on the legality of a particular policy.

As a result of the above, Argentina’s law does not prohibit or sanction monopolies or companies with a dominant position. It only sanctions acts and conduct that may: (i) restrict competition; or (ii) constitute an abuse of a dominant position, provided that such acts and conduct affect the general economic interest (generally understood as consumer welfare). Like any antitrust law, the Competition Law generally forbids two kinds of conduct: (i) agreements between two or more independent firms that are anti-competitive in purpose or effect; and (ii) single company conduct that is abusive, predatory or exclusionary.
**Hard-core cartels**

The Competition Law establishes a non-exhaustive list of conduct/actions that are absolutely restrictive of competition and are presumed to cause damage to the general economic interest, including the following: (i) arranging directly or indirectly the selling or purchasing price of goods or services offered or demanded in the market, as well as exchanging information with the same object or effect; (ii) distributing horizontally areas, markets, customers and sources of supply; (iii) establishing obligations to (a) produce, process, distribute, purchase or market only a limited or restricted amount of goods, and/or (b) provide a restricted or limited number, volume or frequency of services; and (iv) establishing, arranging or coordinating positions or abstention in tenders, contests or auctions. This behavior is known as “cartelization,” and such agreements between competitors will be null and void, and consequently will not have any legal effect.

It should be noted that the conduct listed above would constitute anti-competitive practices that restrict competition and therefore will be prohibited, to the extent that their purpose or effect is to limit, restrict or distort competition or market access resulting in a prejudice to the general economic interest. On the basis of the above, “cartelization” may be defined as any agreement between competitors whose purpose or effect is to restrict or limit competition between them, whether that agreement is about prices, quantities to be produced, customer or market allocation, or on any other element related to the competition between those companies.

The cartelization agreement does not require any basic formality to be sanctioned; it is not even necessary for it to be in writing. It is enough that there is an agreement of wills (even tacit) for a cartel to be set up. In the latter case, proof of the existence of the cartel shall be circumstantial (for example, the existence of information exchange between competing companies, economic evidence regarding the structure of the market, meetings and telephone calls). With regard to the requirement that the cartel adversely affect the general economic interest, it should be noted that taking into consideration the Commission’s case law, the likelihood is very high that the Commission would deem that such an agreement affects the general economic interest.

**Vertical restraints**

As explained above, there are no per se antitrust violations in Argentina. All commercial policies must be analyzed under the “rule of reason” before any definitive conclusion on the legality of a particular policy is reached. However, in general terms, the following policies (if applied by a dominant company) must be analyzed carefully before implementation: (i) exclusivity contracts and long-term supply agreements; (ii) volume and loyalty rebates; (iii) imposing unfair purchase or selling prices or other unfair trading conditions; (iv) setting minimum sale prices; and (v) price discrimination.

**Resale price issues**

The Commission has ruled that maximum resale prices may be used to control the prices at which products would be sold to consumers, to avoid any incentive that the distributor may have to increase prices due to certain market rigidities or to the special position of the distributor in such market. In such cases, the Commission considers that the imposition of a maximum price on the distributor, in principle, should not be considered an unlawful restraint of competition. However, if the company imposing such maximum resale prices has a dominant position in the market, the economic effects of this policy should be carefully analyzed to determine whether such policy affects competition in the long term.
On the issue of minimum resale prices, the Commission has said that “in principle, they affect consumers because they limit the ability of competition to reduce prices at the retail level,” thus resulting in a prior limitation or restriction of competition that, if exercised by someone with a dominant position in the market, may result in a breach of the Competition Law and the imposition of fines. The general principle that may be deduced from this precedent would be that minimum price policies would be illegal if exercised by someone with a dominant position in the market.

**Fines**

The penalties for anti-competitive actions include: (i) fines; (ii) cease and desist orders; and (iii) the dissolution or spin-off of the involved companies. Furthermore, the directors, managers and officers of the companies involved are jointly liable for the fines imposed on the companies if they are found to have contributed, by their acts or omissions, to the existence of the cartel. There is no criminal liability provided in the Competition Law.

Concerning fines, the Competition Law establishes that the infringing parties can be fined in the higher amount under the following two methods:

- Fines of up to 30% of the consolidated Argentine annual turnover of the last fiscal year of the infringing economic groups associated to the products and/or services involved in the perpetuation of the anti-competitive conduct, multiplied by the number of years the conduct persisted, but which amount should not exceed 30% of the consolidated annual turnover generated in Argentina in the last fiscal year by the economic group to which the perpetrator belongs

- Up to double the economic benefit generated by the anti-competitive conduct (illicit gains)

If the calculation of the fine cannot be determined by either of these two methods, the fine will be up to 200 million adjustable units.

In a rare first instance case, the Argentinian National Commission for Competition Defense (CNDC) issued a decision imposing a behavior and structural remedy, as part of a sanction for a cartel practices. In December 2022, the Secretary of Commerce sanctioned a series of nightclub operators for cartel conduct, the sanction included an order to divest part of the assets of one of the companies involved in the cartel. The CNDC fined the cartelists USD 1.5 million for price-fixing and market allocation of local nightclubs in Argentina. In addition to ordering the companies to immediately cease their anticompetitive conduct, one of the conspirators were also ordered to divest one of its nightclubs to a third party. The CNDC determined it was necessary to break up the company’s market power, and issued an injunction to cease the anticompetitive conduct, as well as required a divestment of the company. This is the first time that the CNDC has recommended the adoption of such broad and ambitious divestment measures in the framework of an investigation for violations of competition regulations.
**Leniency programs**

The Competition Law establishes a leniency program to facilitate the investigation of cartels by establishing the exemption or reduction of fines, as well as immunity from certain criminal sanctions and damages (with certain specific exceptions).

To be exempted from fines, the petitioner must carry out the following:

a. Be the first among those involved to provide information and supply evidence
b. Immediately cease the anti-competitive action
c. Cooperate fully and diligently with the competition authorities
d. Not destroy, falsify or conceal evidence of the anti-competitive behavior
e. Not disclose or make public its intention to request the exemption benefit, except to other competition authorities

If the petitioner is not the first to request the benefit, it may still request a reduction of between 50% and 20% of the maximum fine that otherwise would have been imposed if it provides additional evidence to the investigation.

The Competition Law also includes a supplementary benefit for the petitioner that, despite not being able to request the benefit during the investigation of the first cartel, provides information regarding a different cartel in another market. In such case, in addition to the exemption granted for such second conduct, the benefit will also consist of a reduction of one-third of the sanction or fine that would otherwise have been imposed because of its participation in the first conduct.

**Abuse of dominance or market power**

**Dominance or market power**

Dominance or market power exists when: (i) a company is the only buyer or seller in the relevant market; (ii) even if it is not the only one, it is not exposed to substantial competition; or (iii) due to its horizontal or vertical integration, it has the ability to determine the continued operation of a competitor in the market.

However, there is no specific market share threshold, neither in the Competition Law nor in local precedents above, in which dominance is presumed to exist. This issue must be analyzed on a case-by-case basis.

Being a dominant company is in itself not a violation of the Competition Law; dominant companies may continue to compete in the market. However, they have a general obligation not to destroy through unfair or abusive practices the little competition that may exist.
**Types of prohibited conduct**

As explained, the Competition Law only penalizes an abuse of such dominant position. What may be deemed abusive under the Competition Law must be analyzed on a case-by-case basis, as there are no per se antitrust violations. However, in general terms, the Commission follows the same principles used by other antitrust authorities, such as those in the US and the EU.

Examples of conduct that could be interpreted as antitrust violations include: (i) refusal to deal; (ii) tying the selling of a product to the acquisition of another product; (iii) exclusivity contracts and long-term supply agreements; (iv) volume and loyalty rebates; (v) imposing unfair purchase or selling prices, or other unfair trading conditions; (vi) setting minimum sale prices; (vii) predatory or excessive pricing; and (viii) price discrimination.

**Defenses, liability reliefs or exclusion**

As there is no prohibited conduct per se, there are also no specific defenses, liability reliefs or exceptions established under the Competition Law. Consequently, the main defense against an antitrust investigation would be that the conduct under investigation does not adversely affect the general economic interest.

Additionally, the Commission may not sanction companies when the alleged anti-competitive conduct results from governmental intervention (e.g., the government fixes retail prices to reduce inflation levels or encourages price-fixing agreements between competitors to stimulate sales).

Finally, the Commission has issued guidelines for the analysis of abuse of dominant position that summarizes the case law and decisions taken by the Commission in the past.

**Investigations and powers of authorities**

**Legal privilege**

Under Argentine law, all communications between a lawyer and their client are subject to secreto profesional (professional secret). Secreto profesional obliges the lawyer not to disclose any information, including documents provided to or exchanged with their client, therefore protecting the latter as the ultimate beneficiary of this privilege. Hence, in general terms under Argentine law, the only person capable of releasing the lawyer from such privilege would be the client.

Secreto profesional is imposed by law through punishing its violation as a criminal offense and additionally: (i) as part of the ethical code of conduct of the legal profession in force in each jurisdiction; (ii) by setting forth this privilege as one of the grounds for opposing giving testimony as a witness; and (iii) by imposing a duty to lawyers to abstain from being witnesses in a criminal investigation related to secret facts known while performing their work.
Argentine law does not distinguish between in-house and external lawyers for the purposes of imposing secreto profesional. Rather, as indicated above, the obligation to keep secret any information received or exchanged with the client is inherent to the legal profession. To our knowledge, this matter has not been specifically tested before a court, but in our view, there would be a reasonable basis to conclude that even in-house lawyers are subject to this privilege. Further, it can be argued that labor legislation reaffirms this privilege by mandating each employee to comply with all professional legislation, which, in the case of lawyers, would include the obligation to comply with the ethical code of conduct set forth by each jurisdiction where they are practicing.

As mentioned above, under Argentine law, the only person protected by secreto profesional is the client. Thus, the only person capable of releasing a lawyer from secreto profesional will be their client. Even if confronted by a local judge or by a governmental regulator, a lawyer subject to secreto profesional would be required to maintain secrecy regarding the requested information. Please note that the information and documents subject to this prohibition are acknowledged by the lawyer through their clients but does not include information and documents whereby the lawyer participated in the preparation. On the contrary, a party subject to a simple confidentiality agreement would, in principle, need to provide the requested information if asked by a tribunal with jurisdiction or by a governmental body.

**Judicial warrant**

The warrant will set out the limits to the search powers. Warrants will generally allow the officers to search and seize any record, book, account, document or computerized data that contains or is reasonably suspected to contain information relevant to any infringement or offense.
Fines imposed per industry group in Latin America
Baker McKenzie jurisdictions

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<thead>
<tr>
<th>Industry Group</th>
<th>Case</th>
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<tbody>
<tr>
<td>Consumer Good and Retail (CG&amp;R)</td>
<td>Anheuser-Busch Inbev subsidiary</td>
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<tr>
<td>Energy, Mining and Infrastructure (EMI)</td>
<td>YPF</td>
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<tr>
<td>Financial Institutions and Fintech (FI)</td>
<td>Prisma</td>
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<tr>
<td>Healthcare (HC)</td>
<td>Main manufacturers of oxygen for medicinal purposes</td>
</tr>
<tr>
<td>Technology, Media and Telecom (TMT)</td>
<td>Abuse of dominance case against Facebook/WhatsApp for changes in terms and conditions of privacy policies. Still ongoing. An injunction order was issued prohibiting implementation of the changes while investigation is still ongoing.</td>
</tr>
<tr>
<td>Industries, Manufacturing and Transportation (IMT)</td>
<td>Main cement companies</td>
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<td></td>
<td>Molinos Cañuelas and main wheat milling industry associations</td>
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<td>Quilmes (beer brewing company)</td>
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<td>Exclusivity agreements in point of sales.</td>
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Brazil
Merger control

What is the merger notification criteria and timeframe?

The Brazilian Competition Law (BCL) sets an objective list of transactions subject to mandatory pre-merger notification to the Administrative Council for Economic Defense’s (CADE, the antitrust authority), namely: typical merger and acquisition transactions (acquisition of control or significant minority shareholdings, as well as relevant productive assets); certain associative agreements; joint ventures; and consortia, except those formed solely for the purposes of participating in public bids.

Filing threshold

Apart from falling within the list of transactions above, the thresholds for mandatory filing are: (i) the transaction must generate at least potential effects in Brazil; and (ii) the parties’ economic group must meet the revenue criteria.

The effects requirement is often met when the target has a direct presence in Brazil through a subsidiary, distributor, commercial representative, etc., or an indirect presence through export sales. The revenue thresholds are as follows: (i) the economic group of one of the parties involved in the transaction must have had revenues in Brazil, in the year prior to the transaction, equal or higher than BRL 750 million (approximately USD 144 million1); and (ii) the economic group of at least another party to the transaction must have had revenues in Brazil equal or higher than BRL 75 million (approximately USD 14 million2).

It is important to stress that the revenues considered are those of the parties’ economic groups, not simply the revenues of the buyer and the target individually considered.

For the purposes of defining "economic group," Brazilian regulations state that one has to consider: (i) all companies that are controlled directly or indirectly by the same parent company or individual; and (ii) all companies in which any of the companies identified in item (i) holds an equity interest of at least 20%, directly or indirectly, in the corporate or voting capital. CADE’s Tribunal has recently stated that the concept of economic group is even broader, also encompassing the economic group of shareholders holding directly or indirectly an equity share of 20% or more in the party to the transaction, even if the shareholder in question does not exert control over the party.

In the case of investment funds, for revenue calculation purposes, the economic group should be comprised of the following: (i) the investment fund itself; (ii) the economic group of each investor that holds, directly or indirectly, interest equally to, or greater than, 50% of the fund involved in the transaction (it can be through individual participation or shareholders agreement); (iii) companies controlled by the fund involved in the transaction; and (iv) companies in which such fund holds directly or indirectly interest equal to or greater than 20% of the capital or voting share.

Nonetheless, CADE can request the notification of any transaction that does not meet these thresholds for up to one year after closing, with powers to order divestitures.

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1 Quotation from January 23, 2023.
2 Quotation from January 23, 2023.
Main characteristics of the merger clearance process

The BCL establishes a pre-merger notification regime, which requires parties to wait for the approval by CADE to close a transaction. There is no filing deadline, but transactions may only be implemented when the Brazilian authority grants clearance; a violation subjects the offenders to heavy fines. Therefore, parties must keep the physical structure and competitive conditions in the markets unchanged until the final antitrust clearance. Any transfer of assets or any influence of one party over the other, as well as any exchange of competitive-relevant information, is prohibited, unless strictly necessary for the execution of the agreements related to the transaction.

The maximum review period is 330 calendar days – 240 days for the "regular analysis," with a possible 60-day extension (at the request of the parties) or a 90-day extension (by the decision of CADE). Should CADE not issue a final decision within the 330-day period, the transaction is automatically cleared. However, this has never happened since the BCL entered into force in May 2012.

There is a fast-track procedure in place for the review of transactions that have no or very little possibility of causing competitive harm, such as: (i) classic joint ventures; (ii) absence of horizontal overlap; (iii) low combined market share (i.e., less than 20% in the case of horizontal overlap or less than 30% of the market share in any vertically related markets); and (iv) low market share increase.

The fast-track procedure is applied upon the authority’s discretion. CADE’s rules establish a 30-day (calendar) period for the review of these cases – any delay must be reported and justified to CADE’s president.

Notification duty failure and legal consequences

Failure to notify a transaction prior to its implementation might render the transaction null and subject the parties to fines ranging from BRL 60,000 to BRL 60 million (approximately USD 12,000 to USD 12 million3).

The regulations also provide for an exception to this rule, establishing the possibility of requesting a "preliminary authorization" to implement the transaction before clearance, but only if: (i) the transaction does not impose immediate harm to the competition; (ii) the measures to implement the transaction are entirely reversible; and (iii) the parties are able to prove that if such measures are not taken, the acquired company might suffer immediate and irreparable financial harm. CADE must analyze the request for preliminary authorization within 60 days from its submission.

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3 Quotation from January 25, 2023.
Cartels and other anti-competitive agreements

Section 36 of the BCL sets forth that any conduct of which the object is anti-competitive or has the potential to create the following anti-competitive effects is an antitrust violation: (i) limiting, distorting or in any way hindering competition; (ii) dominating a relevant market for goods/services; (iii) arbitrarily increasing profit; and (iv) abusively exercising a dominant position. This conduct may involve restrictions directed either to players who are active in the same relevant market of the offender(s) (horizontal restrictions) or to players active in markets vertically related to the market in which the offender holds a dominant position (vertical restraints).

Paragraph 3 of Section 36 of the BCL provides a list of examples of conduct that could be considered an antitrust violation, should its object or potential effects be among those forbidden by Section 36, such as: (i) fixing prices in collusion with a competitor, allocating markets among competitors and rigging bids; (ii) limiting or hindering access of new companies to the market; (iii) unjustifiably refusing to sell goods or render services within normal payment terms; and (iv) imposing resale prices, discounts, sales conditions, and minimum and maximum quantities or profitability upon distributors and retailers.

Antitrust violations might lead to the imposition of administrative fines and criminal sanctions, as will be further detailed in the section "Fines" below. Additionally, antitrust violations may also result in private damages claims, although this kind of lawsuit is still incipient in Brazil. Since Law No. 14,470/2022 entered into force, those who suffered damages due to cartel agreements and concerted practices affecting Brazilian markets are able to reclaim twice the value of their losses. This rule does not apply, however, when the defendants are companies that entered into leniency and settlement agreements with CADE, who remain liable for single damages only.

Prohibited agreements by object and effect

Hard-core cartels

Hard-core cartels are deemed to be illegal per se and therefore, any evidence indicating the existence of such conduct is sufficient for a conviction, regardless of whether it could indeed lead to anti-competitive effects. This conduct encompasses, for instance, agreements on prices, output level, market allocation and bid rigging.

Sanctions imposed on undertakings that engage in hard-core cartels are harsher than those applicable to other types of antitrust violations (usually ranging from 15% to 20% of the gross revenues accrued by the defendant in the affected market considering the year prior to the initiation of the administrative proceeding). CADE may also impose ancillary penalties, as further described in the section "Fines" below.

Furthermore, individuals directly involved in hard-core cartels might also be criminally prosecuted. Pursuant to Section 4 of Law 8,137/90, taking part in agreements with competitors with the purpose of either: (a) artificially fixing prices/output; (b) allocating market; or (c) controlling the distribution/supply chain to the detriment of
competition is a crime. Violators may be subject to imprisonment for two to five years and to a fine.

**Cartel Victims may seek Double Damages in Private Litigation**

After a long legislative process, a new Brazilian Federal law on cartel damages claims was enacted and entered into force (Law No. 14.470/2022) on 17 November 2022. The statute comes with new provisions that are expected to significantly increase incentives for these lawsuits in Brazil.

According to the new statute, those who suffered damages due to cartel agreements and concerted practices affecting Brazilian markets will be able to reclaim twice the value of their losses.

There are also specific rules allowing companies that execute leniency and settlement agreements with the Brazilian competition authority, CADE, to keep their incentives and avoid resorting to such negotiated solutions in administrative investigations. First of all, they will only be liable for single, not double, damages. Moreover, these companies shall only be responsible for damages they have individually caused.

Law No. 14.470/2022 further settles existing divergences on the applicable statute of limitations by explicitly providing that the victims have five years to sue, counted as of CADE’s final decision.

It also provides that the burden of proof falls on the defendants to demonstrate that they did not benefit from the collusive agreement in case they claim that price surcharges were transferred to downstream links in the productive chain (the so called "pass-on defense").

The new law only applies to lawsuits brought before civil courts. Thus, existing rules on administrative and penal proceedings relating to cartel conducts remain unchanged.

**Vertical restraints**

Vertical restraints are usually analyzed under the "rule of reason." CADE often does not make a clear distinction between vertical agreements and abuse of dominance. As a general rule, the first step in the Brazilian authority’s assessment is the confirmation that there is some degree of market power at the upstream or downstream levels of the supplier or the buyer, or at both levels. Pursuant to the BCL, players with market shares in excess of 20% are presumed dominant, although this assumption can be set aside if the party proves the opposite.

Once the authorities have established that the players under investigation hold a dominant position, they will then analyze the competitive conditions of the relevant market (rivalry, barriers to entry, availability of inputs, etc.) to assess whether the conduct has the potential to create anti-competitive effects.

**Resale price issues**

Resale price maintenance includes: (i) minimum resale price; (ii) fixed resale price; (iii) maximum resale price; and (iv) suggested resale price.

CADE assumes that setting minimum or fixed resale prices is anti-competitive, especially if the company under investigation holds a market share higher than 20%. Defendants are required to demonstrate the efficiencies resulting from the conduct to be relieved from charges. Maximum resale prices are often seen more favorably, without a presumption of anti-competitive effects.

Finally, suggested resale prices are seen as legitimate, provided that: (i) no sanctions are imposed by the distributor if the suggestion is not followed; and (ii) no formal or informal pressure is applied by the distributor so that the suggested prices are followed. Otherwise, CADE will consider that the suggestion conceals a fixed/minimum resale price, and thus will be presumed anti-competitive.
Fines

Corporate fines for antitrust violations range from 0.1% to 20% of the gross revenues accrued by the company in the fiscal year before the initiation of the administrative proceeding, in the industry sector related to the market affected by the conduct under investigation. However, CADE’s Tribunal may adopt a narrower cut for the base revenue used to calculate the fine, should using the industry segment revenue result in a disproportionate sanction. If it is not possible to calculate the corporate gross revenue, penalties could range from BRL 50,000 (approximately USD 10,000) to BRL 2 billion (approximately USD 390 million). The BCL also establishes aggravating and mitigating circumstances that must be taken into account by the antitrust authorities in the calculation of the fine.

Individuals who take part in antitrust violations may also be sanctioned. Company officers may be fined for 1% to 20% of the fine imposed on the corporate defendant, or between BRL 50,000 and BRL 2 billion, depending on their hierarchy and participation.

Apart from fines, CADE may also:
(i) determine the publication of the conviction decision in major newspapers, at the wrongdoer’s expense; (ii) debar wrongdoers from participating in public procurement procedures and from obtaining funds from public financial institutions for up to five years; (iii) include the wrongdoer’s name in the Brazilian Consumer Protection List; (iv) recommend that the tax authorities block the wrongdoer from obtaining tax benefits; (v) recommend that the intellectual property authorities grant compulsory licenses on patents held by the wrongdoer; and (vi) prohibit individuals from exercising market activities, on their own behalf or representing companies, for five years. CADE may also determine a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the harmful effects associated with anti-competitive behavior.

Leniency programs

The BCL governs the Brazilian Antitrust Leniency Program. Leniency agreements grant immunity to companies and/or individuals that disclose to CADE the existence of a cartel and that effectively and decisively collaborate with the authority in the investigation. If the cartel is already under investigation, an application for the program may still be accepted, provided that CADE does not have enough evidence to support a conviction of the defendants and that the applicant willingly cooperates with the investigation. In this case, however, leniency applicants will be granted partial immunity from administrative sanctions. A successful leniency application negotiated with CADE and the Public Prosecutor’s Office also shields the individual applicant from criminal prosecution for cartel and related crimes (e.g., conspiracy and bid rigging), but not from private enforcement (such as damages claims) or corruption charges.

4 Quotation from January 25, 2023.
5 Quotation from January 25, 2023.
Abuse of dominance or market power

Dominance or market power

Under the BCL, companies with a market share in excess of 20% are presumed to be dominant. Thus, conduct undertaken by such companies has the potential to create anti-competitive effects. While the mere possession of a dominant position does not constitute a violation of the law, the abuse of such power, in particular, when employed to exclude rivals, suffices for the intervention of the competition authority.

Typical examples of abusive practices include predatory pricing, limitation of access to inputs, and refusals to deal. CADE, however, will also look at the potential benefits arising from the conduct, such as the resulting efficiencies. Moreover, only if the potential harmful effects of the conduct outweigh its benefits will it be considered illegal and sanctions be imposed.

In these cases, sanctions also range from 0.1% to 20% of the revenues accrued by the company in the industry sector related to the market affected by the conduct in the year preceding the initiation of the administrative proceeding. Nonetheless, competition authorities tend to set a lower percentage than that adopted in cartels. In addition, authorities might determine the termination of the anti-competitive conduct of the company being investigated.

Types of prohibited conduct

As mentioned above, the BCL sets forth that any conduct whose object is anti-competitive or that has the potential to create the anti-competitive effects listed in Section 36 is an antitrust violation. CADE may prosecute a wide range of acts carried out by a company that holds a dominant position in a given relevant market. In this sense, it lists conduct that may be deemed anti-competitive if it is carried out by dominant players, such as limiting or hindering the access of new companies to the market, or unjustifiably refusing to sell goods or render services within normal payment terms.

Defenses, liability reliefs or exclusion

Even if CADE finds that the entity holds a dominant position in the relevant market at stake, and that there are potential anti-competitive effects, it might conclude that efficiencies resulting from the restraint outweigh its negative effects.

For efficiency claims to constitute exceptions for prohibited conduct, they ought to be evidence-based and clearly proportionate. Assessment of the efficiencies varies significantly on a case-by-case basis and might require economic proof. In any event, the party must prove that the restraint is the less restrictive means of achieving such efficiencies.
Investigations and powers of authorities

Legal privilege

Attorney-client communications, provided that they refer to legal advice, are considered legally privileged and are protected by Brazilian law from disclosure. CADE has no specific guidelines on legal privilege, although it is possible to request it in relation to the company’s documents during an investigation.

Judicial warrant

Brazilian enforcers (CADE included) may obtain a judicial warrant to carry out dawn raids should they succeed in demonstrating that there is sufficient preliminary evidence of the involvement of the seized undertaking in the unlawful conduct under investigation and that seized material could be used in such an investigation.

The warrant will set out the limits to the search powers, detailing to the best extent the location where the dawn raid will take place, as well as the reasons behind and the purposes of the dawn raid. Warrants will generally allow the officers to search and seize any record, book, account, object, document or computerized data that contains or is reasonably suspected to contain information relevant to any infringement or offense.
Fines imposed per industry group in Latin America
Baker McKenzie jurisdictions

<table>
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<tr>
<th>Industry Group</th>
<th>Company/Case Description</th>
<th>Year</th>
<th>Conduct/Cartel</th>
<th>Amount</th>
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<tr>
<td>Consumer Good and Retail (CG&amp;R)</td>
<td><strong>Ambev</strong>: The fine was reduced in 2015 (approximately USD 55.9 million) after CADE and Ambev entered into a judicial settlement.</td>
<td>2009</td>
<td>Abuse of dominance</td>
<td>USD 86.1 million (fine)*</td>
</tr>
<tr>
<td>Energy, Mining and Infrastructure (EMI)</td>
<td><strong>Air BP, BR Distribuidora (now Vibra), Raízen and Guarulhos International Airport</strong>: 2022</td>
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<td>Financial Institutions and Fintech (Fl)</td>
<td><strong>Royal Bank of Canada, Morgan Stanley and former Deutsche Bank currency trader</strong>: 2018</td>
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<td>FOREX Cartel</td>
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<tr>
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<td><strong>An international Medical Tech company</strong>: 2023</td>
<td></td>
<td>Bid-rigging</td>
<td>USD 10.8 million (settlement)</td>
</tr>
<tr>
<td>Technology, Media and Telecom (TMT)</td>
<td><strong>Oi</strong>: 2015</td>
<td>Abuse of dominance</td>
<td>USD 153.1 million (fine)</td>
<td></td>
</tr>
<tr>
<td>Industries, Manufacturing and Transportation (IMT)</td>
<td><strong>Höegh Autoliners</strong>: 2022</td>
<td>Price-fixing Cartel</td>
<td>USD 5.43 million (fine)*</td>
<td></td>
</tr>
</tbody>
</table>

*A settlement was reached with seven additional shipping companies, NYK Line, CSAV, K-Line, WWL, Eukor Car Carrier and 54 individuals in the same investigation, which resulted in agreements to cease their conduct and pay a total fine of 29 million reais (approximately USD 5.98 million).

**i. Ambev:** The fine was reduced in 2015 (approximately USD 55.9 million) after CADE and Ambev entered into a judicial settlement.
Chile
Merger control

What is the merger notification criteria and timeframe?

The Chilean Competition Law sets forth that "concentration" is any fact, act or contract, or a group of them, that has the effect that two or more undertakings that do not belong to the same business group and that act independently of each other cease to be independent in any sphere of its business. A concentration shall be deemed in any of the following circumstances:

a. The merger of two or more previously independent undertakings

b. The acquisition or the possibility of exercising decisive influence on an undertaking

c. The creation of an independent third undertaking that performs on a lasting basis all the functions of an autonomous economic entity

d. The acquisition of assets

The notification shall be admissible from the point when there is a real and serious intention from the parties to carry out the operation and until the said operation is complete (if it is completed without filing the notification, sanctions will apply).

Filing threshold

The Chilean Competition Law establishes that the Chilean Competition Authority (FNE) must be notified of concentration operations — that are also subject to the suspensory requirement — meeting both of the following thresholds:

a. Each party has a domestic revenue of UF 450,000 (approximately USD 18.1 million) in the financial year prior to that in which the notification is verified.

b. Parties have a combined domestic revenue of UF 2.5 million (approximately USD 100.7 million) in the financial year prior to that in which the notification is verified.

If the operation does not exceed the Chilean jurisdictional thresholds, then the mandatory procedure does not apply. Sales outside of Chile are not considered for the calculation of the turnover for the purposes of the threshold. However, those that are party to the operation can submit it voluntarily to the FNE, in which case the rules of the mandatory procedure apply. In addition, operations that are not voluntarily notified can be reviewed by the FNE within a year of the transaction’s conclusion.
Main characteristics of the merger clearance process

The Chilean Competition Law establishes a two-phase procedure.

The Phase 1 investigation will start only when all the information required by the merger regulation is provided to the FNE. The information required is very similar to that in other jurisdictions. However, the FNE can waive the obligation to provide certain information if: (a) the information is not available to the parties; or (b) the information is not relevant or necessary for the assessment of the operation.

Once a full notification has been performed, the FNE has 30 business days to make a preliminary assessment of the merger. During such term, the FNE can request information about the parties to the transaction, as well as about third parties. After those 30 days, the FNE can clear the merger (unconditionally or subject to commitments offered by the parties) or open a Phase 2 investigation for an additional 90 business days. In the latter, the FNE has to issue an informed decision, stating why the approval of the operation will substantially lessen the competition. After those 90 days, the FNE can clear the merger (unconditionally or subject to commitments offered by the parties) or prohibit it. Both terms can be extended if the parties offer commitments to the FNE and if the parties and the FNE mutually agree on it.

If the FNE forbids the operation, the parties have the right to appeal before the Competition Tribunal. A subsequent appeal before the Chilean Supreme Court is available if the Competition Tribunal approves the operation, but with remedies different from those offered by the parties to the FNE during the administrative procedure. In addition, it is possible to file a remedy of compliant before the Supreme Court against the decision of the Competition Tribunal that confirms or reverse the prohibition, as occurred in a 2023 merger between health insurance companies.

Notification duty failure and legal consequences

The law states that should a concentration operation that meets the requirements fail to be notified, the Competition Court could impose preventive, corrective or prohibitive measures that may be necessary. In particular, it may apply the following sanctions:

a. Modification or termination of the acts, contracts, covenant, systems or agreements contrary to the Competition Law

b. Modification or dissolution of the abovementioned partnerships, corporations and other legal entities that could have intervened in the acts, contracts, covenants, systems or agreements

c. Fines of up to a sum equivalent to 30% of the infringer’s turnovers in the line of products or services related to the infraction during the period in which the infraction took place, or twice the economic gain reported by the infringer; if it is not possible to determine the turnovers of the economic gain, the Competition Tribunal can impose a fine of up to UTA 60,000 (approximately USD 50.4 million)

d. Fines of up to UTA 20 (approximately USD 16,800) for each day of delay to notify, from the materialization of the transaction

Except for the sanction mentioned in (d), these are the statutory penalties applicable to any infractions of the Competition Law (also to cartels and abuses of dominance).
In April 2018, the FNE filed the first gun-jumping case against two meat-packaging companies that consummated a USD 300 million acquisition, notified to the FNE, but without prior approval. The FNE asked the Competition Tribunal for both parties to the operation to each be fined USD 1.9 million. In July 2018, the parties reached a settlement with the FNE, whereby each party agreed to pay a fine of approximately USD 1 million.

In September 2020, the FNE filed a new complaint for a gun-jumping infraction against the Walt Disney Company and its subsidiary, TWDC Enterprises. The FNE accused both companies of having provided false information in the merger control procedure through which it acquired the shares of Twenty-First Century Fox, Inc. and for failing to comply with measures offered to approve such merger. The FNE settle the case against Walt Disney Company, which paid a fine of USD 250,000, but proceedings continued against TWDC Enterprises for which the authority seeks the imposition of a USD 3.7 million fine. No decision have been issued yet.

In January 2023, the FNE filed a complaint against Cadena Comercial Andina, parent company of the convenience stores Oxxo Chile and Ok Market, also for providing false information in the merger procedure that approved the integration between such stores. The authority seeks the imposition of a UDF 6.5 million fine on the company.

### Cartels and other anti-competitive agreements

#### Prohibited agreements by object and effect

Article 3 of the Chilean Competition Law sets forth a general provision that prohibits any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effects.

Pursuant to such article, the following will be considered as, among others, actions, acts or conventions that impede, restrict or hinder competition or that set out to produce said effects:

a. Express or tacit agreements among competitors, or concerted practices between them, that consist of fixing sale or purchase prices, limiting production, allowing them to assign market zones or quotas, or affecting the result of bidding processes, and the agreements or concerted practices that confer them market power and consist of fixing marketing conditions or excluding competitors

b. Abusive exploitation on the part of an economic agent, or a group thereof, of a dominant position in the market, fixing sale or purchase prices, imposing on a sale of another product, assigning market zones or quotas, or imposing other similar abuses

c. Predatory practices, or unfair competition, carried out with the purpose of reaching, maintaining or increasing a dominant position

d. Participation of a person in a directive or relevant executive charge in two or more undertakings that are competitors between them (interlocking)
Jurisprudence considers this not an exhaustive list of unlawful conduct. Therefore, any act or conduct that impedes, restricts or hinders competition or that sets out to produce said effects could breach the Chilean Competition Law.

Conduct is usually assessed under a “rule of reason” test, except for hard-core cartels, which are considered illegal per se.

Antitrust infractions may lead to the imposition of fines and criminal sanctions in the case of hard-core cartels. Additionally, antitrust infractions may also give cause to private damages claims, including class actions.

**Hard-core cartels**

According to the OECD, hard-core cartels are anti-competitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets. The Chilean Competition Law establishes a per se prohibition against all such conduct, which is contained under letter a) of Article 3 of the Chilean Competition Law. The law does not expressly use the term “hard-core cartel.” However, pursuant to the history of the law that introduced such per se prohibition, the amendment is intended to establish a per se prohibition against hard-core cartels. Thio has also been recognized by the Competition Tribunal.

Hard-core cartels are imposed fines and criminal sanctions (up to 10 years of imprisonment and director disqualification).

**Vertical restraints**

The FNE defines “vertical restraints” as arising between independent economic agents that operate at a different level of the production chain, relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Vertical restraints can be pro-competitive, since they can increase the efficiencies of the market, benefiting the parties to the agreement and final consumers. However, they can also soften the competition between the supplier and its competitors (inter-brand competition) or between the buyer and its competitors (intra-brand competition).

In 2014, the FNE published guidelines on how the agency assesses vertical restraints. According to such guidelines, the FNE considers that vertical restraints are unlawful when their anti-competitive effects or risks exceed the efficiencies that they generate. In addition, the FNE presumes that a vertical restraint is lawful if the market share of each of the parties is below 35%, except for exceptional circumstances, such as cumulative effects (i.e., the existence of several similar restraints in the market) and minimum resale price maintenance.

**Resale price issues**

The Chilean Competition Law does not expressly regulate resale price maintenance, but such conduct could be considered unlawful according to the general provision that prohibits any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effect.
To date, there is no judicial decision dealing with it, but the FNE’s Guidelines on Vertical Restraints refers to how the FNE will assess such conduct. Under the guidelines, the FNE considers that the imposition of a minimum price is the most pernicious vertical restraint. In addition, the FNE states that minimum resale price maintenance will not be presumed lawful, even if the market share of each of the parties is below 35%.

The recommendation of prices or the imposition of a maximum price should not be unlawful, unless they amount to a fixed or minimum price as a result of pressure from, or incentives offered by, any of the parties.

**Fines**

The Chilean Competition Law established a single fine applicable to any infractions of the law (cartels, abuse of dominance, vertical restraints, etc.). The fines can amount to a sum equivalent of 30% of the infringer’s turnovers in the line of products or services related to the infraction during the period that the infraction took place, or twice the economic gain reported by the infringer. If it is not possible to determine the turnovers of the economic gain, the Competition Tribunal can apply a fine of up to UTA 60,000 (approximately USD 50.4 million).

Fines can be imposed on the undertaking and on its directors, administrators and all persons that intervened in the performance of the anti-competitive conduct. In such case, the fines cannot be paid by the legal entity in which the infringer carries out duties or by the shareholders or partners thereof.

Pursuant to the Competition Law, to determine the fines, the following circumstances, among others, must be considered by the Competition Tribunal: the economic benefit obtained as a result of the violation; the severity of the conduct; deterrent effect; the reoffending nature of the offender; the economic capacity of the infringer; and the collaboration the latter provided to the FNE before or during the investigation. Both the FNE and the Competition Tribunal consider that the existence of an effective compliance program should be taken into consideration.

In August 2019, the FNE issued a guideline to explain its method of calculating the fines.

**Leniency programs**

The Chilean Competition Law establishes a leniency program only for hard-core cartels and the FNE has issued guidelines for its applicability. Pursuant to the Competition Law, the first undertaking to provide the FNE with information regarding the cartel will obtain immunity from fines and criminal sanctions applicable to the infraction. The immunity does not cover damage actions.

Leniency is also available for other applicants, but only to the second company that applies and that provides information to the FNE. In such case, the company will obtain a reduction of up to 50% of the fine that could have been imposed on it and a reduction of the possible imprisonment sanction.

Leniency benefits can be revoked if during the judicial proceedings it is proven that the leniency applicant organized illicit conduct by coercing others to participate. In January 2020, the Supreme Court revoked leniency benefits that the FNE had granted to the main tissue manufacturer in connection with a price-fixing cartel. The Supreme Court considered that the company coerced one of its competitor to take part in the cartel, and later coerced them not to abandon it.
The Supreme Court stated that the coercion required by law is not absolute violence, but rather compulsive or relative violence, in which a person is forced through threats to execute a certain act, but the act, is willfully executed, thereby conduct exists from their part. Consequently, the Supreme Court considered that this standard could include economic coercion, i.e., an economic pressure so strong that it generates a real risk of market exit since such economic threat may represent a real pressure or intimidation for a company.

Abuse of dominance or market power

Dominance or market power

The Chilean Competition Law prohibits the abuse of a single or collective dominant position. The law does not define “dominant position” but the Competition Tribunal has adopted in its decisions an approach similar to that existing in the EU, that is, it entails a position that affords the undertaking the power to behave independently of its competitors, its customers and consumers. The Competition Tribunal has also indicated that the existence of a dominant position is derived from several factors, such as market shares, barriers to entry and countervailing buyer power.

Types of prohibited conduct

The Competition Law gives examples of conduct that is abusive, but this is not an exhaustive list. Decisions, both of the Competition Tribunal and the Supreme Court, have considered that the Chilean Competition Law prohibits both exploitative and exclusionary abuses.

Defenses, liability reliefs or exclusion

The Competition Law does not contemplate any defense or exclusion for conduct that is deemed abusive. However, both the Competition Tribunal and the FNE have considered that a dominant undertaking can escape liability if its conduct is objectively justified.
Investigations and powers of authorities

Investigations of Competition Law infractions are performed by the FNE. The FNE has broad powers, as follows, to carry out such investigations: (i) issuance of summons to anyone that could have knowledge of facts under investigation; (ii) request information from third parties; (iii) request any public body and service to provide access to information.

In addition, in case of investigations regarding hard-core cartels, the FNE can conduct dawn raids (enter public or private premises and register and seize all types of objects and documents that are there) and wiretapping. The use of such powers requires prior judicial authorization.

Failure to comply with the investigatory powers of the FNE is sanctioned with fines. Criminal sanctions are also available when a party conceals information or provides false information to the FNE.

The FNE is also empowered to perform market studies to evaluate competition conditions in different markets, and to recommend regulatory measures to correct market failures.

Legal privilege

Under Chilean law, communication with a lawyer in any form is legally privileged and protected from disclosure. Protection conferred by Chilean law is broad, but not absolute. It protects information: (i) communicated confidentially; (ii) on occasion of a professional service; and (iii) communicated by its client.

In a 2023 resolution, the Competition Tribunal refuse to award a request of disclosure regarding works commissioned to lawyers of a company, indicating that legal privilege extends to all background information that the lawyer has and that are related to the commission that he has received.

Judicial warrant

Anyone from whom the FNE requested information, whose remittance could allegedly cause harm to their interests or those of third parties, can request the Competition Tribunal to leave without carrying out the request.

Additionally, in the case of dawn raids or wiretapping, the parties affected by such actions can file a judicial complaint if the FNE did not comply with any of the requirements or formalities established by law. If the complaint is accepted, the FNE cannot use the information obtained as proof in the proceedings before the Competition Tribunal.
Fines imposed per industry group in Latin America
Baker McKenzie jurisdictions

Consumer Good and Retail (CG&R)
Agrosuper S.A. Empresas Ariztía S.A. (Ariztía); Agrícola Don Pollo Limitada and Asociación de Productores Avícolas de Chile A.G. (poultry trade association) | 2014 | Cartel (quotas and other restrictions on production) | USD 26.7 million to both Agrosuper and Ariztia (highest fines meted by the legislation at the time), USD 6.7 million to Don Pollo and USD 11.2 million to the trade association, including its dissolution.

Energy, Mining and Infrastructure (EMI)
Asfaltos Chilenos S.A., Dynal Industrial S.A., Empresa Nacional de Energia Enex S.A. (ENEX), Química Latinoamericana S.A. (QLA) | 2015 | Cartel (bid rigging) | USD 382,000 to Asfaltos Chilenos and USD 229,000 to both Dynal and QLA. Enex obtained leniency.

Financial Institutions and Fintech (FI)
Transbank S.A. | 2005 | Abuse of dominance (price discrimination) | USD 560,000

Healthcare (HC)
Salcobrand and Farmacias Cruz Verde | 2012 | Price Fixing | USD 17.8 million (highest fines meted by the legislation at the time).

Technology, Media and Telecom (TMT)
Telefónica Móviles de Chile S.A. | 2013 | Abuse of dominance (margin squeeze) | USD 4.4 million

Industries, Manufacturing and Transportation (IMT)
Colombia
Merger control

What is the merger notification criteria and timeframe?

Pursuant to general principles governing merger control in Colombia, any transaction resulting in the concentration of one or more markets in Colombia (i.e., between parties that are engaged in the same economic activity or in the same value chain in Colombia) is subject to pre-merger control when the parties meet certain legal thresholds.

On average, the procedure to obtain clearance from the Superintendence of Industry and Commerce (SIC) for operations that do not generate adverse effects on free competition takes between four and eight months. However, the Colombian regulations do provide a fast track option for transactions that have low impact in the markets, as we explain below.

Filing threshold

Where the combined value of the operational turnover or assets of the parties to a transaction with the effects of a concentration (horizontal effects) or of a vertical integration (vertical effects) exceed the legal threshold, an approval for the transaction is needed from the SIC prior to closing.

The concept of economic concentration is broad and includes mergers, acquisitions, and joint ventures, other forms of company associations or corporate grouping, and even exclusive distribution agreements.

When the value of the combined worldwide assets or of the combined Colombian revenues of the parties (including affiliated and related companies) to such transaction exceeds the value set by the SIC, the threshold will be met. The threshold is updated annually and is set at COP 69,600,000,116 or approximately USD 14.5 million, as reflected in the financials closing in 2022.

Main characteristics of the merger clearance process

Where the combined market share of the parties is below 20% in all the relevant markets in Colombia, a simplified notification procedure is available. This simplified procedure or “fast track” provides implied approval upon filing. In addition to the application, parties need to submit information about the merger, including robust evidence that demonstrates that their combined market share is below 20%.

The SIC may take up to 10 business days to acknowledge receipt of the notice. The SIC, however, does not issue any opinion or ruling confirming the approval. The implied approval granted under this procedure can be challenged at a future date by the SIC, if it later considers that the parties were not eligible. The SIC has a term of up to five years from the submission date to review and challenge the notice. This can lead to a full investigation of the merger and fines for failure to seek proper clearance.

If the combined market share of the parties is equal to or above 20% in at least one of the relevant markets, parties will need to apply to the full clearance process and obtain approval prior to closing the transaction. Parties need to submit an application supported by detailed information about the merger.
The SIC has three working days to accept the submission. Thereafter, the authority can take up to 30 business days to decide whether to: (i) authorize the transaction; or (ii) request more information about the merger.

Where the parties have to submit additional information, the SIC has three additional months to issue a final decision to either: (i) approve; (ii) oppose; or (iii) impose remedies to the proposed transaction. This timeline can be extended for an additional term.

The SIC can condition the approval upon the adoption of structural remedies to the transaction by, for example, requiring parties to divest certain assets or lines of business. It may also impose behavioral remedies, but these are used less commonly.

**Filing fees**

The parties must pay a filing fee to the SIC. Filing fees are currently set at:

- **a.** For simplified notifications, COP 2,767,000 or approximately USD 650.
- **b.** For full flings, COP 14,998,000 or approximately USD 3,200.

If the SIC moves to Phase II in a full filing, the filing fee will be between COP 27,630,000 and COP 39,480,000 (approximately USD 6,300 and USD 9,000) depending on the parties’ combined turnover and total assets.

**Notification duty failure and legal consequences**

If a transaction is closed in Colombia without, or prior to, obtaining the required clearance from the SIC, said closing will be deemed as a breach of Colombian antitrust provisions. In such case, the SIC could carry out the following:

- **a.** Impose administrative fines on the parties involved. The fine will be capped at the highest of up to (i) 20% of each party’s turnover for the prior fiscal year, (ii) 20% of each party’s equity for the prior fiscal year, or (iii) 100,000 minimum monthly legal salaries, which at the current rate is equivalent to COP 116,000,000,000 or approximately USD 25 million in 2023.

- **b.** Impose administrative fines on the individuals responsible for the failure to obtain clearance prior to closing. The fine can be up to 2,000 minimum monthly legal salaries, which at the current rate is equivalent to COP 2,320,000,000 or approximately USD 530,000 in 2023.

- **c.** Seek an order to reverse a closed transaction if the SIC has robust evidence that it would have been prohibited had the parties sought prior authorization.

The statute of limitations for the SIC to impose fines and adopt the measures described expires five years after the unauthorized closing.
Cartels and other anti-competitive agreements

Prohibited agreements by object and effect

Article 45.1 of Decree 2153 of 1992 defines "agreement" as every contract, covenant, meeting of the minds and agreed or conscious parallel practice between two or more competitors.

A leading decision from the SIC, that is, Resolution 04946 of 2009, Compañía Nacional de Chocolates S.A. and Casa Lucker S.A., interprets the reference to a conscious parallel practice as "indicating the requirement of a plus factor approach, in which parallel behavior by competitors, even if coupled with proof that the firms involved are consciously adapting to their rivals conduct, would be considered insufficient to find an agreement." The law’s reference to the word ‘conscious’ is held to require additional evidence sufficient to conclude that the parties were engaged in a concerted anti-competitive agreement.

An agreement is prohibited if its purpose or effect is adverse to free competition. The Colombian regulation does not make any distinction between horizontal and vertical illegal agreements.

If the antitrust authority finds proof that the agreement had an anti-competitive purpose or an anti-competitive effect, it is sufficient for the authority to sanction the firms, even if the agreement was never implemented.

Agreements that have the following purposes or effects, among others, are deemed contrary to free competition:

a. Direct or indirect price fixing
b. Determining discriminatory sales or marketing conditions for third parties
c. Distribution of market shares between producers or distributors
d. Allocation of production or supply quotas
e. Allocation, distribution or limitation of sources of supply of productive inputs
f. Limitation to the adoption of sources of supply or productive inputs
g. Limitations to the adoption or developments of new technologies and techniques
h. Making the supply of a product contingent to the acceptance of additional obligations that, by their nature, do not constitute the objective of the business
i. Refraining from producing a good or a service that affects its levels of production
j. Collusion in bidding or tendering, or in the award of contracts, the distribution of goods or the setting of terms of bids
k. Blocking the entrance of third parties to markets or market channels in Colombia.

Hard-core cartels

The Colombian antitrust regulations does not distinguish between hard-core cartels and other types of cartels.

Vertical restraints

Vertical arrangements that involve price fixing, price discrimination in downstream distributors and certain tying requirements can be considered unlawful if there is no evidence of economic efficiencies that result in benefits for consumers.

Resale price issues

It is illegal to impose prices. However, if there is sufficient proof that the imposition of a resale price brings efficiencies, the SIC may consider that this is not an antitrust violation.
On a decision handed down in 2015, the SIC indicated that fixed minimum resale prices have the presumption of illegality. However, if the company being investigated provides evidence of efficiencies that justify the imposition of a particular maximum resale price from its distributors, the conduct would be deemed compliant with the law. The standard of proof cited in the precedent is so stringent that imposing maximum resale prices can be penalized in practice.

Fines

For agreements that are found to be anti-competitive, the SIC can impose sanctions on both business entities and individuals. The available sanctions include monetary fines and orders requiring the modification or termination of the conduct that violates the law. In this case, the SIC could carry out the following:

a. Impose administrative fines on the parties involved. The fine can be up to 100,000 minimum monthly legal salaries, which at the current rate is equivalent to COP 116,000,000,000 or approximately USD 256.4 million, or 150% of the profits derived from the anti-competitive conduct.

b. Impose administrative fines on the officers and agents of the involved business entities. The fine can be up to 2,000 minimum monthly legal salaries, which at the current rate is equivalent to COP 2,320,000,000 or approximately USD 530,000.

Bid-rigging conduct may be penalized with imprisonment for six to 12 years, a fine between COP 156,248,400 and COP 781,242,000 (approximately between USD 46,516.34 and USD 232,518.72), and a ban from contracting with state agencies for eight years.

The SIC has established a leniency program, under which a qualifying participant in the conduct violating the Competition Law can obtain full or partial exemption from penalties by reporting the conduct and cooperating with the investigation carried out by the SIC.

In March 2023, the Colombia Constitutional Court annulled new competition rules enacted in 2022, finding that the provisions that had originally increased antitrust sanctions and provided additional incentives for leniency applicants were in fact unconstitutional on procedural grounds. These annulled provisions had introduced changes to the Leniency Program of the Superintendency of Industry and Commerce for conduct that violated the country’s competition laws, as well as raised the maximum values of sanctions for companies and individuals.

Leniency programs

The level of immunity that may be available to those who take part in the of the leniency program depends on the phase of the investigation in which they decide to collaborate. According to Decree 353 of 2022, when the application for admission to the program is submitted before the issuing of the administrative act that opens an investigation, the immunities are the following:

The benefit for the first-qualifying applicant is full immunity from administrative fines; the second-qualifying applicant can obtain 30% to 50% reduction in the value of administrative fines; and the third-qualifying applicant can obtain up to 25% reduction in the value of administrative fines, all depending on the usefulness of the information and evidence provided in the process.

When the application for admission to the program is submitted after the issuance of the administrative act that opens the investigation, the immunities are the following:

The benefit that the first-qualifying applicant can obtain is up to 30% deduction in the value of administrative fines; the second-qualifying applicant can obtain up to 20% deduction in the value of administrative fines; and the third-qualifying applicant can obtain up to 15%
reduction in the value of administrative fines, all depending on the usefulness of the information and evidence provided.

The request to apply for the leniency program must include and acknowledgment the participation in the anticompetitive conduct, and provide at least general information on the existence of the anticompetitive conduct, its form of operation, the product or service involved, and the participants.

After filing of the application, the SIC may enter into a leniency agreement -depending on the order in which the applicant is classified- and as long as complies with the following requirements:

(i) Acknowledges its participation in the anticompetitive conduct; (ii) provides information and useful evidence on the existence of the anticompetitive conduct and its form of operation, including aspects such as: objectives, main activities, functioning, name of other participants, degree of participation, product or service affected, geographic area affected and the timeline and estimated duration of the conduct; (iii) commits to comply with all requirements and orders from the SIC during the negotiation of the Leniency Agreement, and (iv) terminates its participation in the anticompetitive conduct, in the terms established by the SIC.

The identity of the applicants, as well as the evidence that they provide to the SIC, will be kept confidential until the final decision is issued. Information on the negotiation of the agreement is also confidential.

The competition authority has included a provision on amnesty for the applicant that lost the race for full immunity (Cartel A) and confesses to its participation in another cartel (Cartel B). This applicant will receive a 20% reduction in the value of the administrative fine of Cartel A and, at the same time, receive full exemption from penalties in Cartel B.

The total exoneration or reduction of the fine granted to a successful applicant who has participated in an anticompetitive conduct will be extended, in the same percentage, to all the agents that act or have acted for it as facilitators of the anticompetitive conduct and choose to collaborate in the course of the leniency program (e.g. employees, directors, affiliates).

However, the leniency program does not protect the applicant from private judicial actions that aim to recover damages, nor from a criminal action in the case of bid rigging.

The leniency program is available after a dawn raid. The parties involved in the conduct can apply for leniency up to and until the expiration of the term to respond to the act that launches the investigation.
Abuse of dominance or market power

Dominance or market power

Colombian regulation contains a provision applicable to dominant firms (Article 50 of Decree 2153 of 1992).

Whenever a dominant position exists, the following are considered an abuse of that position:

a. Predatory pricing reducing prices below their costs for the purpose of eliminating various competitors or preventing their entry or expansion

b. Imposing discriminatory provisions for equivalent transactions, such as placing a consumer or a supplier at a disadvantage compared to another consumer or supplier in similar conditions

c. Provisions that have the purpose or effect of making the supply of a product contingent on the acceptance of additional obligations that do not constitute the nature of the business

d. Sale to one buyer under conditions different from those offered to another buyer, with the purpose of reducing or eliminating competition in the market

e. Selling products or providing services in any part of the country at a price different from the one offered in another part of the country, with the purpose or effect of reducing or eliminating competition in that part of the country, and if the price does not correspond to the cost structure of the transaction

f. Obstructing third parties' access to markets or market channels

Identifying an abuse of dominance requires a threshold determination of dominance. It also requires the capacity to determine directly or indirectly the conditions of a market. The law does not set a market threshold or other test for dominance, and the SIC arrives at its findings on a case-by-case basis.

Other unilateral acts

Colombian competition regulation specifies certain acts that are unlawful if a single company undertakes them without regard to whether that firm holds a dominant position. The following acts are contrary to free competition:

a. Violating the rules of advertising contained in the Consumer Protection Statute

b. Influencing a firm to increase the prices of its goods or services, or to desist from increasing its prices, and refusing to sell or provide services to another firm or otherwise discriminating against it for the purpose of retaliation against its pricing policy

c. Not allowing providers to discount with third parties invoices (‘factoring’) emitted to a company, impeding their access to liquidity from invoices with late due dates.
Types of prohibited conduct

Agreements:

a. Horizontal restrictive agreements

b. Vertical restrictive agreements

c. Abuse of dominance

d. Other unilateral acts – the Colombian Competition Law specifies certain acts that are unlawful if undertaken by a single firm without considering whether that firm holds a dominant position, and these are as follows:

   ▪ Violating the rules on advertising contained in the Consumer Protection Law

   ▪ Influencing a firm to increase the prices of its goods or services, or to desist from decreasing its prices, and refusing to sell or provide services to another firm or otherwise discriminating against it for the purpose of retaliation against its pricing policy

Defenses, liability reliefs or exclusion

There are no specific defenses, liability reliefs or exclusions under the Colombian Competition Law. Therefore, the main defense against an antitrust investigation is to ensure that the conduct under investigation does not adversely affect free competition and is in accordance with Article 333 of Colombia’s Constitution.

Investigations and powers of authorities

Legal privilege

Communications with in-house and external counsel, being legally privileged, can be protected from disclosure.

Dawn Raids

The SIC can conduct dawn raids, which do not require a judicial warrant. However, a warrant from either the Competition Deputy Superintendent or the Superintendent of Industry and Commerce is needed.

Officials can require entities or individuals to provide data (either digital or physical), reports and other commercial documents during or after dawn raids.

Failure to cooperate with the SIC during the dawn raid will trigger fines for violation of the competition laws (see above).

After the COVID-19 pandemic, the SIC has undertaken virtual dawn raids, demanding virtual access to computers through the communication platforms.
Fines imposed per industry group in Latin America

Baker McKenzie jurisdictions

**Consumer Good and Retail (CG&R)**


1. Agreements that directly limit supply and distribution of foreign raw goods (Law 155 of 1959, Art. 1 – General Prohibition)

2. Agreements to prevent the access of third parties to the market (Decree 2153 of 1992, Art. 47, No. 10)

USD 88,192,116 | USD 89,286,383 (including sanctions to individuals)

**Energy, Mining and Infrastructure (EMI)**

Cementos Argos S.A., HOLCIM S.A. and Cemex Colombia S.A. | 2017

Agreements that directly limit supply and distribution goods (Law 155 of 1959, Art. 1 – General Prohibition)

USD 65,038,082 | USD 65,420,982 (including sanctions to individuals)


1. Practices that tend to limit free competition (Ley 155 de 1959, Art. 1 – General Prohibition)

2. Collusion in public procurement processes (Decree 2153 de 1992, Art. 47, No. 9)

USD 82,753,129 | USD 83,733,893 (including sanctions to individuals)
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Bid-rigging conduct</td>
<td>USD 9,426,986.80 (including sanctions to individuals)</td>
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<tr>
<td>Banco de Colombia S.A., Banco Davivienda S.A., Banco Santander S.A., BBVA.</td>
<td>2007</td>
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<tr>
<td>Refusal to cooperate with the authority during an investigation</td>
<td>USD 417,339</td>
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<tbody>
<tr>
<td>1</td>
<td>Agreements to fix prices and to abstain from providing health services to users (Decree 1663 de 1992, Art. 5, Nos. 1, 8 and 10)</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>(Only to Asemi) agreements to distribute fees (Decree 1663 de 1992, Art. 5, No. 4)</td>
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<tr>
<td></td>
<td>USD 8,381,847</td>
<td>USD 8,852,776 (including sanctions to individuals)</td>
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<table>
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<tr>
<th>Technology, Media and Telecom (TMT)</th>
<th>COMCEL S.A.</th>
<th>2013</th>
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<tbody>
<tr>
<td>1</td>
<td>Agreements that directly limit supply and distribution of goods (Ley 155 de 1959, Art. 1 – General Prohibition)</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Abuse of dominance by preventing third parties from entering the market (Decree 2153 de 1992, Art. 50, No. 6)</td>
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<td>USD 45,822,466</td>
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Mexico
Merger control

What is the merger notification criteria and timeframe?

Rather than defining the term "merger," the Mexican Competition Law (MCL) defines, in general terms, "concentration" as any merger, acquisition or any other action by means of which companies, associations, shares, equity quotas, trusts or assets in general are accumulated. "Prohibited concentration" is defined as a merger, acquisition or other action between any companies or individuals, whether competitors or not, having the purpose or effect of diminishing, damaging or preventing competition in identical, similar or substantially related goods or services.

Concentrations meeting any of the applicable asset-accumulation-based thresholds shall be reported to the Mexican Competition Commission (Cofece) before being implemented.6 The MCL merger control regime is of a suspensory nature. Therefore, the undertakings involved in a notifiable concentration would not be able to close the transaction until Cofece issues its clearance decision. When issuing a decision in a merger control process, Cofece may authorize the transaction as reported, or either block the notified transaction or condition its approval on its restructuring to avoid anti-competitive effects. In addition, Cofece is empowered through an investigation process to order the partial or full unwinding of a prohibited concentration.

Filing thresholds

Under the MCL, concentrations meeting any of the following thresholds are subject to mandatory merger control filing before Cofece:

a. Transactions whose value in Mexico exceeds 18 million times the value of the Measure Unit (MU) (approximately USD 93 million)8

b. Transactions involving the accumulation of more than 35% of the assets or shares of an undertaking with assets or sales in Mexico exceeding 18 million MU (approximately USD 93 million)

c. Transactions that: (i) imply an accumulation of assets or capital stock in Mexico9 exceeding 8.4 million MU (approximately USD 43 million); and (ii) involves undertakings whose combined assets or annual sales in Mexico exceed 48 million MU (approximately USD 248 million)

Main characteristics of the merger clearance process

Within the following 60 business days from filing, Cofece shall issue its decision on a notified concentration (an extension of 40 business days is available in complex cases). This term may be restarted twice if Cofece requests additional information (although Cofece may request additional information without restarting the term during the whole process). If Cofece does not issue its decision on the case within 60 business days, the transaction will be deemed approved.

6 Please note that if a transaction involves telecoms related markets, such operation would have to be reported with the Federal Telecoms Institute, but the steps and timing of the merger control process is identical to the one processed with Cofece.
7 The MU as of 1 February 1, 2023 is MXN 103.74.
8 The exchange rate is volatile. For didactic purposes, an exchange rate of MXN 20 per USD 1 was used to calculate USD amounts.
9 According to the Merger Control Guidelines issued by Cofece, "accumulation of capital stock or assets" may refer to the book value or commercial value (i.e., price paid for) of the target or target assets located in Mexico.
The pre-merger notification regime under the MCL is of a suspensory nature, which requires the involved undertakings to wait for clearance by Cofece before closing the notified concentration. There is no filing deadline, but it shall take place before the concentration has any effect in Mexico.

There is a fast-track procedure in place for those transactions in which it is evident that no competition effects would arise, but it is rarely used in practice. Under the fast-track procedure, Cofece shall clear a transaction within 15 business days from confirming that the transaction has met the criteria to apply for this process.

On 8 December 2017, Cofece introduced and established its electronic merger control filing system, which became mandatory since 19 July 2019. Thus, as of 19 July 2019 no in person filings are further allowed.

Finally, it is important to mention that Cofece conducts a pre-merger control process for transactions taking place in all industries and sectors, except for those related to the telecommunications and broadcasting industries, where the relevant authority that enforces the MCL is the Federal Institute of Telecommunications (FIT).10

Notification duty failure and legal consequences

Aside from the administrative penalties described under the section ‘Fines’ below, notifiable concentrations (i.e., those that meet the applicable thresholds) carried out without being cleared by Cofece are considered null and void under the MCL. In addition, in the case of illegal concentrations, Cofece is empowered to order total or partial deconcentrating of any illegal merger, end of control and suppression of acts.

Cartels and other anti-competitive agreements

Prohibited agreements by object and effect

The MCL prohibits, in broad terms, monopolies and monopolistic practices that "diminish, damage or impede free competition in the production, processing, distribution and marketing of goods and services." Monopolistic practices are classified as: (i) absolute monopolistic practices, which can be defined as agreements between competitors to eliminate competition among them, and are prohibited by object or per se; and (ii) relative monopolistic practices, which can be defined as conduct carried out by dominant undertakings against third parties, and are not illegal per se. Thus, in order for such practices to be illegal, an economic agent with substantial market power and a negative impact on the affected markets must perform them. Relative monopolistic practices are analyzed under a "rule of reason" approach or by effect.

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10 Please note that although the steps and timing of the merger control process carried-out before the FIT is identical to the one carried out with Cofece, the FIT has not set an electronic system for mergers. Thus, the merger control process with the FIT has to be carried out in person.
Hard-core cartels

According to the MCL, typical absolute monopolistic practices include agreements or arrangements among competitors, whose purposes or effects are to: (i) fix prices; (ii) limit production, purchase or distribution; (iii) divide markets; (iv) "rig" bids; or (v) exchange information resulting in any of the abovementioned conduct in (i) to (iv).

The MCL provides that in addition to the civil and criminal sanctions that may be applicable to the parties involved, such agreements and arrangements are null and void. Therefore, they will not have any legal effect.

Vertical restraints

The MCL prohibits the following types of vertical restraints between non-competitors under the relative monopolistic practices provisions: (i) establishing exclusive distribution agreements, whether based on subject matter, geographic territories or time periods, including the allocation of customers or suppliers; and (ii) establishing other exclusive dealing arrangements.

As vertical restraints are considered relative monopolistic practices, they are not illegal per se, but only so when they: (i) are carried out by undertakings with substantial market power; and (ii) have the purpose or effect of eliminating third parties from or unduly preventing their access to a particular market, or giving exclusive advantages to certain undertakings.

Resale price issues

The MCL considers resale price maintenance, as well as other restrictions, such as maximum or minimum prices, as a relative monopolistic practice. Therefore, it only prohibits these types of restrictions when they: (i) are carried out by undertakings with substantial market power; and (ii) have the purpose or effect of eliminating third parties from or unduly preventing their access to a particular market, or giving exclusive advantages to certain undertakings.

Fines

In addition to the obligation to cease prohibited practices or divest prohibited concentrations, violators may be subject to administrative penalties in the following amounts:

a. Up to 10% of the annual income of the offender for carrying out an absolute monopolistic practice

b. Up to 8% of the annual income of the offender for carrying out a prohibited relative monopolistic practice or a prohibited concentration
c. Up to 5% of the annual income of the offender for failing to notify Cofece of a concentration that meets the applicable thresholds

d. Up to 10% of the annual income of the offender for noncompliance with remedies imposed by Cofece in a merger control process

e. Up to 200,000 times the MU (approximately 1 million USD) for individuals directly participating in a prohibited monopolistic practice or prohibited concentration in their capacity as representatives of the offenders, and prohibition to act in representation of an entity or as its counselor, administrator, director, manager and/or agent for up to five years

f. Up to 180,000 times the MU (approximately USD 933,660) for entities or individuals who induce, provoke or facilitate a monopolistic practice or prohibited concentration

g. Up to 8% of the annual income of the offender for breaching a settlement agreement with Cofece for early termination of an investigation

h. Up to 10% of the annual income of the offender for breaching an order issued by Cofece to discontinue those acts deemed as a monopolistic practice or a prohibited concentration

In cases of recidivism, twice the respective amount applies.

In addition to the administrative fines listed above, individuals engaged in an absolute monopolistic practice may also be subject to criminal sanctions of imprisonment for up to 10 years and monetary fines.

Cofece appears before the General Attorney to bring the criminal action against an offender based on the administrative process and identifies the individuals allegedly responsible for the relevant absolute monopolistic practice.

The MCL also grants private parties an express right to file an individual or collective action for damages and loss of profits. A precondition to bring such an action before the Mexican courts is that the responsible undertakings have been sanctioned during the administrative proceeding before Cofece. The judge is allowed to consider Cofece’s opinion on the plaintiff’s alleged damages and lost profits.

**Leniency programs**

The MCL establishes a leniency program only for absolute monopolistic practices. Companies and individuals may apply for the leniency program. The benefits of participating in a leniency program include full criminal immunity for all applicants and a substantial reduction in fines (almost nil for the first applicant and 50% to 30% for subsequent applicants). To be awarded leniency, applicants must fully cooperate with Cofece during the investigation and the administrative process, and submit evidence of their cartel conduct. In addition, the applicants must end participation in such cartel conduct, unless instructed otherwise by Cofece.
Abuse of dominance or market power

Dominance or market power

Being a dominant undertaking (i.e., having substantial market power) by itself is not prohibited; rather, the MCL prohibits and sanctions abusive conduct by undertakings with individual or joint dominant positions.

The MCL does not establish a market share threshold above which an undertaking is presumed to be dominant, but a case-by-case economic analysis is needed to assess this concept. In principle, an undertaking would be considered dominant if it is capable of fixing prices or establishing supply conditions in a particular market without other agents being able to counteract such capacity.

Types of prohibited conduct

The MCL prohibits the following types of conduct under the relative monopolistic practices provisions: (i) bundling/tying sales; (ii) refusing to deal with certain parties; (iii) boycotting; (iv) price depredation; (v) loyalty rebates; (vi) crossed subsidies; (vii) price discrimination; (viii) increasing third-party costs; (ix) discriminatory access to essential inputs; and (x) margin squeezing.

Like vertical restraints and resale price maintenance, abuse of dominance conduct is considered a relative monopolistic practice. They are, therefore, not illegal per se, but only so when they: (i) are carried out by undertakings with substantial market power; and (ii) have the purpose or effect of eliminating third parties from, or unduly preventing their access to, a particular market, or giving exclusive advantages to certain undertakings.

Defenses, liability reliefs or exclusion

Relative monopolistic practices are illegal only when carried out by dominant undertakings and result in negative impacts to the markets. Therefore, if those two elements are not present, the conduct shall be considered legal. In addition, if the foregoing elements are demonstrated, a relative monopolistic practice can be justified if the undertaking involved evidence of efficiency gains that favorably impact the competition process, ultimately benefiting consumer welfare and outweighing the potential anti-competitive effects of the conduct. Among the gains in efficiency, the following may be considered:

a. Introduction of new goods or services
b. Utilization of residual lots and defective or perishable products
c. Reduction of costs resulting from the creation of new techniques and production processes, asset integration, increases in the production scale, and the production of different goods or services using the same production factors
d. Introduction of technological advances that produce new or improved goods or services
e. Combination of productive assets or investments and their returns, which improve the quality or increase the attributes of the goods or service
f. Improvements in quality, investments and returns, timeliness and service, which favorably impact upon the distribution channel
g. Other gains that are proven to render net contributions to consumer welfare
Investigations and powers of authorities

Cofece, as the agency responsible for enforcing the MCL, has broad investigation and enforcement powers. It may initiate administrative procedures on its own or, at the request of third parties, investigate and resolve such cases and enforce its orders through administrative penalties. It may also refer criminal cases to the General District Attorney. Moreover, Cofece may issue opinions, both binding and non-binding, in antitrust matters.

During the investigation of a monopolistic practice or a prohibited concentration, Cofece may conduct verification visits without prior notice (i.e., dawn raids) at the premises of the entities under investigation, to request documents and information related to the investigation. During the raid, Cofece is empowered to interview any employee of the target. In addition, Cofece may summon undertakings to declare on issues related to the facts under investigation and issue requests for information to the target of the investigation, as well as to third parties and authorities.

Legal privilege

Mexican law recognizes the concept of privilege, although it is not established as attorney-client privilege but as a "professional secrecy obligation." The obligation allows certain persons or professionals, such as lawyers, to refuse to produce information or give witness statements in certain circumstances. Specifically, lawyers have the right and obligation not to disclose any information that they have received in the course of a particular matter in which they are involved or which is connected to a matter entrusted to them. The information may only be disclosed if the lawyer has the express authorization of the person who provided it. Therefore, Cofece may not request the submission of privileged documents.

In addition, although Cofece may have access to privileged documents when conducting a dawn raid, the Mexican courts have issued decisions recognizing the privileged nature of communications between external lawyers and their clients, indicating those communications shall not be considered in investigations for violations against the MCL, unless there is evidence that the lawyer is co-participating in the violation. Additionally, Cofece has put in place specific rules that allow the alleged responsible parties to identify the privileged documents that must be disregarded from the investigation process.

Judicial warrant

Cofece’s resolutions are subject to judicial warranty by means of an amparo trial before federal courts. However, only resolutions finalizing a proceeding, and not intra-proceeding resolutions, may be challenged. Moreover, there is no effects-suspension available.
### Fines imposed per industry group in Latin America

<table>
<thead>
<tr>
<th>Industry Group</th>
<th>Case</th>
<th>Year</th>
<th>Description</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Good and Retail (CG&amp;R)</td>
<td>Pilgrim’s, San Antonio, Tyson, Pollo de Querétaro and Bachoco</td>
<td>2013</td>
<td>Manipulation and collusion regarding the price of chicken meat</td>
<td>Approximately USD 6,910,994</td>
</tr>
<tr>
<td>Energy, Mining and Infrastructure (EMI)</td>
<td>Pemex Refinación (State productive enterprise)</td>
<td>2017</td>
<td>Imposition of conditions for the sale of gasoline and diesel to service stations</td>
<td>Approximately USD 32,791,914</td>
</tr>
<tr>
<td>Financial Institutions and Fintech (FI)</td>
<td>Profuturo GNP Afore, Afore Sura, Afore XXI Banorte and Principal Afore (pension funds managers, &quot;Afore&quot;)</td>
<td>2017</td>
<td>Agreements to reduce transfers between Afores</td>
<td>Approximately USD 61,921,313</td>
</tr>
<tr>
<td>Healthcare (HC)</td>
<td>Casa Marzam, Casa Saba, Fármacos Nacionales, Nadro and Almacén de Drogas and 21 executives</td>
<td>2021</td>
<td>Agreements to fix retail prices for certain drugs, blocked pharmacies from using discounts to compete for customers, and limited amount of drugs sold to certain retailers.</td>
<td>Approximately USD 41.28 million and suspended and disqualified 10 executives from their position at the companies for first time in history.</td>
</tr>
<tr>
<td>Technology, Media and Telecom (TMT)</td>
<td>Telmex and Telnor</td>
<td>2013</td>
<td>Unilateral refusal to provide their competitor with their services offered in the relevant markets in which they have market power</td>
<td>Approximately USD 36,684,785</td>
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<tr>
<td>Industries, Manufacturing and Transportation (IMT)</td>
<td>Sud Americana de Vapores, Kawasaki, KLine, Mitsui, Nippon Yusen and Wallenius Wihlmsen</td>
<td>2017</td>
<td>Agreements to segment the market for car shipping services</td>
<td>Approximately USD 32,458,721</td>
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</tbody>
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Peru
Merger control

What is the merger notification criteria and timeframe?

In June 2021, Perú implemented a new general merger control regimen, which applies to all sectors, through the Law N° 31112, Law that establishes the prior control of corporate mergers ("Merger Control Law") and its Regulation, approved by Supreme Decree N° 039-2021-PCM. The Merger Control Law provides that certain business concentration operations exceeding the established thresholds will be subject to prior approval of the Commission for the Defense of Free Competition of the National Institute for the Defense of Competition and Protection of Intellectual Property - INDECOPI (the "Commission").

According to the Merger Control Law, a business concentration operation implies a change or transfer of control of an economic agent, such as: (i) mergers between independent companies; (ii) acquisition of companies (iii) joint ventures; or (iv) acquisition of operating productive assets.

Filing threshold

The Merger Control Law establishes that a business concentration operation is subject to prior approval of Indecopi when the following thresholds are met concurrently:

- The total value of the annual sales or gross income, or value of assets in Peru of the economic agents involved in the operation exceeds 118,000 tax units (UIT) or USD 151 million approximately.

- The value of sales or annual gross income, or value of assets in Peru of at least two of the economic agents involved in the operation exceeds 18,000 tax units (UIT) or US$ 23 million approximately, per each economic agent.

The figures of the fiscal year prior to the notification of the business concentration operation must be considered.

Two separate assessments based on both parameters must be conducted. One based on the value of the annual sales or gross income, and the other one based on the value of assets. If the business concentration operation meets the thresholds based on any of both parameters, prior authorization of the Commission is required before closing the operation.
Note the Technical Secretariat of the Commission may review ex officio and ex post, a business concentration operation that does not meet the thresholds, in cases where there are reasonable indications to consider that the operation may generate a dominant position or affect the competition significantly in the relevant market. When the thresholds are not met, the economic agents can request the Commission for authorization voluntarily also.

**Main characteristics of the merger clearance process**

Before the Merger Control procedure starts, there is a period in which the authority assesses if the authorization request is complete. This period may take up to twenty-five (25) working days, as follows:

- The Technical Secretariat reviews the request for authorization of the business concentration operation, notifying the intervening parties of compliance or non-compliance with the requirements within ten (10) working days from submitting the request.

- If the request for authorization does not comply with the requirements to start the procedure, the Technical Department may grant 10 business days to cure the request. Once the parties submit the information to cure the request, the Technical Secretariat analyzes whether the request must be admitted or rejected as incomplete within five (5) working days. If admitted, the authority issues an initiation resolution.

**Phase 1:**

Within thirty (30) working days from the admission of the request for authorization, the Commission determines whether the business concentration operation falls within the scope of Merger Control Law and whether it raises serious concerns as to cause significant restrictive effects on competition in the market.

If the business concentration operation does not fall within the scope of the Merger Control Law or it does not raise any competition concerns, the Commission ends the procedure, authorizing the operation in Phase 1.

If the Commission finds that it falls within the scope of the law and it raises serious concerns as to generate restrictive effects on competition in the market, it shall declare it by a grounded resolution, informing the parties of the risks that the authority has identified, as well as the end of the Phase 1 and the beginning of the Phase 2.

**Phase 2:**

At the beginning of this phase, the Commission publishes a brief summary of the resolution that starts the second phase, so that third parties with a legitimate interest may submit relevant information to the authority, without being considered parties in the procedure.

The Phase 2 may take up to ninety (90) business days, and may be extended for a maximum of thirty (30) additional business days, for justified reasons.

In this phase, the Commission assesses the effects of the business operation concentration on competition in the market and the efficiencies it may generate. At the end, the Commission may: i) approve the operation without conditions; ii) approve it subject to conditions; or, iii) reject it.

If the authority does not meet the deadlines, the business concentration operation is considered approved.

The Commission’s decision might be appealed before the Competition Tribunal, which has in turn up to 90 working days to issue a decision.

In any phase of the procedure, the economic agents may submit to the competent authority proposals of commitments aimed at mitigating the possible effects on competition that could arise from the proposed business concentration operation. If so, the Commission can extend the procedure up to additional forty-five (45) working days.
If the authority determines that the proposed commitments mitigate the possible effects on competition, it authorizes the transaction subject to such commitments or conditions, and ends the procedure.

The Merger Control Law provides specific provisions in the cases of business concentration operations by companies supervised by the banking, stock market and telecom regulators.

**Regarding the Merger Control Law**

There is an initial stage in which the authority evaluates if the notification complies with requirements and the companies can cure any noncompliance as appropriate. This stage takes up to 25 working days.

Afterwards, a two-phase proceeding begins.

In the first phase, once the request is admitted, the Peruvian Competition Commission (Indecopi) has 30 working days to decide on whether the operation falls within the scope of the law and if it raises significant concerns related to restrictive effects on competition. At the end of this phase, the authority can issue any of the following decisions, as applicable:

- When the operation does not fall within the scope of the law or does not raise significant concerns related to restrictive effects on competition, the Commission issues the decision approving the operation.
- When the operation falls within the scope of the law and raises significant concerns related to restrictive effects on competition, the Commission issues a decision starting the second phase.

In the second phase, the Commission assesses the operation. This phase may take up to 90 working days, which the authority can extend for an additional 30 working days.

The commission’s decision might be appealed before the Competition Tribunal, which has in turn up to 90 working days to issue a decision.

**Notification duty failure and legal consequences**

Infringements of the Merger Control Law causes fines that depend on each parties’ economic group’ turnover and the seriousness of the violation. For example, closing a business concentration operation before the resolution of the authority has been issued or before the deadlines of the procedure are met, can be sanctioned with fines up to 10% of turnover. Breaching a condition to which the approval of the operation was subject to, or executing a business concentration operation that was rejected can be sanctioned with fines up to 12% of turnover.

The business concentration operation that is closed without the corresponding authorizations is deemed null and void.

**Cartels and other anti-competitive agreements**

**Prohibited agreements by object and effect**

Legislative Decree No. 1034 ("Antitrust Law") sanctions the following anti-competitive conduct: (i) abuse of dominance; (ii) vertical agreements that restrict competition; and (iii) horizontal agreements.

**Hard-core cartels**

The following agreements between competitors, if not complementary or accessory to other licit agreements, are *per se* illegal:

- Price-fixing (or fixing of other commercial conditions)
- Limiting production or sales
Customers, suppliers or geographic allocation

Bid rigging

The following agreements could be deemed illegal if they have or may have negative effects on competition or on consumers’ welfare:

Discrimination

Refusal to deal

Agreement on product quality when such quality is not ruled by the technical norms (either national or international) and negatively affects consumers

Tied sales

Unjustified and concerted refusal to deal

Impeding the entrance to or permanence in the market of a competitor

Agreeing with no justification to an exclusive distribution or sale

Vertical restraints

Vertical agreements would only be deemed illegal if at least one party holds a dominant position in the corresponding relevant market, and thus, the agreement has the effect or objective of restricting, impeding or distorting competition.

Resale price issues

Resale price maintenance is permitted if it is justified by efficiency reasons and if it does not have the effect or objective of restricting, impeding or distorting competition.

Fines

Companies can be sanctioned with fines equivalent to 12% of the income received in the previous year by either the company or its economic group.

In addition, fines up to 100 Tax Units (approximately USD 125,500) can be imposed on legal representatives or people constituting the management or administrative bodies, depending on their involvement in the violation committed.

Leniency programs

Companies and individuals may apply for a leniency program. The benefits of participating in a leniency program are as follows: (i) full immunity for the first applicant; (ii) a 30% to 50% reduction of fines for the second applicant; (iii) a 20% to 30% reduction of fines for the third applicant; and (iv) up to 20% reduction of fines for subsequent applicants.

To benefit from a leniency program, the applicant must: (i) provide the relevant elements to initiate a proceeding against an alleged cartel; and (ii) agree to collaborate fully with the subsequent investigation until its conclusion.
In May 2023, the Congress in Peru unanimously passed a bill exempting softcore cartels and abuses of dominance conduct from criminal proceedings. The bill also grants leniency applicants additional protections, such as prohibiting the public prosecutor from initiating criminal proceedings until after Indecopi has issued a sanctioning decision. The new law also guarantees the identity of leniency applicants will remain confidential. The new legislation is set to limit criminal prosecutions to hard-core cartels, such as bid-rigging, price-fixing, and market and customer allocation.

Rewards program

Individuals who did not participate in or who only have a “peripheral role” in the implementation of a cartel can apply for a rewards program if they provide information related to the cartel and such information is sufficient to detect the infringement. The reward is a payment of up to 5% of the fine effectively paid by the offenders.

Rewards program applicants are bound by collaboration and confidentiality duties with the competition authority, as well as by other rights and obligations as established in the “Guidelines of the Reward Program.”

Abuse of dominance or market power

Dominance or market power

“Dominance” is defined by the Antitrust Law as the possibility of restricting, affecting or distorting — substantially — the conditions of the offer or demand in the relevant market and rendering the corresponding agent of the competitors, providers or clients unable to counteract such possibility.

Neither the Antitrust Law nor jurisprudence refers to a market share by which the existence of a dominant position can be ruled out.

Only when a dominant agent uses its position to unduly restrict competition, and by which it obtains benefits and harms real or potential competitors, will the conduct be punishable.

Types of prohibited conduct

According to the Antitrust Law, the following qualify as abuse of dominance:

- Unjustified refusal to deal
- Discrimination (applying unequal conditions to equivalent transactions)
- Tied sales
- Impeding the entrance to or permanence in the market of a competitor
- Establishing, imposing or suggesting unjustified exclusive distribution or sales agreements and non-compete clauses or the like
Abusive use of judicial or administrative procedures that results in the restriction of competition

Encouraging others to not provide goods or services or to not accept them

Defenses, liability reliefs or exclusion

There are no specific defenses, liability reliefs or exclusions established under the Peruvian Competition Law. Therefore, the main defenses against an antitrust investigation for an alleged abuse of dominance are either: (i) ensuring that the entity being investigated holds no dominant position; or (ii) ensuring that the conduct under investigation does not hurt free competition.

Free Competition Compliance Programs

Indecopi, the antitrust authority, issued in 2020 the Guide to Free Competition Compliance Programs. The guide provides information on the requirements and benefits of implementing an effective compliance program.

The guide establishes that to achieve its benefits, a compliance program must satisfy the following essential requirements: (i) real commitment to comply from senior management (tone from the top); (ii) identification and management of current and potential risks; (iii) internal procedures and protocols; (iv) training for employees; (v) update and constant monitoring of the compliance program; (vi) audits; (vii) procedures for consultations and complaints; and (viii) appointment of a compliance officer or committee.

Furthermore, it indicates that compliance with the following components can significantly strengthen the effectiveness of a compliance program: (i) preparation of a competition manual; (ii) provision of incentives to employees who identify risky behaviors and contribute to the implementation of the compliance program; and (iii) establishment of disciplinary measures for noncompliance with said program.

The guide likewise establishes that Indecopi may apply a reduction from 5% to 10% of the fine that would have been applicable to the offending economic agent if the following conditions are satisfactorily met: a) the compliance program complies with the abovementioned essential requirements in accordance with the size of the company; b) the offense is an isolated incident; and c) the company took appropriate actions against the breach, including reporting it to Indecopi.
Investigations and powers of authorities

Legal privilege

The Antitrust Law does not contain any provision regarding legal privilege. In that sense, it would not be possible to refuse to provide information and/or a deposition based on it. The only exception to this rule is the exchange of communication between the company and its lawyers, as the right and obligation to keep professional secrets and not to reveal any confidential information relating to an attorney-client relationship is protected by the rule.

Judicial warrant

The antitrust authority needs no judicial warrant to conduct a raid and take copies of documents. Only under the following specific circumstances will a judicial warrant be required: (i) moving original documents or official records of a company outside its premises; and (ii) unlocking the premises of a company in case of refusal of entry or when it is closed.

In 2020, the Peruvian competition authority published guidance on its procedures for dawn raids. The Guidelines describe the main characteristics of dawn raids carried out during antitrust investigations, and provides guidance on the rights and obligations of those inspected during a raid.

Criminal sanctions

The Congress enacted the Law No. 31040, which implemented criminal sanctions for antitrust violations. It provides that the abuse of dominant position and collusive practices may be considered crimes that can be sanctioned with imprisonment sanction ranging from two (2) to up six (6) years.

It must be taken into account that the criminal sanction is independent of the sanction that Indecopi may apply. Likewise, it has not been established that a prior decision from Indecopi is required in order to apply criminal sanctions.
## Fines imposed per industry group in Latin America

**Baker McKenzie jurisdictions**

<table>
<thead>
<tr>
<th>Industry Group</th>
<th>Case Description</th>
<th>Year</th>
<th>Case Type</th>
<th>Fine (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Good and Retail (CG&amp;R)</td>
<td>Kimberly Clark Perú S.R.L. and Productos Tissue del Perú S.A. (leniency program applied)</td>
<td>2017</td>
<td>Cartel (price fixing)</td>
<td>85,900,000</td>
</tr>
<tr>
<td>Energy, Mining and Infrastructure (EMI)</td>
<td>Lima Gas S.A., Solgas S.A., Zeta Gas Andino S.A. and some individuals</td>
<td>2019</td>
<td>Cartel (price fixing)</td>
<td>14,084,555</td>
</tr>
<tr>
<td>Financial Institutions and Fintech (FI)</td>
<td>Peruvian Association of Insurance and nine insurance companies (*)</td>
<td>2003</td>
<td>Cartel (price fixing)</td>
<td>243,000</td>
</tr>
<tr>
<td>Technology, Media and Telecom (TMT)</td>
<td>Telefónica del Perú S.A.A.</td>
<td>2017</td>
<td>Abuse of dominance (tied selling)</td>
<td>349,439</td>
</tr>
<tr>
<td>Industries, Manufacturing and Transportation (IMT)</td>
<td>Thirty-three construction companies and twenty-six executives</td>
<td>2021</td>
<td>Bid-rigging for public road tenders</td>
<td>660 million</td>
</tr>
</tbody>
</table>
Venezuela
Merger control

What is the merger notification criteria and timeframe?

It is voluntary; therefore, no timeframe is applicable.

Filing threshold

There are no filing thresholds.

Main characteristics of the merger clearance process

There are no specific merger control regulations provided under Venezuelan law. Consequently, no prior authorization or consent is required from public entities.

Notification duty failure and legal consequences

No notices other than strictly corporate notices (e.g., before the Commercial Registry) are required.

Cartels and other anti-competitive agreements

Prohibited agreements by object and effect

The Antitrust Law has an omnibus provision covering, in broad terms, both the restraint of trade and the abuse of a dominant position. It also has particular provisions considering specific violations under both categories. The omnibus provision prohibits conduct, practices, agreements, covenants, contracts or decisions that prevent, restrict, distort or limit free competition. The Antitrust Law provides for collective restraints that consist of agreements or covenants made directly or through resolutions or decisions of unions, associations, federations, cooperatives or other similar groups, shareholders or partnerships that restrict or prevent competition among members. Specifically, the Antitrust Law prohibits agreements, collective decisions or recommendations and concerted practices that: (i) directly or indirectly fix purchase or sales prices, or other trading conditions; (ii) limit production, distribution, technical development or investment; (iii) apply dissimilar conditions to equivalent transactions with different trading parties, thereby placing some at a competitive disadvantage; and (iv) include tying arrangements making the closing of contracts subject to the acceptance of additional obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts. Based on experience, some activities are more likely to invite scrutiny from the antitrust agency, which may result in liability. Nonetheless, agreements between competitors regarding prices or other trading conditions have not been considered illegal per se by the antitrust agency.
Hard-core cartels

Neither the Law of Fair Prices nor the Antitrust Law makes specific reference to cartel activities.

Vertical restraints

Where the relationship between the parties is vertical (as in the case of a manufacturer and a distributor), the antitrust agency applies the "rule of reason" analysis and examines their specific effects on a particular market or the business justification for the restriction.

Resale price issues

The Antitrust Law prohibits contracts in which the prices and conditions of the contract for the sale of goods or the provision of services to third parties are established and produced, or those that may have the effect of restricting, distorting or impeding fair economic competition.

Fines

Fines are calculated over the annual gross income of the offender, and the value of the fines for restricted activities can range from 1% to 20% over the annual gross income.

Leniency programs

The Antitrust Law provides for a leniency regime under which infringing companies could: (i) stop anti-monopoly conduct; or (ii) repair the damages they caused.

Abuse of dominance or market power

Dominance or market power

A dominant position is present when a given economic activity is carried out by an individual or a group of individuals linked together, which includes both a purchaser and a seller, and in their capacity as a service provider and as an end user, or when, despite the existence of a multiplicity of individuals performing certain types of activities, there is no effective competition between them.

Types of prohibited conduct

The Antitrust Law prohibits the abuse of a dominant market position by one or more persons or entities. The abuse can take a number of forms, but the law is directed at curbing the following in particular: (i) the imposition of discriminatory purchases or sales prices, or other trading conditions; (ii) the limitation, without justification, of production, distribution or technical development, thereby prejudicing enterprises and consumers; (iii) the unjustifiable refusal to satisfy the demand for products or services; (iv) the application of dissimilar conditions to equivalent transactions with different parties, thereby placing some at a competitive disadvantage; and (v) subjecting contracts to additional conditions that, by their nature or according to commercial usage, have no connection with the subject matter of the said contracts. The particular cases, however, are not exhaustive.
Defenses, liability reliefs or exclusion

There are no specific defenses provided for in the law. This must be analyzed on a case-by-case basis.

Investigations and powers of authorities

Legal privilege

Legal privilege is still in force while an investigation is being conducted. Certain conditions might be applicable to lift legal privilege.

Judicial warrant

Judicial warranties can include the seizure of documents and many other warranties.
Examples of significant merger enforcement

ARGENTINA

The most significant merger case last year was that of Discovery/WarnerMedia. The Argentinian competition authority (CNDC) issued an objection report after its review of the USD 43 million acquisition, once it identified potential horizontal effects, plus the possibility for the merged company to restrict the distribution of its many channels. The competition authority issued an injunction, and sought potential remedies.

BRAZIL

On 11 March 2023, the Brazilian Competition Authority (CADE) blocked Hapvida’s acquisition of its rival, Smile, a health plan insurance provider. CADE alleges they blocked the deal to prevent the two companies from controlling 90% of the health insurance market in parts of Brazil. The proposed acquisition is said to be valued at USD 45 million dollars, and this is the second time in which CADE has blocked an acquisition by Hapvida. Two years ago, it also blocked the purchase of another rival insurer. CADE has publicly commented that the Brazilian health markets are overly concentrated. According to the CADE’s investigative branch, the proposed deal could affect the medical and health plans, including eliminating a key player in the market thereby creating a duopoly in the market.

CHILE

In May 2018, the FNE blocked the first merger since the mandatory control regime came into force in June 2017. The operation consisted of the acquisition by the company Ideal (the Chilean subsidiary of the Bimbo Group) of the local company Nutrabien. Both companies produce and commercialize food products and are currently competing in the sponge cake (including brownies, filled cakes and individual cakes), alfajores (a Chilean chocolate-covered double-layer biscuit filled with milk caramel spread) and cookies categories, with Ideal being the main actor in the country when it comes to sponge cake and alfajores products.

In its assessment, the FNE did not define the relevant market where the companies compete, but instead it focused on the closeness of the competition between the parties’ products. The FNE considered that Nutrabien and Ideal would be very close competitors in sponge cakes and alfajores. In particular, the analysis carried out by the FNE shows that the majority of consumers of sponge cakes and alfajores sold by Nutrabien, in the absence of such products, would acquire the products...
made by Ideal. In the opinion of the FNE, such situation would generate a relevant incentive for Ideal to increase the prices of the products currently commercialized by Nutrabien after the merger. That is, the losses in sales that the price increase of the products currently commercialized by Nutrabien would generate could be recovered through bigger sales of its other products, which would make such price increase profitable.

The FNE decided to block the merger since the mitigation measures offered by the parties were insufficient to counteract the negative effects that the merger would generate. In this respect, the notifying parties offered the FNE only behavioral measures, that is, those that regulate or limit the behaviors to be adopted by Ideal in the future, such as: limiting its investment in advertising and market research for three years; subjecting it to maximum price levels and minimum quality for three years; and expanding the number of customers and points of sale of certain Nutrabien products by 20%. The FNE considered that the remedies proposed by the parties were not appropriate because they were too complex to control, and they implied a temporary regulation of the market, which could affect market entry incentives. Additionally, the FNE considered that the remedies offered were temporary in circumstances where the risks identified could be permanent. Currently, the case is under appeal before the Competition Tribunal.

COLOMBIA

This year’s most important merger case is the proposed acquisition of Viva Air by Avianca airlines. In August 2022, Avianca sought expedited approval from the Colombia’s aviation agency to purchase Viva Air after signing a merger agreement in April 2022. It invoked the failing firm defense and asked for a speedy review due to Viva’s financial state. In November 2022, the deal was blocked, concluding the merged entity would ultimately hold almost 94% share of domestic flight routes and sole control over sixteen routes. The authority also rejected the parties’ failing firm defense. In February 2023, Viva Air filed for insolvency and suspended operations, reports claim that the merger clearance tie-up was the root cause. Soon after, in March 2023, the Colombian’s Civil Aviation Authority had conditionally cleared the merger. The conditions included maintaining the acquired company’s low-cost business model as well as establishing fare caps on routes where the integrated airlines have a monopoly. Avianca filed an appeal in April 2023, and is currently requesting a modification of the conditions to reflect the current market and account for changed circumstances now that Viva filed for insolvency. The request on appeal includes the availability of Viva’s capacity in terms of aircraft, to meet connectivity needs, as well as resolve the situation of the low-cost carrier’s users. Rival airlines can appeal against the clearance decision. It is

11 Avianca filed appeals before the Aeronáutica Civil requesting clarifications and minor modifications to the last resolution issued.
uncommon for parties to appeal a conditional clearance. However, Avianca has asked to apply adjustments to the conditions imposed, in order “to guarantee the minimum conditions to be able to operate what is left of Viva, and thus preserve connectivity” and supply to passengers in Colombia.

MEXICO

At the time of writing, the most prominent merger case for Cofece continues to be the concentration in 2018 between Bayer and Monsanto, the two most relevant undertakings in the agricultural industry worldwide. Both companies supply farmers in Mexico with an ample variety of seeds and products for crop protection, such as herbicides. Following a review of the proposed transaction, Cofece found that the concentration would result in Bayer becoming the sole supplier of genetically modified cottonseed in Mexico, gaining significant market shares in the market for multiple crops, such as onion, cucumber, tomato, watermelon, melon and lettuce, as well as non-selective herbicides. Moreover, Cofece also identified high entry barriers in these markets, especially in terms of the difficulty and time required for research and the development of new products, restrictions in legal frameworks, and the high levels of investment required. In light of the above, Cofece conditioned the concentration to the divestment of the following businesses of Bayer: (i) the genetically modified cottonseed business; (ii) the vegetable seed business in its totality; and (iii) certain non-selective herbicides. It is important to note that Bayer has already proposed to sell the listed businesses to its rival, BASF, which Cofece determined has the capacity and incentive to compete vigorously in such markets. It is also worth mentioning that Cofece collaborated with other competition agencies around the world, mainly the US Department of Justice, in the analysis of this transaction.

In the last year, Cofece has issued a couple of noteworthy and large gun-jumping fines against parties who failed to notify the Commission of the transaction. In March 2023, Mexico’s competition authority issued the highest ever gun-jumping fine of USD 3.3 million to two tech companies for closing a USD 3.5 million merger despite the merger still being under review. In 2022, AT&T and Warner Bros Discovery were fined USD 2.8 million for failing to notify the Commission of a carve-out of one of their subsidiaries, this separation occurred after the USD 46.5 million deal was cleared.
No-Poach Agreements:
A Threat to Labor Mobility in Latin America
No-Poach Agreements: A Threat to Labor Mobility in Latin America

A closer look at the latest cases and developments in the region.

In Latin America, we are seeing major changes in the political landscape in countries such as Colombia, Brazil, Peru and Mexico.

These changes are causing shifts in enforcement and a continued focus on key sectors that affect the day-to-day well-being of consumers: essential goods, healthcare/pharma, and consumer products. Many authorities in the region are also focusing on areas that critically affect the population. For that reason, it is of no surprise that the labor market is now under the spotlight as well. Competition authorities around the world continue to sharpen their focus on markets for employee talent, as they look to protect employees and promote competition and worker mobility.

**Trendsetters**

The current push to scrutinize competition issues in labor markets began in the United States with the issuance of a guidance in October 2016 by federal antitrust enforcers. In the 2016 Antitrust Guidance for Human Resources Professionals, the US Department of Justice (DOJ) and Federal Trade Commission (FTC) put companies and their executives on notice that “naked” wage-fixing and no-poaching agreements could be prosecuted criminally. The guidance established that employers competing to hire or retain the same employees are “competitors” from an antitrust perspective, even if they do not make the same products or provide the same services. Five years later, in 2021, President Biden issued an Executive Order announcing 72 initiatives to increase vigorous antitrust enforcement. The Order prioritized certain conduct for antitrust enforcement, rulemaking and/or guidelines, including banning employee non-compete clauses and sharing of wage data among employers. Since then, enforcers in the US have been vigilant in criminally prosecuting no-poach conduct and wage-fixing cases. There have been approximately eight indictments, which resulted in one guilty plea, and four acquittals at trial, marking a string of losses for the DOJ. Nevertheless, the agencies have publicly committed to “ensuring that workers receive competitive wages and a fair chance to pursue better work.”1 At a conference, the DOJ’s Assistant Attorney General for Antitrust Jonathan Kanter stated, “We’re going to continue to bring the cases — we’re not backing down.”2

While the US has set the bar, and seems to remain the highest-risk jurisdiction from an enforcement standpoint. Authorities across the world are following suit, intervening in labor markets to challenge anti-competitive practices and the unfair contractual terms of employers. Investigation and enforcement in this field is serious and carries the risk of criminal prosecution, hefty civil fines and damages claims, drawn-out and expensive class action litigation, as well as reputational harm.

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1 [Health care company pleads guilty and sentenced conspiring suppress wages school nurses](https://www.wsj.com/articles/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses-11570164442)
2 [University of Chicago, Stigler Center, April 2022 Antitrust & Competition Conference](https://www.chicagobooth.edu/stigler-center/events/international-antitrust-conference)
Latin America following suit

Enforcers across Latin America are catching up, as global authorities focus on harms to employees and the wider effects of employers’ collusion in this area.

We have seen such developments expand across the region, notably in Mexico, Brazil, Peru and Colombia. These cases cover the breadth of labor market anticompetitive conduct, with some cases involving wage-fixing. Meanwhile, others have investigated no-poach agreements and information exchange of sensitive employee information and compensation. Authorities appear to agree that this type of conduct has the purpose and effect of segmenting a market to limit competitors from hiring each other’s employees, which unduly restricts employees’ mobility and their ability to negotiate and obtain better salaries.

Brazil

Brazilian’s competition authority, CADE, was one of the first jurisdictions to begin investigating this type of conduct in early 2021. CADE initiated an investigation on the exchange of commercially sensitive information between six companies as part of a larger probe that targeted 37 companies, for a total of 108 defendants for allegedly engaging in wage-fixing labor agreements in the healthcare sector, and anticompetitive information exchange. This was the first competition investigation into labor markets in Brazil. There was said to have been evidence in the case that established an exchange of commercially sensitive information between competing employers regarding compensation, salary readjustments and employee benefits offered to current and future personnel. A year later, September 2022, six companies as well as thirty-five individuals investigated agreed to pay fines of USD 6.62 million to settle the information exchange investigation. This is an example of where companies need to be on alert about the significant risk of sharing commercially sensitive information on employees, including remuneration, benefits, salaries and amongst other employment information. The authority underlined that while investigations into anticompetitive conduct involving labor markets were relatively new at the time in Brazil, this conduct was indeed attracting the attention of competition authorities in several jurisdictions in the region. This has proved to be true, as we will highlight in our next few cases.

Colombia

In December 2021, Colombia’s Superintendence of Industry and Commerce (SIC) initiated an investigation against the Colombian professional soccer association, the entity in charge of organizing and operating the Colombian professional soccer league, sixteen professional soccer teams. The investigation also included twenty individuals associated with allegedly participating in no-poach agreements. The various soccer teams allegedly entered into an agreement with the intention of creating a list of players
whose rights could not be negotiated with other teams, thereby restricting market competition. This agreement purportedly affected the professional soccer players from Colombia’s first and second divisions between the years of 2018 and 2021. This was the first administrative investigation opened by the SIC with regard to no-poach agreements.

**Mexico**

In a similar case involving agreements affecting professional soccer, Mexico’s Federal Economic Competition Commission (COFECE) sanctioned football clubs in its first-ever no-poach probe, which resulted in fines for seventeen football clubs, the country’s soccer federation, and eight individuals. The investigation revolved around anticompetitive conduct of enforcing salary caps and restricting player movement. COFECE imposed total fines of USD 7.91-8.87 million on seventeen clubs in Mexico’s top professional league, as well as the Mexican Football Federation (FMF) and eight unidentified individuals. The investigation revealed agreements imposing maximum wage caps for women’s soccer players. This case differs from others in that the agreements between the soccer clubs not only had the purpose and effect of manipulating players’ wages, and prevented other soccer clubs from competing for them, what’s more, COFECE noted these agreements created a negative impact of “widening the gender pay gap.”

The competition authority declared that this conduct in fact eliminated competition between the clubs to contract with the soccer players with better salaries. These practices also prevented players from changing teams even when their contracts expired, hindering employee mobility, and impeding competition in the labor market. According to the authority, players consequently lost their capacity to freely negotiate and obtain better working conditions, creating losses of USD 4 million dollars for the market. The case also involved an agreement to segment the player transfer market. The soccer clubs, with the help of the FMF, agreed to apply the right of retention in a “gentleman’s agreement,” through which each club registered the players with whom they had a contract.

At the end of the contracts, teams maintained the right to retain their players. If a different club was interested in signing a specific soccer player, it would have to obtain authorization from the first club that had the player in their “inventory” and, often, pay a fee for the change. These “gentleman’s agreements” materialized during the transfer and hiring regime for players at the beginning of the season.

**Peru**

In 2020, Peru’s competition authority, INDECOPI, published one of the first guidelines in the region where it established that no-poach agreements between companies that compete in the same labor pool are in fact a violation of competition law, even if the companies operate in separate industries. In the guidelines, the competition authority determined both no-poach and wage-fixing agreements are to be classified as hardcore cartel behavior.

Two years later, INDECOPI, launched an investigation into six construction companies after they allegedly agreed not to hire each other’s employees, marking the agency’s first-ever probe into no-poach agreements. INDECOPI opened the investigation after its preliminary probe revealed that the companies agreed not to contract or hire each other’s former or current construction workers and administrative staff from years 2011 to 2017. The authority alleged that this conduct harmed the “labor mobility” of these workers because they were restricted from freely changing employers. Marking this the first labor-antitrust investigation in Peru.

In the most recent development, INDECOPI issued its first ever fine for no-poach conduct, against six construction companies, in addition to fourteen executives for USD 1.5 million. According to the decision, the personnel of human resources of these companies coordinated no-poach agreements for a span of six years. The competition authority held that these agreements prevented the workers from freely switching employers, and also limited their access to better salaries.

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3 COFECE sanctions 17 clubs of the Liga MX, the Mexican Football
4 Id.
The decision determined that the companies colluded to allocate the labor market for construction workers, as well as the market for administrative personnel. This case is distinct in that the collusion is said to have involved employees from two different types of labor markets.

**Antitrust risks in labor markets**

Companies should be aware of the ever-changing landscape. The three high-risk areas for companies involve the prohibited practices of wage-fixing, blanket no-poach agreements, and exchange of sensitive commercial information with competitors.

Wage-fixing practices include agreeing to fix with another company an employee’s salary or other terms of compensation at a specific level or within a certain range. Competitors should not enter into agreements on how much to pay their employees, for example, imposing salary maximums as seen in the case in Mexico, or by capping or withholding pay raises and/or bonuses.

Under a naked no-poach arrangement, companies agree to restrict the movement of employees between rival employers (whether downstream competitors or not), which can prevent mobility and career development. Companies should not: agree to not recruit, refuse to solicit or hire certain employees, or agree to not compete on terms of compensation. It is important to note that these unlawful gentlemen’s agreements terms are found not only in written agreements but also in oral and inferred agreements — even handshake agreements. Informal settings are often prone to this type of conduct. We advise companies to be vigilant during trade association meetings and other informal settings.

Companies should proceed with caution when exchanging information with competitors and avoid sharing commercially sensitive information on employees, such as wages/salaries, compensation or benefits information, and terms and conditions of employment. These include bonuses, holiday entitlements, allowances, healthcare and travel/relocation allowance. Such employee information should be treated in the same way as any other competitively sensitive data, and should not be shared with competing employers.

Ultimately, companies that compete for the same talent pool run the risk of violating antitrust laws if they enter into these types of competitor agreements. Those in a highly specialized industry or that hire from a highly specialized talent pool are particularly at risk.

In summary, if a company enters into agreements that restrict worker mobility (i.e., segmenting the labor market, similar to market allocation), collude to fix salaries (similar to price-fixing), or exchange commercially sensitive employee information, it may run afoul of antitrust laws.

**Key recommendations**

Companies should perform an internal health check and revisit their business practices and policies with regard to this area. It is also highly advisable for companies to train their human resources staff, especially senior management, on competition matters, including information exchange, so that they can better understand the risks surrounding
these labor market issues. Finally, companies should review their hiring policies, contractual clauses, and any such agreements, they have in place to ensure compliance with the antitrust and competition law and, prevent potential fines, both corporate and individual (in certain jurisdictions), including related criminal penalties.

**Conclusions**

We have seen a general strengthening of the authorities’ investigative and sanctioning powers in Latin America. Many jurisdictions are also reforming their laws to comply with best international practices. The region has experienced a noteworthy increase in the importance and application of competition law and enforcement policy. All of this shows the growing importance of competition enforcement in the region. Authorities in Mexico, for example, have increased the number of anti-competitive practices prohibited by their laws. In addition, several jurisdictions such as Chile, Colombia, Mexico and Peru have aimed at increasing sanctions for anti-competitive conduct. The increasing scrutiny in labor markets we are currently seeing in the United States will most likely have an direct impact on Latin America. Competition authorities in this region have emphasized that they are starting to take notice of the war for talent.

We will most likely see an uptick in enforcement in investigations in the region, following suit from the United States. The intersection between labor and antitrust is on the radar for many jurisdictions, not only in our region, but globally. The authorities are recognizing the competitive harm in fixing salaries, restricting the mobility of workers in a particular concentrated sector, and the impact these types of agreements have on an employee’s ability to achieve better working conditions or negotiate better salaries. As these novel theories of harm continue to get fleshed out, the Latin America region will be watching and the authorities will be listening.
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