Latin America
Antitrust & Competition Handbook
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Foreword

Antitrust law in Latin America is evolving. Stronger cooperation among regulators and the growing influence of the OECD — to which Brazil, Chile, Colombia and Mexico are already parties — 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, in recent months, the Colombian authority 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 enacted a new competition law that provides an amended merger control, the creation of a leniency program, increased fines and a reviewed method of calculation, and the creation of a new competition authority.

• Peru implemented amendments to their competition law, which focuses on compliance tools, such as an economic reward for whistle-blowers financed by the competition authorities and the implementation of antitrust compliance programs. A new official procedure to claim for damages on behalf of the diffuse and collective interests of consumers, among other procedural amendments, was also introduced.

• The Colombian Congress is studying a bill intended to disqualify any vendor declared by the competition authority to be guilty of anti-competitive conduct from entering into contracts with the Colombian state.

• Chile's extensive amendment to its competition law implemented in 2017 includes a mandatory merger control regime; establishes collusion criminal prosecution; facilitates antitrust damages claims and class actions; increases the
fines value amount; establishes a per se rule for hard-core cartels; and prohibits the simultaneous participation in competitors' board of directors, among others.

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.

**Carolina Pardo**
Chair, Latin America Antitrust & Competition Practice
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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 the new Argentine Competition Law No. 27,442 ("Competition Law"), one year after the new competition authorities, envisaged by the new Competition Law, are appointed (the appointment process is currently ongoing, although it is difficult to predict how the elections and the probable appointment of a new government may influence it), a pre-merger system will enter into force by means of which filing must take place before control is acquired.

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 ARS 2.64 billion. This
amount will be updated by the new competition authorities on a yearly basis and fixed in adjustable units. 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 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 ARS 2.64 billion 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 ARS 528 million.

- The total price for the transaction in Argentina does not exceed ARS 528 million.

- The acquiring group has not entered into any other transaction exceeding the total amount of ARS 528 million in the previous 12 months and ARS 1.584 billion 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:

(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, whichever occurs first

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 point of view, 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 from the Commission 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 of between ARS 132,000 and ARS 528,000, which amount shall be
determined by the National Executive Branch and which will be adjusted on a yearly basis.

However, as per the new Competition Law as explained above, one year after the new competition authorities, envisaged by the new Competition Law, are appointed, a pre-merger system will enter into force by means of which filing must take place before control is acquired. The Competition Law is not specific on the way the pre-merger system will be implemented and we expect the new authorities to issue guidelines on gun-jumping to clarify.

In this regard, 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) In mergers between companies, before signing the definitive merger agreement

(b) In bulk transfers, prior to the registration of the sale document in the corresponding Public Registry of Commerce

(c) In 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

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 ARS 19.8 million per day of delay, according to the current value fixed to adjustable units. 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 so-called "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 those acts or conduct that may: (i) restrict competition; or (ii) constitute an abuse of a dominant position, provided that such conduct affects 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 affects 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 so-called "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 those cases, the Commission considered 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 ARS 5.28 billion, according to the current value fixed to adjustable units.

**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:
(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 continuation 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 not in itself 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 already 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 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 *per se* prohibited conduct, 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).

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.
### Highest fines imposed per industry group in Latin America Baker McKenzie jurisdictions

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<th>Year</th>
<th>Type of Abuse</th>
<th>Fine Amount</th>
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<td><strong>Consumer Good and Retail (CG&amp;R)</strong></td>
<td>Clorox</td>
<td>2015</td>
<td>Abuse of dominance</td>
<td>ARS 5 million</td>
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<tr>
<td><strong>Energy, Mining and Infrastructure (EMI)</strong></td>
<td>YPF</td>
<td>1999</td>
<td>Exploitative abuse</td>
<td>ARS 100 million</td>
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<td><strong>Financial Institutions and Fintech (FI)</strong></td>
<td>Prisma</td>
<td>2016</td>
<td>Market investigation of the credit card and electronic payments system; resulted in the determination of the existence of potential anti-competitive practices</td>
<td>Since this was a market investigation, no fines were applied. As a result, the banks (Prisma’s main shareholders) announced their decision to sell their shares in Prisma.</td>
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<td><strong>Healthcare (HC)</strong></td>
<td>Main manufacturers of oxygen for medicinal purposes</td>
<td>2006</td>
<td>Cartel – bid rigging</td>
<td>ARS 30 million</td>
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<td><strong>Technology, Media and Telecom (TMT)</strong></td>
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<td></td>
<td>No relevant case</td>
</tr>
<tr>
<td><strong>Industries, Manufacturing and Transportation (IMT)</strong></td>
<td>Main cement companies</td>
<td>2006</td>
<td>Cartel</td>
<td>ARS 100 million</td>
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Brazil
Merger control

What is the merger notification criteria and timeframe?

The Brazilian Competition Act (BCA) sets an objective list of transactions subject to mandatory pre-merger notification, namely: typical merger and acquisition transactions (acquisition of companies or part of companies, shares — even acquisition of minority shareholding may be reportable — stocks and assets); certain associative agreements; joint ventures; consortia; and joint ventures, 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) it must generate effects in Brazil; and (ii) it must meet the revenue criteria. The effects requirement is 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) one of the parties to the transaction must have had revenues in Brazil in the year prior to the transaction, in excess of BRL 750 million (approximately USD 193.56 million); and (ii) at least another party involved must have had revenues in Brazil in excess of BRL 75 million (approximately USD 19.35 million). The revenues considered are those of the parties' economic groups (not simply the revenues of the buyer and the target). 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 a participation in excess of 20% directly or indirectly in the corporate or voting capital. Nonetheless, authorities can request the notification of any transaction that does not meet these thresholds up to one year after closing, with powers to order divestitures.
Main characteristics of the merger clearance process

The BCA establishes a pre-merger notification regime, which requires parties to wait for the approval by the Brazilian antitrust authorities to close a transaction. There is no filing deadline, but transactions may only be implemented when the Brazilian authorities give 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 approval by the authorities. 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 the authorities). Should the authorities not issue a final decision within the 330-day period, the transaction is automatically cleared.

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 or cooperative joint ventures; (ii) substitution of an economic agent; (iii) low market share (combined share less than 20% of the horizontal overlap or less than 30% of the market share in the vertically integrated markets); and (iv) low market share increase (horizontal mergers involving a combined market share higher than 20%, but lower than 50%). The fast-track procedure is applied upon the authorities' discretion. The Administrative Council for Economic Defense's ("CADE") internal regulation establishes 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 14,600 to USD 14.6
million). However, the regulations also provide 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. The authorities must analyze the request for preliminary authorization within 60 days from its submission.

Cartels and other anti-competitive agreements

Section 36 of the BCA 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 BCA 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 not used as frequently as in other jurisdictions, such as in the US.

Prohibited agreements by object and effect

Hard-core cartels

Hard-core cartels are illegal per se and, therefore, evidence indicating the existence of the conduct suffices 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, bid rigging or any other arrangement that somehow limits the access of competing firms to suppliers/distributors.

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 18% of the gross revenues accrued by the defendant in the year prior to the initiation of the administrative proceeding). Authorities 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, and offenders might be imprisoned for two to five years and receive a fine. Given the seriousness of the penalties applicable in these cases, it is not possible to apply for a prosecution agreement, which is an alternative in the Brazilian criminal system for less serious criminal violations.

Vertical restraints

Vertical restraints are usually analyzed under the "rule of reason." Therefore, the Brazilian authority must first confirm whether 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 BCA,
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.

The Brazilian competition authorities assume that setting minimum or fixed resale prices is anti-competitive. Defendants are required to demonstrate the efficiencies resulting from the conduct to be relieved from charges, which is virtually impossible considering that the antitrust authorities in past cases rejected arguments usually raised to support the adoption of this conduct. Maximum resale prices are usually seen more favorably, without a presumption of anti-competitive effects. This is because maximum prices can benefit consumers by preventing abusive resale prices set by resellers with a dominant position.

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 revenues accrued by the company in the industry sector related to the
market affected by the conduct under investigation, in the fiscal year before the initiation of the administrative proceeding. However, the CADE Tribunal may adopt a narrower cut for the base revenue, should using the industry segment revenue result in a disproportionate sanction. The BCA establishes aggravating and mitigating circumstances that must be taken into account by the authorities in the calculation of the fine.

Individuals who take part in antitrust violations may also be sanctioned. Higher-level officers may be fined by 1% to 20% of the fine imposed on the corporate defendant, while lower-level employees may be fined between BRL 50,000 (approximately USD 12,500) and BRL 2 billion (approximately USD 500 million).

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 BCA governs the Brazilian Antitrust Leniency Program. Leniency agreements grant immunity to companies and/or individuals that disclose to the competition authorities the existence of a cartel and that effectively and decisively collaborate with the authorities in the investigation. If the cartel is already under investigation, an application for the program may still be accepted, provided that the authorities do
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 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.

Abuse of dominance or market power

Dominance or market power

Under the BCA, 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 mere possession of a dominant position does not constitute in itself a violation of the law, the abuse of such power, in particular, when used to further hinder competition by excluding 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. Authorities, 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 imposed.

In these cases, sanctions also range from 0.1% to 20% of the revenues accrued by the company in the year preceding the initiation of the administrative proceeding. Nonetheless, competition authorities tend to set a lower percentage than that adopted in more severe conduct, such as 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 BCA 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. The Brazilian competition authorities 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 the Brazilian competition authority 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 effects.

For efficiency claims to constitute exceptions for prohibited conduct, they ought to be evidence-based and quantifiable. 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 documents 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 (competition authorities included) might obtain a judicial warrant to carry out dawn raids should they succeed in demonstrating that there is sufficient proof of the involvement of the seized undertaking in the unlawful conduct under investigation and that seized material could be used as evidence 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.
# Highest fines imposed per industry group in Latin America Baker McKenzie jurisdictions

<table>
<thead>
<tr>
<th>Industry Group</th>
<th>Company</th>
<th>Year</th>
<th>Violation</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Good and Retail (CG&amp;R)</td>
<td>Ambev</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>Votorantim</td>
<td>2014</td>
<td>Cartel</td>
<td>USD 381.7 million (fine)</td>
</tr>
<tr>
<td>Financial Institutions and Fintech (FI)</td>
<td>Citicorp</td>
<td>2016</td>
<td>Cartel</td>
<td>USD 19.5 million (settlement amount)</td>
</tr>
<tr>
<td>Healthcare (HC)</td>
<td>Eli Lilly</td>
<td>2015</td>
<td>Sham litigation</td>
<td>USD 9 million (fine)</td>
</tr>
<tr>
<td>Technology, Media and Telecom (TMT)</td>
<td>Oi</td>
<td>2015</td>
<td>Abuse of dominance</td>
<td>USD 6.5 million (fine)</td>
</tr>
<tr>
<td>Industries, Manufacturing and Transportation (IMT)</td>
<td>White Martins</td>
<td>2010</td>
<td>Cartel</td>
<td>USD 541.2 million (fine)*</td>
</tr>
</tbody>
</table>

*Please note that two fines mentioned above — against Ambev and White Martins — have been subject to litigation before the Brazilian judiciary.

(i) White Martins: There is currently a lawsuit discussing such fine. At this stage, the judiciary decision is to annul the fine.

(ii) Ambev: The fine was reduced in 2015 (approximately USD 55.9 million) after CADE and Ambev entered into an agreement before the judiciary.
Chile
Merger control

What is the merger notification criteria and timeframe?

The Chilean Competition Law sets forth that a 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 million, as of August 2019) in the financial year preceding the transaction.
(b) Parties have a combined domestic revenue of UF 2.5 million (as of August 2019, approximately USD 100 million) in the financial year preceding the transaction.

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, as 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 (from Monday to Friday) 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.

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 partnerships, corporations and other legal entities that could have intervened in the acts, contracts, covenants, systems or agreements above-mentioned

(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 apply for a fine of up to UTA 60,000 (approximately USD 50.4 million, as of August 2019)

(d) Fines of up to UTA 20 (approximately USD 16,800, as of August 2019) 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.

**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 has considered that this is not an exhaustive list of unlawful conduct.

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.

Hard-core cartels are sanctioned with 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, as of August 2019).

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.

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 a 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) summons to declare 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 perform dawn raids (enter public or private premises and register and seize all types of objects and documents that may exist thereof) 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.

**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.

**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 powers 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 a means of proof in the proceedings before the Competition Tribunal.
# Highest fines imposed per industry group in Latin America Baker McKenzie jurisdictions

<table>
<thead>
<tr>
<th>Industry Group</th>
<th>Entity 1</th>
<th>Year</th>
<th>Offence Description</th>
<th>Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Good and Retail (CG&amp;R)</td>
<td>Agrosuper S.A. Empresas Ariztía S.A. (Ariztía); Agrícola Don Pollo Limitada and Asociación de Productores Avícolas de Chile A.G. (poultry trade association)</td>
<td>2014</td>
<td>Cartel (quotas and other restrictions on production)</td>
<td>USD 26.7 million to both Agrosuper and Ariztía (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.</td>
</tr>
<tr>
<td>Energy, Mining and Infrastructure (EMI)</td>
<td>Asfaltos Chilenos S.A., Dynal Industrial S.A., Empresa Nacional de Energía Enex S.A. (ENEX), Química Latinoamericana S.A. (QLA)</td>
<td>2015</td>
<td>Cartel (bid rigging)</td>
<td>USD 382,000 to Asfaltos Chilenos and USD 229,000 to both Dynal and QLA. Enex obtained leniency.</td>
</tr>
<tr>
<td>Financial Institutions and Fintech (FI)</td>
<td>Transbank S.A.</td>
<td>2005</td>
<td>Abuse of dominance (price discrimination)</td>
<td>USD 560,000</td>
</tr>
<tr>
<td>Healthcare (HC)</td>
<td>Sanderson/Fresenius Kabi</td>
<td>2019</td>
<td>Bid rigging</td>
<td>USD 26.7 million (highest fines meted by the legislation at the time), currently under appeal. Biosano obtained immunity.</td>
</tr>
<tr>
<td>Technology, Media and Telecom (TMT)</td>
<td>Telefónica Móviles de Chile S.A.</td>
<td>2013</td>
<td>Abuse of dominance (margin squeeze)</td>
<td>USD 4.4 million</td>
</tr>
<tr>
<td>Industries, Manufacturing and Transportation (IMT)</td>
<td>NYK and MOL</td>
<td>2019</td>
<td>Maritime car carriers cartel (market allocation)</td>
<td>Approximately USD 8 million, currently under appeal. CSAV obtained immunity.</td>
</tr>
</tbody>
</table>
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.

Filing threshold

Where the combined value of the operational turnover and assets of the parties to a merger exceed the legal threshold, an approval for the transaction is needed from the SIC. The value of the combined Colombian assets or the combined Colombian revenues, including related companies in Colombia or abroad, exceeds 60,000 times the monthly minimum wage. The threshold is updated annually and is COP 49,686,960 or approximately USD 15 million for 2019.

Any transaction resulting in an economic concentration in at least one market in Colombia, either between parties engaged in the same economic activity (horizontal effects) or in the same value chain (vertical effects), are subject to merger control regulations.

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

Main characteristics of the merger clearance process

Where the combined market share of the parties is below 20%, a simplified notification procedure is available, which provides implied
approval within 10 business days from the application to the SIC. In addition to their application, parties need to submit information about the merger, including evidence that the market share is below 20%.

The SIC has 10 business days to answer the notice or determine that the transaction needs to go through the full clearance process. 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 are not eligible. The SIC has a term of up to five years from the filing 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 above 20%, the full clearance process will need to be followed. Parties need to submit an application supported by detailed information about the merger.

The SIC has 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.

The SIC may impose structural remedies to the transaction by, for example, requiring parties to sell certain assets or sections of the business. It may also impose behavioral sanctions restricting certain practices, but these are used less commonly.

Notification duty failure and legal consequences

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

(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 82,811,600,000 or approximately USD 24,653,646 in 2019.

(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 1,656,232,000 or approximately USD 493,072.

(c) Seek an order to reverse a closed transaction if the SIC has robust evidence that a closed transaction 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 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
Hard-core cartels

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

Vertical restraints

The SIC's analysis for vertical agreements is the same for horizontal agreements. Hence, vertical arrangements that involve price fixing, price discrimination in downstream distributors and certain tying requirements are unlawful if there is no evidence of a competitive benefit.

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 recent decision 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 resale price from its distributors, the conduct would be deemed compliant with the law.

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:

(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 82,811,600,000 or approximately USD 24 million, or 150% of the profits derived from the anti-competitive conduct.
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 1,656,232,000 or approximately USD 493,072.

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.

**Leniency programs**

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.

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.

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 15% reduction in the value of the administrative fine of Cartel A and, at the same time, receive full exemption from penalties in Cartel B.

However, the leniency program does not protect the applicant from private judicial actions that aim to recover damages, nor a criminal action in 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 period for responding to the opening resolution has expired.
Abuse of dominance or market power

Dominance or market power

Colombian regulation provides 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 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

Types of prohibited conduct

Agreements:

(i) Horizontal restrictive agreements

(ii) Vertical restrictive agreements

(iii) Abuse of dominance

(iv) 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 documents, can be protected from disclosure.

**Judicial warrant**

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

Officials can require entities or individuals to provide data (either digital or physical), reports and other commercial documents during or after dawn raids.
Highest 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 (Ley 155 de 1959, Art. 1 – General Prohibition)

2. Agreements to prevent the access of third parties to the market (Decreto 2153 de 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 (Ley 155 de 1959, Art. 1 – General Prohibition)

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

**Financial Institutions and Fintech (FI)**


Bid-rigging conduct

USD 9,426,986.80 (including sanctions to individuals)

Banco de Colombia S.A., Banco Davivienda S.A., Banco Santander S.A., BBVA. | 2007

Refusal to cooperate with the authority during an investigation

USD 417,339

**Healthcare (HC)**

Aliansalud, Coomeva, Famisanar, Salud Total, SOS, Medicina Prepagada Suramericana S.A., EPS Sura, Saludcoop, Cruz Blanca, Cafesalud, Sanitas, Promotora Compensar SAS Propensar, EPS Confenalco Antioquia, EPS Confenalco Valle, EPS Humana Vivir y ACEMI | 2011

1. Agreements to fix prices and to abstain from
providing health services to users (Decreto 1663 de 1992, Art. 5, Nos. 1, 8 and 10)

2. (Only to Asemi) agreements to distribute fees (Decreto 1663 de 1992, Art. 5, No. 4)
USD 8,381,847 | USD 8,852,776 (including sanctions to individuals)

**COMCEL S.A. | 2013**

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

2. Abuse of dominance by preventing third parties from entering the market (Decreto 2153 de 1992, Art. 50, No. 6)

USD 45,822,466
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. 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\(^1\)) (approximately USD 76 million\(^2\))

(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 76 million)

(c) Transactions that: (i) imply an accumulation of assets or capital stock in Mexico\(^3\) exceeding 8.4 million MU (approximately USD 35.4 million); and (ii) involves undertakings whose combined assets or annual sales in Mexico exceed 48 million MU (approximately USD 193.4 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.

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.

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1 The MU as of 1 February 2019 is MXN 84.49.
2 The exchange rate is volatile. For didactic purposes, an exchange rate of MXN 20 per USD 1 was used to calculate USD amounts.
3 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.
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.

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 ("Ifetel").

Notification duty failure and legal consequences

Aside from the administrative penalties described under the section "Fines" below, those 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 that 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 that are prohibited only when aiming to create or resulting in negative effects on the market. Relative monopolistic practices are analyzed under a "rule of reason" approach or by effect.
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 above-mentioned 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 when: (i) carried out by undertakings with substantial market power; and (ii) they 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: (i) carried out by undertakings with substantial market power; and (ii) they 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 non-compliance with remedies imposed by Cofece in a merger control process

(e) Up to 200,000 times the MU (approximately USD 844,000) 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 760,400) 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 when: (i) carried out by undertakings with substantial market power; and (ii) they 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.

**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.
## Highest fines imposed per industry group in Latin America Baker McKenzie jurisdictions

<table>
<thead>
<tr>
<th>Industry Group</th>
<th>Company/Details</th>
<th>Year</th>
<th>Description</th>
<th>Fine (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consumer Good and Retail (CG&amp;R)</strong></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>6,910,994</td>
</tr>
<tr>
<td><strong>Energy, Mining and Infrastructure (EMI)</strong></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>32,791,914</td>
</tr>
<tr>
<td><strong>Financial Institutions and Fintech (FI)</strong></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>61,921,313</td>
</tr>
<tr>
<td><strong>Healthcare (HC)</strong></td>
<td>Dentilab, Ambiderm, Degasa, Productos Galeno, Holiday de México and several individuals</td>
<td>2017</td>
<td>Agreements in the bidding processes of latex gloves used for diagnostic medical exploration and surgery</td>
<td>13,558,421</td>
</tr>
<tr>
<td><strong>Technology, Media and Telecom (TMT)</strong></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>36,684,785</td>
</tr>
<tr>
<td><strong>Industries, Manufacturing and Transportation (IMT)</strong></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>32,458,721</td>
</tr>
</tbody>
</table>
Peru
Merger control

What is the merger notification criteria and timeframe?

Merger control in Peru is only applicable to concentrations in the electricity sector (i.e., electrical generation, transmission and distribution activities).

According to Law No. 26876, a "concentration" is the realization of the following actions: (i) mergers; (ii) setting-up of a company in common; (iii) direct or indirect acquisitions of control on other companies by acquiring capital stock shares; (iv) participation, through any contract or legal figure, that confers the direct or indirect control of a company; (v) acquisition of productive assets of any company that develops activities in the sector; or (vi) any other act, contract or legal figure, including legacies made between competitors, suppliers, clients, shareholders or any other economic operators by which societies, associations, shares, social partners, trusts or assets in general are concentrated.

Filing threshold

Any concentration\(^4\) between companies of the electricity sector must be notified to the antitrust authority when it involves companies that have or will have after the transaction, jointly or separately, the following:

- A share equal to or higher than 15% of the market in horizontal concentration
- A share equal to or higher than 5% of any of the involved markets in vertical integration

\(^4\) The only transactions exempted by Law No. 26876 from notifications are the following: (i) concentration that involves, in one or more acts, the direct or indirect acquisition of assets valued at 5% less than the total value of all the company's assets; and (ii) concentration that involves, in one or more acts, the direct or indirect accumulation of less than 10% of the acquired company's total shares, unless this enables the acquirer to have direct or indirect control over a generation, transmission or distribution company.
Main characteristics of the merger clearance process

The antitrust authority has 30 working days from: (i) the receipt of a complete notification; or (ii) the receipt of any additional information requested by the antitrust authority considered necessary for the adequate examination of the notified transaction to complete the merger clearance process.

Once an application is submitted, the antitrust authority has five working days to confirm whether the notification is complete. The parties then have five working days to complete the notification. After that, the antitrust authority will have another 10 working days within which to request additional information. Following that, the parties will be given 10 working days to provide such additional information. If the parties fail to comply with either obligation, the notification is deemed to have not been filed.

The authority can extend the 30-working day term for another 30 days if it considers it necessary for its analysis.

Notification duty failure and legal consequences

Failure to file the concentration notification will cause fines of up to 500 Tax Imposition Units (approximately USD 627,000). However, the antitrust authority can also impose fines amounting to a maximum of 10% of the parties' gross income if it considers that there has been a substantial violation of the norms, such as in the following cases: (i) failing to present the notification; and (ii) conducting the concentration before obtaining approval from the antitrust authority.

In addition, the antitrust authority is entitled to initiate judicial processes to rescind the transaction. Such judicial processes include: (i) sale of productive assets; and (ii) the annulment of the act of concentration for violation of the rules of public policy.
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
Antitrust Law sanctions third parties facilitating hard-core cartels.

**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 responsibility 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.

There are two conditions in order to benefit from a leniency program: (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.
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 qualifies as an 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 exclusive distribution or sales agreements and non-compete clauses or the like that are unjustified
- Abusive use of judicial or administrative procedures, which results in the restriction of competition
• Encouraging others not to provide goods or services or not to 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; and/or (ii) ensuring that the conduct under investigation does not hurt free competition.

Investigations and powers of authorities

Legal privilege

The Antitrust Law contains no 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 a attorney-client relationship is protected by it.

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.
### Highest fines imposed per industry group in Latin America Baker McKenzie jurisdictions

<table>
<thead>
<tr>
<th>Industry Group</th>
<th>Company/Companies</th>
<th>Fines Details</th>
<th>Amounts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consumer Good and Retail (CG&amp;R)</strong></td>
<td>Kimberly Clark Perú S.R.L. and Productos Tissue del Perú S.A. (leniency program applied)</td>
<td>(2017) Cartel (price fixing)</td>
<td>USD 85,900,000 in total. The highest fine amounts to USD 53,584,615.</td>
</tr>
<tr>
<td><strong>Energy, Mining and Infrastructure (EMI)</strong></td>
<td>Lima Gas S.A., Solgas S.A., Zeta Gas Andino S.A. and some individuals (first instance)</td>
<td>2017 Cartel (price fixing)</td>
<td>USD 23,220,000 in total. The highest fine amounts to USD 18,963,000.</td>
</tr>
<tr>
<td><strong>Financial Institutions and Fintech (FI)</strong></td>
<td>Peruvian Association of Insurance and nine insurance companies (*)</td>
<td>2003 Cartel (price fixing)</td>
<td>USD 243,000 in total. The highest fine amounts to USD 41,500.</td>
</tr>
<tr>
<td><strong>Healthcare (HC)</strong></td>
<td>Albis S.A., Farmacias Peruanas S.A., Eckerd Perú S.A., Mifarma S.A. and Nortfarma S.A.C.</td>
<td>2016 Cartel (price fixing)</td>
<td>USD 2,641,992 in total. The highest fine amounts to USD 1,221,000.</td>
</tr>
<tr>
<td><strong>Technology, Media and Telecom (TMT)</strong></td>
<td>Telefónica del Perú S.A.A.</td>
<td>2014 Abuse of dominance (tied selling)</td>
<td>USD 460,000</td>
</tr>
<tr>
<td><strong>Industries, Manufacturing and Transportation (IMT)</strong></td>
<td>Ferrocarril Santuario Inca Machupicchu S.A.C. against Ferrocarril Trasandino S.A.</td>
<td>2007 Abuse of dominance (unjustified refusal to deal)</td>
<td>USD 191,000</td>
</tr>
</tbody>
</table>
Venezuela
Merger control

What is the merger notification criteria and timeframe?

It is voluntary and, 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 warrants can include the seizure of documents and many other warranties.
## Examples of significant merger enforcement

| **ARGENTINA** | The most significant merger case was that of Cablevisión and Multicanal, originally approved in 2007, subject to compliance with certain conditions. The approval was later withdrawn (2009) after the alleged lack of compliance with stated conditions. This gave rise to a long legal battle (part of the larger fight between the previous government and the Clarin Group, owner of Cablevisión), which ended in 2015 in favor of Clarin. |
| **BRAZIL** | On 2 August 2017, the Brazilian Competition Authority (CADE) unanimously blocked the proposed acquisition of fuel distributor Alesat Combustíveis by competitor Ipiranga Produtos de Petróleo, rejecting the applicants' extensive remedies proposal in a decision that suggests a tougher stance on merger reviews and grants more weight to companies' past anti-competitive conduct. The transaction would have resulted in the reduction of players from four to three, with combined market shares of less than 40% (with an increment of less than 20%), and overlaps limited to a few Brazilian states. The Tribunal found that the applicants' remedies proposal had failed to address the most pressing competition concerns arising from the deal and instead proposed complex remedies that were difficult to implement, in spite of the fact that the applicants' remedies proposal fit CADE's case law in the sector. Moreover, it pointed out the possibility of the transaction resulting in coordinated effects in view of the many cartel investigations involving the fuel/distribution industry, |
stating that a history of complaints against the industry players, regardless of condemnations, further increased the likelihood of coordination.

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 that could distort the incentives of companies to enter it. 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

The most important merger decision was that issued by the Colombian SIC in 2014, between Yara, the biggest multinational company of fertilizers, and Abonos Colombia S.A. (Abocol), a Colombian company. The transaction was approved by the SIC, but remedies were imposed to avoid a negative impact on consumers' welfare and on the development of the market of simple and compound inorganic fertilizers in Colombia. The conditions were based on a number of behavioral remedies, such as: (i) offering clients free technical assistance services; (ii) not imposing
exclusivity agreements; and (iii) not reducing the distribution offices in the country, unless there was an economic or legal excuse.

This merger was significant to the country because it contributed to the expansion of the agricultural industry in Colombia and increased employment rates in the sector.

**MEXICO**

At the time of writing, the most prominent merger case for Cofece, in 2018, was the concentration between Bayer and Monsanto, the two most relevant undertakings in the agricultural industry worldwide. In Mexico, both supply farmers 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.
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