

LATIN LAWYER REFERENCE ANTITRUST 2019

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# Introduction

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Latin America saw a wave of antitrust reforms in the 1990s, when antitrust enforcement became more prominent in the context of economic liberalisation efforts throughout much of the region. In those early days, when the region was transitioning to a more open economy, the greatest challenge for national antitrust authorities was developing an “antitrust culture” with antitrust rules where none previously existed. More than two decades later, the region is well into a new wave of antitrust development, this time towards international enforcement convergence. While the details of national competition laws vary from country to country, there are common trends across the region, including:

- reforms to simplify institutional structures and strengthen the powers of national competition authorities;
- more sophisticated merger control enforcement regimes that require mandatory pre-notification;
- implementation of leniency programmes to boost cartel enforcement;
- investigations into bid-rigging of public tenders;
- more active enforcement against abuse of dominance; and
- the growing use of private litigation to seek compensation for damages resulting from antitrust infringements.

Moreover, Latin American authorities increasingly cooperate among themselves and with their peers around the world to coordinate enforcement actions, exchange experiences and improve technical and procedural investigative and prosecutorial capabilities. Overall, authorities in the region have been busy, improved their craft, and without a doubt have put Latin American competition enforcement on the compliance map for companies that operate globally.

## Institutional reforms

Latin American jurisdictions have continued to hone their laws and regulations to improve enforcement effectiveness and efficiency. Reforms have focused on simplifying institutional structures, reinforcing agency independence, and providing more effective investigation tools and sanctioning powers.

Argentina passed a new competition act in 2018 creating a new antitrust authority – the National Antitrust Authority (ANC) – to replace the previous Antitrust Commission, as well as a specialised Court of Appeals to review decisions issued by the ANC. Similarly, in 2016, Chile eliminated overlapping powers between the National Economic Prosecutor (FNE) and the Free Competition Defense Court (TDLC), so that the TDLC now reviews prohibition decisions issued by the FNE.

In Mexico, legislative reforms implemented in 2013 and 2014 created two authorities responsible for antitrust enforcement: the Federal Economic Competition Commission (COFECE) and Federal Telecommunications Institute (IFT). The latter now has jurisdiction exclusively over the telecom and broadcasting sector (reflecting nuances specific to this sector in Mexico, including significant concentration). The reforms implemented in Mexico also established specialised courts for competition, broadcasting and telecommunications matters.

In mid-2012, Brazil replaced a system that relied on three different bodies with a system that concentrates investigative and decision-making powers in one authority – the Administrative Council for Economic Defence (CADE), which internally allocates such powers among its General Superintendency and Administrative Tribunal. Colombia, for its part, centralised competition enforcement in the Superintendency of Industry and Commerce (SIC) in 2009.

Overall, legislative reforms across the region have reinforced the autonomy of national competition agencies, improved their investigative powers (eg, providing increased powers to conduct dawn raids, engage in more effective fact discovery and to impose fines) and increased their human resources.

## Merger control

The purpose of a merger control regime is to assess, normally prospectively, the net competitive effects of a given transaction and to provide for remedies that preserve competition otherwise believed to be lost as a result of a given transaction. The fundamental merger control question across most jurisdictions is whether, as a result of a proposed transaction, competition will be lessened or distorted significantly enough to result in higher prices, lower quality or output, or reduced innovation. The stakes are high – strategic deals that could change the trajectory of a buyer for years to come can be blocked in their entirety. Lesser, but nonetheless significant, consequences for the parties involved include (i) delays to closing a transaction to comply with merger control requirements and (ii) structural (often a divestiture) or behavioural conditions imposed on transaction parties. Merger control regimes also present an opportune platform for strategic mischief by complaining rivals. In short, merger control can be a trap for the unaware and unprepared.

## Pre-merger notification requirements

Most economies in Latin America have a merger control regime in place, and most of these prohibit parties from closing a transaction prior to agency review. Argentina, Brazil, Chile, Colombia, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Peru and Uruguay are among the jurisdictions with pre-merger notification obligations. Argentina, the longest hold-out among the major Latin American economies to move from a post-closing notification regime to a pre-merger notification regime, installed a

pre-merger regime with suspensory effects in 2018, although this reform has yet to become effective. For the time being, parties may continue to observe the previous regime that allowed notifications to be filed up to one week after closing the transaction. More recently, in May 2019 Peru approved a law to introduce a general mandatory pre-merger control regime for all sectors of the economy (previously Peru required authorisation for mergers in the electricity sector only). The law must now be published in the official journal and will enter into force within one year of the publication.

Similarly, Costa Rica continues to allow notifications to be filed up to five days after parties close on a merger. Legislation has been proposed to eliminate this post-filing alternative. In Panama and Venezuela, notification is voluntary, but the enforcement authority can investigate and modify a transaction post-closing if it is found to violate national competition law. Bolivia requires previous authorisation for mergers in certain regulated sectors or industries, such as utilities and banking.

## A decade of cumulative merger reforms

The current merger enforcement landscape was largely shaped through reforms that swept through the region over the course of the past decade to improve effectiveness and predictability. As mentioned above, Peru made the most recent changes by passing legislation to create a general mandatory and suspensory pre-merger control regime. Argentina also made recent changes by completely remodelling its merger control rules in 2018, adopting an ex ante merger control system, increasing its filing thresholds, revising its overall merger review timeline and including a fast-track procedure, among other changes. These recent reforms followed a wave of changes that had been implemented with success in Brazil, Mexico, Colombia, Chile, Costa Rica, Ecuador and Paraguay. In Brazil, the merger regime was heavily modified in mid-2012 to require pre-merger notifications with suspensory effect, establish higher filing thresholds, and restructure the merger review process. Since then, CADE has issued secondary legislation on many topics. Most recently, in 2017 CADE published a best practices manual for the review of ordinary merger cases; in 2018 it published guidelines on merger remedies; and, in 2019, CADE has stated that it is working on an improved method to calculate gun jumping fines and is preparing guidelines on how to submit information in response to information requests.

Similar reforms occurred throughout Latin America. In Mexico, legislative reforms implemented in 2013 and 2014 streamlined the merger review process. In 2015, COFECE issued merger review guidelines and in 2017 added provisions on the interpretation and analysis of non-compete clauses and shareholder agreements. Additionally, COFECE issued guidelines on the use of electronic means in competition proceedings. In Colombia, the SIC issued a resolution in 2015 to clarify, among other things, the possibility of closing a transaction internationally that might affect competition in Colombia by carving out or holding separate assets or businesses that impact Colombia until the agency's review is complete. In 2016, Chile approved significant changes to its (previously voluntary) merger control regime. Most notably, this included changes to introduce a mandatory pre-closing notification obligation as of June 2017, prohibit interlocking directorates in companies that are competitors, and require post-closing notification of acquisitions of 10 per cent or more shareholdings in competitors. In 2017, the FNE issued guidelines on merger thresholds and on remedies. Costa Rica reformed its previously voluntary merger control regime to become mandatory as of 2013. Ecuador and Paraguay enacted merger control legislation for the first time, respectively, in 2011 and in 2013; both countries issued corresponding implementing legislation, respectively, in 2012 and in 2014.

Looking ahead, inbound investment is expected to gain traction as Latin American economies show signs of strong growth going forward (in particular Brazil, Chile, Colombia, Mexico and Peru). Merger control enforcement will continue to be brisk, with antitrust authorities prepared (and institutionally equipped) to block or condition transactions where conditions warrant, and investigate and bring gun-jumping cases where parties ignore or race ahead of the merger control process.

## Merger control enforcement highlights by country

Merger enforcement has been active across several countries in Latin America. The following reflect recent highlights of activities by country.

### Mexico

In 2017, COFECE blocked a joint venture between magnet wire producers Rea Magnet Wire Company and Xignux based on concerns that the significant market share of the resulting entity would create barriers to competition in the relevant market and possibly lead to price increases. Between March and June of the same year, COFECE imposed divestiture remedies to clear billion dollar deals between ChemChina-Sygenta, Boehringer-Sanofi and Dow-Chemical-DuPont, again over concerns that the high market shares and increased market power of the combined entities in each of these cases would hinder effective competition in the corresponding relevant markets.

Mexico's other competition-related authority – the IFT – imposed behavioural and structural remedies (divestiture of Fox Sports) to approve Walt Disney's acquisition of 21st Century Fox. The deal raised concern in Mexico's pay-TV market, particularly in the sports segment and in the factual programmes segment. Additionally, Mexican authorities have been actively reviewing gun-jumping violations. For example, in 2019 COFECE imposed fines for late notification on Banco Ve por Más and Bankaool

(approximately US\$39,000 each), as well as on BorgWarner and Remy Holdings International (approximately US\$75,000 each); and in 2017, COFECE fined Panasonic Corporation, Panasonic Europe, Ficosa Inversión and Pindro Holding approximately US\$750,000 each for failing to notify a transaction that resulted in Panasonic acquiring more than 35 per cent of Ficosa Mexico's assets.

## Brazil

In Brazil, between 2017 and 2018 CADE blocked mergers between Ultragas/Liquigas in the market for distribution of GLP (the resulting entity would have had more than 40 per cent of sales in several Brazilian states, in a market characterised by high barriers to entry); Kroton/Estácio in the education sector (these were the two largest private higher education institutions in Brazil); Ipiranga/Alesat in the fuel distribution sector (the merger would have eliminated a maverick and created conditions for collusion post-deal) and Mataboi/BJB in the meat retail market (owing to vertical and horizontal concerns).

In the same time period, CADE imposed structural or behavioural remedies to approve a number of high-profile deals, including ArcelorMittal/Votorantim Siderurgia in the long steel market, Itaú/Citibank in the bank retail business, Bovespa/CETIP in the stock and over-the-counter markets, AT&T/Time Warner in the markets of television programming and pay-tv, TAM/Iberia/BA in the markets for cargo and passenger air transport between Europe and South America, and Dow/DuPont in the material science, crop protection and seed markets. Notably, in the case of ArcelorMittal's purchase of Votorantim Siderurgia, CADE's General Superintendency issued an opinion recommending that the deal be blocked, but CADE's Tribunal nevertheless decided to approve the deal conditioned on ArcelorMittal divesting a number of plants to different rivals. In 2019, CADE imposed structural remedies (divestiture of Fox Sports) to approve Walt Disney's acquisition of 21st Century Fox. In a press release, CADE stated that there was close dialogue among the competition authorities in Brazil, Mexico and Chile concerning procedural and substantive aspects of the case, to reach a consistent remedy solution.

As for gun-jumping, in 2016 alone CADE imposed fines ranging from US\$200,000 to US\$8.5 million in at least six cases. CADE imposed the record fine of US\$8.5 million in relation to Technicolor's acquisition of a Cisco Systems' subsidiary because the parties announced the completion of the deal while CADE's review was still pending and CADE rejected the effectiveness of the carve-out agreement the parties signed to shelter Brazilian assets. More recently, in 2018, CADE settled gun-jumping investigations for failure to notify and imposed penalties varying from approximately US\$75,000 to US\$275,000 on the parties in the following transactions: Supermercados BH/Opção Comércio de Alimentos, Rede D'Or São Luiz/GGSH Participações, Expresso Guanabara/Empresa de Ônibus Nossa Senhora da Penha, Enzo/Smaff.

## Chile

In May 2018, the FNE rejected Ideal SA's acquisition of Alimentos Nutrabien, finding that the companies were close competitors in the markets for cakes and that the deal would entail price increase and other risks. In June 2018, the FNE prohibited Santander Chile from acquiring a stake in local company Servipag that offers ancillary banking services, considering that the deal would result in a substantial lessening of competition in the digital collection and payment buttons market. Between 2017 and 2018, the FNE imposed remedies to approve Bayer's acquisition of Monsanto (requiring divestment of certain seed and herbicide businesses and commitments not to (i) offer exclusivity rebates for some products and to (ii) refrain from tying or packaging the distribution of some products); the acquisition, by Hormigones Bicentenario, of HolChile's controlling interest in Polpaico SA (requiring divestment of seven concrete plants to enable the quick entry of a new competitor with sufficient scale); and AT&T's acquisition of Time Warner (requiring targeted behavioral conditions).

In 2018, FNE filed a complaint before the TDLC to impose gun-jumping fines of approximately US\$3.8 million in relation to Minerva's acquisition of JBS; the parties argued that the deal was not implemented in Chile based on a carve-out agreement, but the FNE considered a carve-out agreement insufficient to mitigate anti-competitive effects and concluded that the parties had unduly completed the acquisition before FNE's clearance.

## Colombia

Between 2015 and 2016 the SIC imposed remedies to clear the mergers between Grupo Argos and Grupo Odinsa in the infrastructure sector, as well as between Pepsi and Postobon and between AB Inbev and SabMiller in the beverages sector. More recently, in 2017, the SIC imposed remedies to authorize the purchase, by fuel distributor Terpel, of ExxonMobil Colombia. Terpel had to divest a production plant and two lubricant brands to avoid excessive installed capacity after the transaction.

In 2015, the SIC had already blocked two deals involving Terpel. First, the SIC blocked the proposed acquisition of retail aircraft fuel distributor Aviacom, because it found that Terpel would both increase its dominance in the upstream market and consolidate its monopoly position in the retail market. Second, SIC blocked Terpel's application to become the exclusive operator of the fuel network in one of Colombia's airports, finding that the fuel network is an essential facility and Terpel would have a significant competitive advantage if it acquired such a network.

## Ecuador

In 2017, the Superintendent of Control of Power Market (SCPM) required AB Inbev to divest a production plant and a portfolio of brands in Ecuador as part of a large remedy package to clear its merger with SABMiller. At the end of 2015, the SCPM imposed structural remedies to clear the merger between Halliburton and Baker Hughes.

## Cartel enforcement

When the market functions properly, competitors strive to improve quality, reduce costs and innovate, and consequently consumers benefit from better and cheaper products and services. When competitors collude and agree not to compete, they innovate less, have reduced incentives to reduce costs and both absolute and quality-adjusted prices to consumers normally rise. Some forms of conduct short of brazen agreement are also viewed as harmful to competition because they reduce uncertainty as to competitive actions, such as the exchange of sensitive commercial information (eg, planned price increases or discounts, competitive or bidding strategies, and R&D investments). Cartel enforcement addresses these types of conduct.

Cartel participation is considered to be a very serious violation of the antitrust laws; companies and individuals that participate in cartel conduct may be subject to heavy fines and other sanctions. Latin American authorities have been vigorously prosecuting cartel infringements in recent years, with bid-rigging cases as a particularly important focus of their enforcement efforts. In many cases, this was a result of the Lava Jato investigation that started in Brazil and spread across the region.

## Administrative fines

In many countries, administrative fines are imposed as a percentage of the sales of the company that participates in the cartel. In Brazil, fines are up to 20 per cent of the economic group's gross turnover in the field of activity in which the violation occurred (fines are double for repeat offenders); in Chile, they are up to 30 per cent of the company's sales of the products or services related to the infringement; in Argentina, they are up to 30 per cent of the volume of business associated with the products or services object of the infringement, multiplied by the duration of the conduct (limited to 30 per cent of the total volume of business in Argentina); in Mexico and Uruguay, they are up to 10 per cent of the company's annual income; in Costa Rica and Ecuador, they are up to 10 per cent and 12 per cent, respectively, of the company's turnover.

Colombia imposes maximum fines of approximately US\$25 million, but the local authority has proposed raising this cap. In some jurisdictions, fines can be alternatively calculated based on the profits obtained with the anticompetitive conduct. For example, in Chile and Argentina, fines can be twice the economic profit obtained with the infraction; in Colombia and Paraguay, they can be 150 per cent of the profit from the infringement. Individuals can also be subject to administrative fines. For instance, in Brazil, the executives involved in the infringement may be fined up to 20 per cent of the fine applied to the company and other employees may be fined up to approximately US\$550,000; in Colombia, Ecuador and Mexico, fines for individuals may reach, respectively, approximately US\$500,000, US\$190,000 and US\$780,000.

## Leniency programmes

Most countries – such as Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Peru and Uruguay – adopt leniency policies as a tool to detect cartel infringements. Leniency programmes have proven effective for this purpose, as long as they are seen as predictable and reliable by potential applicants. The first leniency applicant can usually receive full immunity from administrative fines, as long as certain requirements are met. Depending on the country, requirements may include the need to confess to the infringement, provide evidence that is sufficient for the authority to open an investigation, terminate the conduct, fully cooperate throughout the investigation, and maintain the confidentiality of obligations. In Argentina, Chile, Colombia, Ecuador, Mexico and Peru, second-in applicants may obtain fine reductions of up to 50 per cent and possible fine reductions exist for other applicants in decreasing percentages; such fine reductions usually depend on whether the second or subsequent applicants are able to provide evidence or information that adds value to the investigation.

Brazil provides the possibility for other cartel participants to settle with the authority and obtain fine reductions (up to 50 per cent for the first settling party and progressively lower for others) in exchange for their recognition of having participated in the conduct, cooperation, and commitment to pay a pecuniary contribution. Argentina, Brazil, Colombia and Uruguay have “leniency-plus” programmes, under which subsequent applicants may benefit from a fine reduction for their participation in a first cartel if they report a second cartel and provide evidence of it. There is no leniency programme in place in Bolivia, Costa Rica, Paraguay and Venezuela, but in most of these jurisdictions (Venezuela being the exception) there may be other options to suspend investigations, settle, or otherwise reduce fines. At least in Costa Rica, there have been recent debates about the introduction of a leniency programme.

## Criminal liability

In Brazil, Chile and Mexico, cartel conduct can be enforced criminally. In Colombia, bid-rigging has also been considered a criminal offense since 2011. In Brazil, participation in hardcore cartels can be punished with imprisonment of up to five years and penalties; in Chile, with three to 10 years of imprisonment; and in Mexico, with five to 10 years of imprisonment. In Colombia, bid-rigging is punished with fines of between approximately US\$50,000 and 250,000. Additionally, individuals may face sanctions of between six and 12 years' imprisonment. Many countries have adopted or are discussing the adoption of provisions under which companies or individuals found guilty of competition law offences (such as bid-rigging) may become ineligible to participate in government procurement procedures or otherwise enter into agreements with public entities for a long period.

## Cartel enforcement highlights by country

### Brazil

In 2018 alone, CADE opened 35 new cartel investigations and issued final rulings on 20 cartel cases, imposing approximately US\$180 million in fines. This includes fines of approximately US\$84 million imposed on companies and individuals that engaged in customer allocation and price fixing in relation to the packaging cartel, and also fines of approximately US\$80 million on companies and individuals involved in price fixing and output restrictions in the salt market cartel. Between 2017 and 2018, CADE signed almost 30 leniency agreements. CADE celebrated 60 settlements in 2018, collecting over US\$250 million in contributions from settling parties. Among these, settlements with companies in the financial sector alone resulted in over US\$20 million, and settlements connected to Lava Jato investigations resulted in almost US\$240 million. In recent years, CADE has seen an unprecedented surge of bid-rigging cases that are also connected to other crimes such as bribery, corruption and money laundering. Fighting bid-rigging is expected to continue to be a priority for CADE, and enforcement is expected to develop further based on cooperation mechanisms between CADE and the other Brazilian authorities that are responsible for investigating connected crimes. Additionally, CADE has started to use algorithms as a tool to detect bid-rigging infringements, which may further improve the effectiveness of its enforcement.

### Colombia

In 2017, the SIC imposed fines of approximately US\$68 million on Argos, Cemex, Holcim, and on senior managers of these companies for participation in a cement price fixing cartel. In February 2017, the SIC sanctioned the Colombian Association of Cattle Auctions and 16 of its affiliates in approximately US\$235,000 for engaging in price-fixing on the commission charged to cattle buyers. In August 2016, the SIC fined Kimberly Clark approximately US\$10 million, Carvajal approximately US\$5 million, and Scribe approximately US\$4 million for engaging in price-fixing and information exchanges in a cartel related to the production and distribution of notebooks; 24 individuals were also fined approximately US\$900,000 in connection with the cartel.

In June 2016, the SIC imposed a fine of roughly US\$70 million on Tecnoquímicas, Familia, Kimberly, and 16 high-level employees for participating in a 10-year cartel that fixed the prices of baby nappies. In June 2018, the SIC fined Bureau Veritas Colombia and Tecnicontrol approximately US\$4.5 million for bid-rigging in relation to supplies contracted by Ecopetrol. And, in April 2017, it fined seven private security services companies and 17 senior directors approximately US\$9 million for bid-rigging in the procurement processes of several public entities in Colombia. The SIC has several other ongoing bid-rigging investigations, and in 2017 it created a task force to fight anticompetitive behavior affecting public procurement in Colombia.

### Mexico

In May 2017, COFECE imposed its highest cartel fine ever – approximately US\$60 million – on providers of pension-fund administration services for having colluded to set limits on the transfer of savings accounts from one fund to another. Other cartel fines imposed by COFECE between 2016 and 2017 include approximately US\$1.2 million imposed on the participants in a price-fixing cartel in the corn tortilla market; approximately US\$4.7 million on participants of a cartel that manipulated sugar prices and restricted downstream sales; and approximately US\$3.8 million on companies that exchanged information and manipulated prices in the market for compressors for air conditioners.

In 2017, COFECE imposed approximately US\$13 million in fines related to bid-rigging issues. COFECE has declared that anti-bid-rigging efforts will continue to be an enforcement priority. In the same year, COFECE received 15 leniency applications and opened many ongoing cartel investigations, including investigations in the pharmaceutical and liquefied petroleum gas sectors.

### Chile

In 2017, the TDLC confirmed FNE's findings of a cartel between CMPC and SCA in the Chilean tissue and toilet paper market. CMPC received immunity from fines for reporting the cartel, and SCA was fined approximately US\$18.3 million.

Some cartel cases have been investigated and sanctioned by multiple authorities in the region. For example, the soft paper cartel was investigated at least by the SIC in Colombia, INDECOPI in Peru, and SCPM in Ecuador following leniency applications. This case has been the object of a jurisdictional dispute between the SIC, INDECOPI and the General Secretariat of the Andean Community (SGCAN), which is formed by Bolivia, Colombia, Ecuador and Peru. The SGCAN has claimed jurisdiction to investigate the infringement as a regional cartel and impose its own fines, ignoring the previous decisions and leniency benefits granted by the SIC and INDECOPI; SIC and INDECOPI have challenged the SGCAN's decision and are taking action to protect their enforcement powers and leniency programmes.

## **Abuse of dominance**

Companies that have market power (“dominant companies”) may take advantage of their strong market position to engage in conduct that distorts or hinders the development of competition. For example, they may misuse their power to exclude or squeeze out competitors from or foreclose their entry in the market, to discriminate among customers and impose excessive prices or other unjustified contractual conditions. Abuse of dominance enforcement addresses these types of conduct. While it is not illegal for a company to be dominant, having a degree of market power triggers a special responsibility for the dominant company to behave in a way that does not disrupt the market.

Depending on the jurisdiction, there may be differences in the type of conduct that the law considers to be abusive, on the market share thresholds that national authorities consider as indicative of dominance, and on the remedies that authorities may impose to end such practices. To identify dominance, authorities consider different indicators such as market concentration, the existence of barriers to entry and market shares. For instance, in Brazil a market share above 20 per cent already indicates dominance; in Colombia, a market share of 25 per cent can indicate dominance based on public utility law; Argentina, Chile, Mexico and Ecuador do not specify a market-share threshold above which a company is presumed to be dominant.

Abuse of dominance investigations have become more frequent, likely a result of enforcers becoming more sophisticated and equipped, as well as due to an increasing number of complaints against the behavior of dominant companies. A common concern from authorities across the region relates to the high concentration of financial markets and possible abusive conduct by banks to create barriers for fintech and crypto operators to compete and offer innovative services to customers, so a number of the recent abuse of dominant investigations in the region concern the financial markets.

## **Abuse of dominance enforcement highlights by country**

### **Brazil**

CADE has declared its intention to raise the bar in abuse of dominance enforcement, with over 30 unilateral conduct investigations opened in 2018. In 2018, CADE fined Banco Bradesco and Cielo in approximately US\$8 million for abuse of dominance based on a settlement agreement. CADE found that they abused their dominant position by refusing to contract or by executing exclusive payment arrangements. CADE fined B3 SA Bolsa Balcao in approximately US\$2.4 million in another settlement concerning B3's practices to hinder rivals from entering the market. In 2019, CADE settled an investigation against the Brazilian postal company that agreed to pay a fine of approximately US\$5.8 million for abuse of dominance in the market for small, medium and large express parcels (it prevented the delivery of magnetic cards, chequebooks and other items by express and motorcycle couriers). CADE has a number of ongoing abuse of dominance investigations in the financial sector related to the electronic payment market, possibly abusive contractual clauses from credit card operators with payment acquirers, exclusive payment arrangements and the credit card issuance market.

### **Colombia**

In March 2018, the SIC imposed fines of approximately US\$6.8 million on the Aqueduct and Sewerage Company of Bogotá and two directors for applying supply conditions to a given customer that were unjustifiably different than the conditions applied to other buyers. In practice, the conduct caused an obstruction of customers' activities in the related market for commercialisation of drinking water in the north area of Bogotá.

### **Mexico**

In 2018, COFECE launched an investigation involving several economic agents about possible abuse of dominant position in the e-commerce market, as well as an investigation into the possible existence of barriers to competition in the card payment systems market.

The IFT has in a few occasions tried to determine if broadcaster Televisa is dominant in the local pay TV market, where it has a share of about 60 per cent. In 2015, the IFT concluded that, despite its market share, Televisa did not have substantial power in the market because its market share had been falling. Prompted by a Televisa competitor, the IFT revisited this issue in 2017 and this time found that Televisa is dominant in the pay TV market; however, following an order by the Mexican Supreme

Court to revisit its decision, the IFT concluded that presently it does not have evidence to find that broadcaster Grupo Televisa has market power in pay-tv.

## Chile

In 2018, FNE received complaints against Unilever for alleged predatory practices in sales to distributors. In 2014, Unilever had already entered into a settlement agreement in Chile to end an investigation into abusive practices in the laundry detergent market. Unilever's commitments then included abolishing exclusivity agreements with dealers and eliminating incentives and rebates or other prizes to customers conditioned on the fulfillment of certain sales goals. Unilever extended these commitments to other products for which it had over 50 per cent local market share.

## Argentina

In 2016, the Argentinian authority opened an abuse of dominance investigation involving Prisma, the only company authorised to issue Visa cards in the country. The investigation concerned Prisma's dominant position in the acquisition and processing markets, and whether it extended to other downstream markets in which Prisma also participated. To end the investigation the banks that were Prima's shareholders agreed to divest Prisma and also agreed to some behavioral remedies related to the conditions for Prisma to provide processing services.

## Civil enforcement

Customers or other parties that suffer harm resulting from a competition law infringement (for instance, customers that pay higher prices as a result of acquiring goods or services that were the object of a cartel) may seek compensation for damages from the relevant cartel participants. A leniency applicant that receives immunity or reduction of administrative fines may still be subject to civil damages claims.

In Latin America, few private damages claims have been proposed to date, and there are not many decisions from local courts actually awarding damages. Local laws and case law in many jurisdictions still need to develop and clarify several issues essential to enable private enforcement, such as: (i) who has standing to claim damages in individual lawsuits (ie, direct purchasers and/or indirect purchasers); (ii) whether class actions are possible and who can propose them (ie, public prosecutors or other public bodies, unions, associations); (iii) how to prove the violation of antitrust law (whether a previous decision from an administrative or other authority is needed and what evidence is admissible); (iv) how to calculate the damage suffered (and how to demonstrate the causal link between the violation and the damage); (v) what is the statute of limitations for victims to claim damages; (vi) whether joint and several liability applies to the defendants of damages claims; and (vii) which courts are competent to rule on private damages claims.

There is, nevertheless, a growing awareness in the region about the possibility of engaging in private damages claims and a growing number of law suits have been filed for this purpose. There is also a growing debate on whether parties may have access to the files of competition authorities, in order to gather evidence that could be used in civil damages claims. To address this issue, in Brazil CADE issued a Resolution in 2018 clarifying the procedure to access documents and information obtained in the context of antitrust investigations, including information arising from leniency and settlement agreements.

## Purpose of this reference section

This reference section aims at offering a practical, and yet comprehensive view of the different areas of competition law enforcement in Latin American jurisdictions. From a merger control perspective, this section describes the procedural considerations and substantive tests applied in each country and offers a view on the risk of prohibition and imposition of remedies, which have proved to be material in many jurisdictions. From a cartel and abuse of dominance enforcement perspective, this section provides an overview of the types of infringement that authorities may wish to investigate, the applicable sanctions, as well as incentives and alternatives that companies and individuals may have to cooperate with the investigation. In relation to private enforcement, this section provides information on whether private damages actions are possible, what are the corresponding requirements and whether there are any noteworthy precedents. Overall, this section allows a quick understanding of the basic competition law concepts in each country, the latest enforcement trends by local authorities, and the most relevant risks of which companies active in Latin American jurisdictions should be mindful.





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Rita Motta is a counsel in the Brussels office of Latham & Watkins and a member of the firm's global antitrust and competition practice. Her practice focuses on a wide range of issues under competition law, including merger control, cartel investigations, abuse of dominance and state aid. She also regularly advises clients on the implementation of antitrust compliance programmes and on data privacy issues.

Ms Motta has vast experience in representing clients in complex multijurisdictional merger filings and antitrust investigations. In particular, Ms Motta's practice covers merger control and antitrust investigations Europe and in Latin American countries.

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