LATIN LAWYER

The Guide to Corporate Compliance - Fifth Edition

Navigating competition rules throughout the region

The Guide to Corporate Compliance - Fifth Edition

The fifth edition of The Guide to Corporate Compliance - edited by Andrew M Levine, litigation partner at Debevoise & Plimpton - brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all those who must navigate the region's complex and fast-changing framework of rules and regulations.

This latest iteration provides fresh analysis on competition rules, how law firms should handle clients subject to US sanctions and developing a strong compliance programme - among other key issues.

Generated: June 11, 2024

LATIN LAWYER

Navigating competition rules throughout the region

Lorena Pavic, José Pardo and Raimundo Gálvez

Carey

Summary

HOW COMPLIANCE WITH COMPETITION LAW SHAPES BUSINESS ACTIVITY

In many Latin America jurisdictions, competition regulation has become one of the most relevant legal issues to be considered when doing business, as countries throughout the region have responded to the new challenges that this discipline represents by strengthening their competition policies and institutions.

Therefore, the implementation of an effective competition compliance programme that meets the raising standards that jurisdictions throughout the region have established on this matter has proven to be of the utmost importance when doing business in Latin America.

This chapter aims to provide a general framework of the different aspects that should be considered when designing a competition compliance programme, giving an overview of the legal reforms in this area in recent years, relevant case law in Latin America, and sanctions that companies may face if antitrust infringements are detected, as well as possible connections with other compliance risks.

LEGAL REFORMS ON COMPETITION

In the past decade, the evolution of the different Latin American legal frameworks on competition has involved major reforms, which have significantly raised the standards and requirements for companies regarding a wide range of competition topics. These include exclusionary and exploitative conduct, vertical restraints, commercial policies, membership of trade associations, merger control, interlocking regulation and cartel enforcement, among others.

CHILE

In the case of Chile, the most relevant recent reform to Chilean competition law, Decree-Law No. 211 (DL 211), was introduced by Law No. 20945 in 2016. This amendment strengthened the competition authorities' powers to align local regulation with international standards, especially following recommendations by the Organisation for Economic Co-operation and Development regarding Chilean competition policy.[2] The following are the main amendments that have had a significant effect on the competitive performance of undertakings active in the Chilean market:

- the introduction of a per se rule with respect to hardcore cartels, independently of the parties' market power, the intent of the infringer or the anticompetitive effects of the conduct;[3]
- the recriminalisation of cartels, by the establishment of a penal sanction of up to 10 years' imprisonment;[4]
- an increase in the amounts of fines, introducing a flexible maximum up to double the illegal gains obtained (the economic benefit) or up to 30 per cent of the offender's sales during the corresponding period in which the infringement was executed;[5]
- the establishment of additional penalties for cartels, such as absolute temporal disqualification to act as a director or manager in certain types of corporations and companies, and a ban for up to five years on entering into any type of agreement with state bodies (e.g., to be a supplier to the state), or being awarded any public concession;
-

strengthening the leniency programme by the introduction of a criminal liability exemption for the crime of collusion;[6]

- the establishment of a mandatory ex ante control for concentrations whose parties equal or surpass certain turnover thresholds;[7]
- the establishment of the interlocking directorate (i.e., the simultaneous participation of persons in relevant executive positions or as board members in two or more competing companies) as anticompetitive conduct under certain circumstances, and the obligation to report to the National Economic Prosecutor's Office (FNE) the acquisition of a minority stake in a competing company that fulfils certain requirements;[8] and
- the introduction of new powers for the FNE, such as the exclusive initiative of the National Economic Prosecutor for filing criminal lawsuits for collusion crimes, the setting of the turnover thresholds for mandatory merger control and the power to perform market studies, among others.

Also, in August 2023, Law No. 21,595 on Economic Crimes was published in the Official Gazette, which incorporates several innovations in the socio-economic order. Among other things, this law systematises the crimes related to business activity under four major categories of crimes, creates new crimes, establishes and strengthens the system of penalties and sanctions, and substantially increases the crimes for which legal entities may be criminally liable. However, regarding the imposition of criminal liability for the crime of collusion by legal entities, this is subject to a series of penalties, sanctions and measures that the legislator must dictate for its applicability, so they are not yet in force until this occurs.

PERU

In the case of Peru, in 2018, a new Legislative Decree was introduced that incorporated rewards for useful information to detect, investigate and sanction cartels.[9] In addition, Peru's Competition Authority, Indecopi, issued guidelines for public officials in 2018 for combating collusion in public procurement.[10] In June 2020, Indecopi published its Guidelines on Antitrust Compliance Programmes, which seeks to prevent the risks of engaging in anticompetitive conducts. These Guidelines establish the possibility for offending agents to access a reduction benefit of between 5 per cent and 10 per cent of the value of the fine, if the offender has implemented a compliance programme prior to the offence, and complies with certain requirements, such as the fact that senior management has not participated in the commission of the offence, and the offence is promptly reported to Indecopi, among others.[11]

In December 2020, the Peruvian Congress published Law No. 31112, establishing merger control in Peru, and replacing the prior Emergency Decree No. 013-2019. Later, in March 2021, the Merger Control Law Regulations were officially published and entered into force in June 2021. Previously, the law established mandatory pre-notification and clearance requirements only for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission, or distribution. The new merger control regime applies now to concentrations occurring in all fields of economic activities.

In January 2023, Indecopi published the first version of its Guidelines for the qualification and analysis of concentration operations, which seeks to improve the predictability of the merger control regime. The first section of the Guidelines is dedicated to defining a concentration

from a substantive perspective, while the second section describes the procedure under which the Antitrust Commission of Indecopi will determine whether to clear, approve with conditions, or forbid an operation. According to the local agency, the document has been prepared following the technical advice of the World Bank's Global Markets, Competition and Technology Unit, as well as the International Finance Corporation (IFC).

On 7 June 2023, Law 31,775 was published, amending Article 232 of the Criminal Code, on the crime of Abuse of Economic Power.[12] With this amendment, horizontal collusive practices subject to the absolute prohibition (hardcore cartels) now can be sanctioned not only in administrative proceedings, but also in criminal courts. Also, the individuals involved in the alleged crime could be individually prosecuted. However, Law No. 31,775 provided that the beneficiaries of the total exemption under the Leniency Program, may also benefit from immunity in criminal proceedings.

Regarding the implementation of the merger control procedure, from June 2021, when Law 31112 came into force, which definitively introduced in Peru the ex ante merger control, until August 2023, Indecopi received a total of 36 merger applications and approved 27, processing them in an average of 44 working days.

For 2024, two events are particularly relevant: the consolidation of the ex-ante merger control and the publication of the Guidelines to identify unusual consortiums in public procurement.

ARGENTINA

In Argentina, a new Competition Law was enacted in 2018, which created a National Competition Authority to replace the Comisión Nacional de Defensa de la Competencia (CNDC). This Law also instituted a new ex ante merger control regime, a leniency programme and increased fines for anticompetitive conduct, among other measures.69-backlink ">[13]

In May 2023, the competition authority published a new Regulation for the Notification of Economic Concentrations,[14] which introduced the following changes: implementation of the fast-track mechanism; much more severe consequences for the submission of incomplete information; request to the parties for further documentation relating to the purpose of the transaction; introduction of new grounds for suspending or interrupting the competition authority's term; introduction of the requirement for the notifying parties to prepare a draft resolution; and establishing the possibility for the notifying parties to include non-antitrust considerations in the transaction analysis.

As for digital markets, in October 2023, the competition authority created an internal working group to focus on their study, although no relevant decisions have been taken on this front.

As for antitrust enforcement, it is worth noting that during 2023 the Argentinian competition authority was more active in unilateral cases than in cartel cases. In fact, no cartel case is known to have been closed by the competition authority in 2023.

Although there have been no changes regarding the Competition Law since it was enacted in 2018, on December 27, 2023, the Argentine government sent a bill to Congress to completely amend the Antitrust Law.[15] The bill is expected to be debated in early 2024. If the bill is passed, fewer merger notifications are expected, as the notification threshold, unless modified in the congressional debate, will most likely be much higher than the current one.

MEXICO

Peru and Argentina are not the only jurisdictions that have made radical institutional changes. In 2013, Mexico also introduced a new competition authority, the Federal Economic Competition Commission (Cofece).[16]

Furthermore, Mexico introduced a Federal Telecommunications Institute, which is exclusively responsible for the broadcasting and telecommunications markets,[17] and a Directorate General of Digital Markets to analyse the development of digital markets and their impact on competition.[18]

Since 2018, Cofece publishes the 'Merger Report'[19] to disclose the cases analysed during the year. In 2023, Cofece analysed 146 mergers, a decrease of 13 per cent compared to 2022. Even though the Competition Authority has 60 working days from the completion of the notification to issue its decision, the average time in 2023 was 25 working days in cases where the deadline for resolution was not extended.

Of the total number of mergers analysed, only one was challenged, corresponding to the acquisition of five dolphinariums and an aquatic park in Quintana Roo. The Plenary of the Commission considered that the operation would reduce competition in the market for dolphinarium entertainment services, giving the economic agent the ability to increase prices and a dominant position in the market.

BRAZIL

Regarding Brazil, its competition agency (CADE) issued in 2016 its Guidelines on Competition Compliance Programmes,[20] which address specific measures enterprises must adopt to avoid breaching competition rules and also what CADE expects from an effective antitrust compliance programme. In March 2020, the Brazilian authority also updated its guidelines regarding CADE's antitrust leniency programme.[21]

More recently, in April 2024, CADE published a new guide for the analysis of non-horizontal (vertical and conglomerate) mergers. The document aims to transparent the criteria used by the authority to analyze mergers; guide CADE members in the application of best practices in the analysis of vertical merger investigations; and help market actors understand the steps, techniques and criteria used in CADE's analyses.

60-backlink >[22]

ECUADOR

In September 2022, the Ecuadorian president signed Executive Decree No. 570, which introduced substantial changes to the Competition Act's Regulation, the most important ones being: (1) the definition of anti-competitive effect is provided, and now the Ecuadorian agency must prove that this effect materialises in an actual or potential harm to the consumer in order to sanction it; (2) when the agency wants to argue that a conduct is by its object anticompetitive, it will have to demonstrate that there is doctrinal consensus on that qualification in addition to several precedents that point this out; and (3) regarding merger control, turnovers will now only consider revenues in the relevant market, which will impact the turnover threshold used to determine whether a merger is mandatorily notifiable.

Moreover, in May 2023, an important amendment was introduced to the Ecuadorian Organic Law for Regulation and Control of Market Power (LORCPM), which incorporates a series of substantive changes in competition. Among them, the following stand out: a new definition of anticompetitive practices by object, extension of the scope of application of the law to any person who actually or potentially carries out an economic activity, modifications to the abuse of market power infraction, new and greater sanctioning powers of the Ecuadorian Competition Agency (SCE) in consumer law matters, and important procedural modifications.

59-backlink">[23]

In addition, during 2023, new regulations were introduced by the SCE. Among other topics, they regulate: the procedure for the calculation of fines for violations of the Regulation and Control of Market Power Law; internal proceedings relative to the agency's functioning; and commercial and sensitive information management during administrative proceedings before the competition authority. It should also be noted that in 2023 the SCE sanctioned a company[24] with a fine of approximately US$500,000 for the provision of false information in the context of an investigation. The conduct was configured by not submitting certain documents when it was possible to do so.

GROWING COMPETITION STANDARDS FOR DOING BUSINESS

All these major reforms in Latin America demonstrate how standards for competition are rising significantly. They pose a challenge for companies, as decisions from Latin American authorities can sometimes be more difficult to predict. Penalties have increased, demands on firms have grown progressively stricter and authorities have become more active and have greater enforcement powers. In Chile, the FNE's growth in terms of experience and consolidation has been manifested in a greater level of success in its actions against cartels, both before the Competition Tribunal (TDLC) and the Supreme Court. In fact, the last rejected FNE claim regarding a cartel case was filed in 2009.[25] The FNE has obtained convictions in the 19 claims filed since then.

This evolution occurs in a regulatory environment in which the legal and institutional frameworks are rather young. This means that the criteria to be applied by the authorities are often still uncertain.[26] Authorities may be overzealous in their investigations, applying conservative standards and in some cases requesting excessive information from the involved parties (e.g., during the process of notification of concentrations). For example, in Chile there are not many rulings on unilateral conduct, the merger control regime is still young, and the first and only case of concerted practices as a hub-and-spoke cartel was sentenced by the Supreme Court in April 2020.[27] This case is especially relevant from the compliance standpoint. One of the most relevant aspects of the TDLC ruling was the recognition of the role of compliance programmes as potential tools for mitigating and even exempting liability. However, the Supreme Court disagreed with the TDLC, establishing that compliance programmes do not constitute exemptions of responsibility, even though the court agreed with the TDLC regarding the possibility that a complete, real and serious programme can be considered when determining the amount of the fine.

In the case of Mexico, there is no jurisprudential practice or regulatory recognition that allows reducing a sanction resulting from the implementation of a compliance programme. However, authorities may consider the cooperation of the offender and its good faith for purposes of grading the sanction.[28] In addition, to determine the amount of the fines to be imposed, Cofece takes into account the criteria set out in Article 130 of the Federal Economic Competence Law, such as the seriousness of the infringement, the damage caused, signs of intent, market share, economic capacity, etc.[29]

In Colombia, although there is no legal framework that regulates compliance programmes, their requirements and their effects, there is an instrument of the Energy and Gas Regulatory Commission, Resolution No. 80 of 2019. This regulation established a mandatory compliance system for regulated parties in the energy and gas sector, which includes compliance with competition regulations.[30] On the other hand, the Colombian Institute of

Technical Standards and Certification (INCOTEC), the body in charge of issuing technical standards and certifying quality standards for companies, published in January 2020 a document that defines certain guidelines for the establishment of good practices in the protection of competition. Nonetheless, none of the above-mentioned documents refers to the effects that the adoption of a compliance programme may have when determining the fine to be applied to an agent that has violated competition rules.

The result of all the foregoing is that companies are having difficulties in adapting to changes and new standards. Doing business in Latin America can be complex from a regulatory point of view, so it is vital that undertakings, especially those agents with a relevant market power that participate in risky or complex markets, understand current legislation and compliance standards, and stay up to date with changes as they happen.[31]

Undertakings without full knowledge of competition regulation are at risk of illicit anticompetitive conduct, with the consequent risk of severe sanctions or, on the other hand, inhibit conduct that is actually licit, constraining the competitiveness and success of that conduct.[32] Because of this, competition law compliance and a functioning compliance programme are essential. Executives and employees, especially those in executive and commercial positions, must be properly trained, as this type of measure can help to avoid competition risks and to conduct business legally, with the intent of ensuring that the commercial success of the company is accompanied by a low exposure to competition risks.[33]

Considering the above, issues such as use of the right sources for business intelligence, the risks of accessing commercially sensitive information from competitors, the potential exclusionary or exploitative effects of certain designs of commercial policies, the necessary safeguards when participating in trade associations, the ex ante assessment of concentrations, among other things, are now some of the main priorities in day-to-day business.

ANTICOMPETITION RISKS AND REQUIREMENTS IN LATIN AMERICA

The different jurisdictions in Latin America present some differences in the conducts qualified as anticompetitive, particularly in relation to those that are exposed to criminal sanctions.

For example, in Chile, Article 3 of DL 211 provides, generically, that whoever carries out or enters into, individually or collectively, any conduct, act or agreement that 'impedes, restricts or hinders free competition or that tends to produce such effects', will be sanctioned with the measures contemplated therein. This includes, among other things, vertical and horizontal anticompetitive agreements (both unilateral and coordinated), different forms of abuse of dominance and some conduct related to concentrations.

Risks of being involved in anticompetitive conduct in Chile are related to a wide range of severe sanctions that can be imposed by the TDLC both on undertakings – either public or private – and on individuals. The sanctions of general application include:

- the modification or termination of agreements, contracts or arrangements against competition;
- the modification or dissolution of the company, corporation or other legal entity involved in anticompetitive infringements;[34] and

- fines of up to 30 per cent of the offender's sales of the respective product or service line of business during the period in which the infringement was executed, or up to twice the economic benefit received as a result of the infringement. If is not possible to determine either the sales or the economic benefit, the TDLC may impose fines up to a maximum amount equivalent to 60,000 tax units (approximately 47 billion Chilean pesos).[35]

In Chile, regarding criminal penalties, Article 62 of DL 211 punishes from three years and one day up to 10 years anyone who enters into, organises or executes anticompetitive agreements that fix prices, limit production, allocate market zones or quotas or affect the outcome of public bids, namely hardcore cartels.

In Colombia, criminal sanctions apply only to bid rigging.[36] The Colombian Criminal Code establishes in these cases fines of up to 1,000 legal minimum wages (approximately 1.16 billion Colombian pesos) and between six and 12 years' imprisonment.

In contrast, and similarly to Chile, in Brazil only cartels are considered federal crimes, for which individuals may be prosecuted and sanctioned not only with fines, but also with imprisonment of between two and five years. Brazil's antitrust authority (the Administrative Council for Economic Defence (CADE)[37] has signed a series of cooperation agreements with criminal prosecutors' offices from a number of states, to make criminal prosecutions more effective, and to facilitate the notification of foreign individuals and entities investigated by the agency, the collection of relevant evidence and information, and the possibility of learning new techniques from other agencies.

Beyond Brazil and Chile, individuals in Mexico may also be prosecuted for entering, ordering or executing any contract or arrangement between competitors with certain anticompetitive purposes, facing between five and 10 years' imprisonment.

In the case of Peru, the Criminal Code establishes the crime of 'abuse of economic power' punishing (1) the abuse of dominant position and (2) the participation in practices and agreements restricting competition with the purpose of preventing, restricting or distorting competition. The person who engages in such conduct may be punished with two to six years of imprisonment.

Beyond the legal context, the reality is that the number of detected cartels has increased significantly over time in Latin America. According to a study carried out by the World Bank, in recent decades, out of a total of around 400 cartels discovered in the region, around 250 were detected in Brazil, Chile, Colombia, Mexico and Peru.[38] Another of the study's findings was that most of the sectors affected by cartels are of importance to countries' competitiveness and productivity, such as manufacturing, warehousing and transportation.

SAFEGUARDS TO MITIGATE COMPETITION RISKS

Regarding recommendations in the context of competition law breaches, first and foremost – as the most serious competition infringement – companies should implement safeguards and measures to avoid any kind of collusive behaviour, certainly including hardcore cartels and any type of concerted practices, including those related to the sharing of commercially sensitive information between competitors, either directly or through third parties (e.g., customers or suppliers).

The previous safeguards are especially important in the context of markets subject to additional factors that could facilitate collusion, such as those characterised by high levels of market concentration, symmetric market shares, product homogeneity, low innovation, price and costs transparency, stability of demand and low levels of entry or exit of competitors, among others.[39]

Regarding collusive behaviour, undertakings should have internal mechanisms to identify and prevent anticompetitive behaviour, for deterring illegal conduct, first, and if applicable, making it possible to apply for leniency. This is the purpose of the existence of leniency programmes. In this respect, in Chile a reliable and effective compliance commitment demands full disclosure of background information to the authorities in the event of identifying a cartel.[40]

Collusive conduct is the most serious competition infringement. In Chile, the Supreme Court imposed fines in cartel cases of more than US$45 million in total in January 2020,[41] and in December 2019, the FNE filed an antitrust claim for collusion against companies active in the market of feed and nutrition for salmon, requesting fines totalling US$70 million.[42] More recently, in October 2021, the FNE filed a claim against Brink's, Prosegur and Loomis, companies active in the securities transportation market, and six of their executives, for, according to the FNE, having colluded to fix prices for the transportation of securities and related services. In this case, the FNE requested fines up to US$63 million in total. This case is particularly interesting, since it is the first case of collusion charged under the current legal text, that is, after the legal reform to DL 211 of 2016. Thus, if the TDLC and the Supreme Court issue a final conviction, the cartel may be criminally prosecuted in application of the criminal sanctions contemplated for the crime of collusion.[43]

In relation to the latter, it is interesting the recent decision of the FNE not to file a criminal complaint regarding the crime of collusion committed by companies dedicated to public passenger transportation in Temuco and Padre de las Casas, as it ruled out that it had seriously compromised competition.[44] This is the first resolution dictated by the National Economic Prosecutor, basing his decision not to file a criminal complaint in a case of a collusive agreement whose existence has been established by a final judgment of the TDLC.

In Brazil, in 2018, CADE initiated 35 new cartel investigations and issued final rulings on 20 cartel cases, imposing approximately US$180 million in fines.[45] According to CADE's report 'Measuring the expected benefits of CADE's activities in 2023", unilateral conducts generated most of the benefits in fines, estimated at US$2.789 million. This is followed by concentrations, with $230 million, and cartel cases, with around US$108 million[46].

In turn, in Colombia in 2017, the antitrust authority imposed fines of approximately US$68 million on Argos, Cemex and Holcim, and on senior managers of these companies, for participation in a cement price-fixing cartel. In this sense, in 2023 the Superintendency of Industry and Commerce (SIC) updated its Collusion Instructive,[47] with the object of allowing contracting agents to: identify and alert about the possible occurrence of anticompetitive practices in contracting processes; obtain tools to prevent and minimize their occurrence; and learn how to report such practices to the SIC.

In May 2017, Cofece imposed its highest cartel fine to date (approximately 1.1 billion Mexican pesos) on providers of pension-fund administration services for collusion to set limits on the transfer of savings accounts from one fund to another.[48]

In the case of Costa Rica, the competition agency recently successfully investigated and sanctioned nine companies which colluded in the rice market, agreeing not to buy rice from the national producer until a decree is published establishing a consumer price.[49] In this case, penalties of over 5 billion colones (equivalent to more than US$8 million) in total were established.

Leniency programmes have been established in Latin American countries such as Argentina, Brazil, Chile, Mexico and Peru. These five countries, which form the Latin American Strategic Alliance on Competition, signed a joint statement – the Paris Letter[50] – in late 2018 on shared principles that would guide the implementation of their respective leniency regimes, with the objective of tightening the relationship between their competition authorities.[51]

Further, there have been recent jurisdictional changes that have added leniency programmes to competition regimes. For example, in Argentina, a set of amendments were introduced by Law No. 27442 in the context of a new presumption of illegality of hardcore cartels, including the creation of a leniency programme for cartel cases, which offers full immunity to the first firm that confesses to having participated in a cartel, a fine reduction of between 20 per cent and 50 per cent for the second agent, and an extra benefit for those who, not having obtained full immunity in a leniency procedure, disclose or recognise a cartel in a different market. For instance, in November of 2022, the CNDC declared that Alliance, Grisú and Powerlink were guilty of a collusive agreement to fix prices and share the market for discotheque services for student tourism in the city of San Carlos de Bariloche. The CNDC considered that any concerted practice harms competition and fined Alliance and Grisú 150 million Argentinian pesos and 90 million Argentinian pesos, respectively. However, regarding Powerlink, considering that this company was the one that filed the complaint and provided key information for the investigation, and considering the objective of the legislator with the introduction of the leniency programme in Law No. 27422, the CNDC exempted this firm from a fine.

In the case of Peru, Indecopi issued in 2019 its Leniency Programmes Guidelines.[52] In Chile, the FNE published its Internal Guidelines on Leniency in Cartel Cases in 2017,[53] providing more legal certainty to whoever wishes to obtain leniency benefits and limiting the scope of discretion conferred by the law to this agency.

In the case of Costa Rica, the Comisión para la Promoción de la Competencia (COPROCOM) published in May 2022 a leniency programme and guide, which seeks to promote transparency and legal certainty in the agency's proceedings. This programme offers the first participant a total exoneration in exchange for its collaboration, and a partial reduction for three other participants. The programme also exempts the first participant in the programme from disqualification from participating in public bids and, if necessary, establishes subsidiary civil liability for the first participant with respect to the other infringers.

Second, with respect to unilateral conduct, dominant undertakings have a special duty of care in what relates to not restricting competition by deteriorating market conditions, exploiting customers or suppliers or by generating foreclosure effects. To determine the appropriate safeguards, it is necessary to analyse not only the market share of the respective company but also to attend to other features of the market, such as the presence of potential natural or regulatory barriers to entry.

In this sense, dominant undertakings should constantly review their commercial policy and their in-force agreements with suppliers and customers, with consideration of the specific

market conditions. The aim is to avoid being involved in anticompetitive conduct through vertical restraints such as exclusivity agreements, tying, resale price restrictions, discounts and rebates, among other things.[54]

Third, the mandatory merger control regime requires companies to notify concentrations that equal or exceed the set turnover thresholds. In Chile, this happens under an administrative procedure before the FNE.[55] This proceeding involves a standstill obligation to the parties of the transaction, which prohibits the implementation of the operation before it is cleared by the FNE.[56] This translates into the following requirements:

Companies must notify to the FNE all transactions that meet the substantive requirements to be considered as a concentration operation and equal or surpass the jurisdictional turnover thresholds, before their closing, subject to the risk of incurring an infringement of failure to notify.[57]

The notifying parties cannot implement the transaction before the FNE's clearance, which may consider a variety of actions that constitute early implementation of the concentration (gun jumping).[58]

Notifying parties must comply with the remedies in the case of conditional approvals.

Companies are not allowed to implement the transaction in the case of a prohibition ruling.

In May 2022, the FNE released a new version of the Guidelines for the Analysis of Horizontal Mergers and Acquisitions, which reflect the FNE's experience in years of operation of the mandatory merger control. The main innovations compared to the previous 2012 version include:

- a direct reference to counterfactual assessment as a basic predictive method of merger control;
- a description of the quantitative methodologies used to estimate unilateral risks;
- a section dedicated to the evaluation of mergers in dynamic markets and digital platforms;
- greater detail in coordinated risk hypotheses; and
- an explanation of the criteria used to evaluate the failing firm defence, among other topics.

Also, the FNE published an Instruction on Pre-notifications, which establishes a formal stage available to companies and economic agents to resolve substantive and procedural doubts for future notifications in the context of the merger control.[59]

In November 2021, the FNE filed a claim before the TDLC against a company active in the maritime transport service, for the acquisition of a competing vessel (Navimag Carga S.A.). This transaction did not exceed the mandatory notification thresholds at the time it was completed, so it was not subject to mandatory control. However, the FNE considered that such acquisition implied the monopolisation by the acquirer of the bidirectional route Puerto Montt–Chacabuco, which could constitute an infringement of Article 3, Paragraph 1 of DL 211 (i.e., a general anticompetitive offence). The FNE requested the imposition of fines and a number of additional measures against the acquiring company.[60] The FNE and Navimag Carga S.A. settled the case before the TDLC, as the company agreed to pay UTA 500 (approximately US$460,000) and adopt several other measures.

Concerning merger control legislation, Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, Uruguay and [61] Peru, among others, have merger control regimes.

In April 2021, Ecuador established a 'fast-track' merger control procedure as a result of the covid-19 crisis.[62] Comprising a 25-day analysis of the concentration, it allowed the competition authority to reduce their procedure timing by 20 per cent compared with the previous year. Also, as noted above, with the introduction of modifications in 2022 on Article 5 of the LORCPM Regulation, turnover calculation must only consider revenues from the relevant market affected by the transaction, that is an important number of operations could be dispensed of mandatory control.

Most of these merger control jurisdictions are modelled on a mandatory filing if the operation surpasses certain jurisdictional thresholds, usually based on individual or combined turnovers, though some of them, such as Argentina, Colombia, Costa Rica and Mexico, also include a de minimis asset threshold.

In this context, in the past few years, Latin American authorities have issued different documents and guidelines, making advances in areas of competition law not previously explored by other authorities in the region. A good example is the Guidelines for the Analysis of Previous Consummation of Merger Transactions published in Brazil by CADE, which details concepts, procedures and penalties for gun jumping, serving as a reference for the rest of the region.[63]

An interesting case in this regard is Costa Rica, the jurisdiction in which the COPROCOM, the local competition agency, imposed a fine of $130 million colones (equivalent to more than US$219,000) in August 2022 on a large pharmaceutical company for failing to report the purchase of six pharmacies over the years, a relevant precedent in gun-jumping matters for local companies.

Another example is Mexico. Cofece published in April 2021 an update of its Merger Notification Guidelines, which seeks to provide greater certainty to economic agents regarding the Commission's treatment of merger analysis. Specifically, the Guide establishes those elements that Cofece will consider in its merger analysis in order to clarify: (1) its treatment of collaboration agreements between economic agents; (2) issues relating to the calculation of notification thresholds; (3) who is required to notify a concentration involving multiple purchasers; and (4) what information must be submitted to raise the failing firm defence.

This is also the case of the Colombian SIC, which in August 2019 published the Corporate Integration Analysis Guide, with the aim of providing a simplified orientation on the agency's criterion, when evaluating if an integration operation may be restrictive of competition.-[64] Finally, the authority's Single Circular,[65] along with its annexes also provide important insights for the development of a competition merger control assessment.

POSSIBLE CONNECTIONS BETWEEN ANTICOMPETITION AND OTHER COMPLIANCE RISKS

Several types of anticompetitive conduct relate closely to other compliance risks. In many cases, other types of responsibilities may be the consequence of the same facts, such as corporate responsibility, or harm to other groups of individuals may also give rise to penalties,

such as consumers or employees. Competition law may also include different types of penalties other than those of an economic nature.

COMPETITION COMPLIANCE AND CRIMINAL RESPONSIBILITY

One of the main risks associated with anticompetitive conduct is that derived from criminal responsibility established in the law. In Chile, collusion was punished with imprisonment until 2003, when Law No. 19911 came into force and removed this type of penalty; however, in 2016, it was reincorporated into DL 211 by the amendment introduced by Law No. 20945.[66]

Currently, Article 62 of DL 211 establishes imprisonment sanctions, ranging from three years and one day up to 10 years for those who participate in crimes of collusion. The Law also establishes that, in the event that alternative sanctions may apply, they can only be requested after the convicted person has been imprisoned for at least a year. So far, this sanction has not been applied because there have been no cases regarding events that occurred after the amendment came into force.

Several Latin American countries have imposed criminal sanctions against price fixing cartels. In this regard, Colombia's Criminal Code establishes as a criminal breach bid-rigging in public procurement procedures,[67] and sanctions it with six to 12 years of imprisonment. In a similar sense, Peru's Criminal Code also considers collusive agreements as a crime in the context of public tender procedures.[68] Individuals in Mexico may also be prosecuted for entering, ordering or executing any contract or arrangement between competitors with certain anticompetitive purposes, facing between five and 10 years' imprisonment.

Finally, the Economic Crimes Act of Brazil considers collusive behaviours as a crime and sanctions such conduct with two to five years of imprisonment.[69]

COMPETITION COMPLIANCE AND CONSUMER PROTECTION

As well as criminal responsibility, anticompetitive conduct may affect consumers, who may be entitled to compensation. In Chile, Article 30 of DL 211 establishes that, once the TDLC has issued a final and binding judgment, later actions may be prosecuted either through a compensation action before the TDLC, or through the procedure for collective actions before a civil court.

This type of civil responsibility is widely contemplated across the region. For example, in the case of Mexico, Article 134 of the Federal Law of Economic Competition establishes that those who have suffered damages as a result of a monopolistic practices or an unlawful concentration may file legal actions in defence of their rights before the courts specialised in antitrust matters. As in the case of Chile, the obligation to pay for this type of damages has its direct antecedent in the declaration of the unlawfulness of such conduct by the competent court, regardless of the fact that the plaintiff has to prove the damage and causation between the damage and the anticompetitive conduct.

Likewise, in Peru, Article 52 of the Peruvian Law for the Repression of Anticompetitive Conduct enables any person who has suffered damages as a consequence of an anticompetitive conduct declared by administrative resolution to file a civil claim for damages before the Judicial Power. The article also empowers the Indecopi to initiate class actions in defense of affected consumers. On 17 May 2021, Indecopi published a guide on compensation for damages to consumers for anticompetitive behaviour,[70] which seeks to complement and delineate the criteria for the application of such rule.

COMPETITION COMPLIANCE AND PERSONAL RESPONSIBILITY OF BOARD MEMBERS

Another of the main risks alongside those of competition relates to the responsibility of board members within a company. In Chile, Law No. 18046 of Corporations (LSA) sets forth the right of board members to be provided with sufficient, true and timely information about the essential data of the company, as well as the legal obligation of executing their charge with the due diligence that the duty of being properly informed implies. In fact, in Article 78 of the LSA, it is established that for board members to execute an adequate administration, it is their duty to acquire sufficient information. Regarding this, the Superintendency of Securities and Insurance (SVS)[71] has sanctioned board members for not executing their right to be informed, owing to the fiduciary nature of their position.

There have been cases in which this standard has resulted in civil responsibilities for board members and other senior executives. In the FASA cartel case, the SVS penalised the president, executives and board members of Farmacias Ahumada during the investigated time period with a fine of 300 Unidad de Fomento (6.2 million Chilean pesos at the time) to each one, for not having duly exercised their legal right to be informed, and in a timely manner, as they should have done by virtue of the background information they had, both public and internal, in relation to a cartel case in which the company was involved.[72]

COMPETITION COMPLIANCE AND ANTI-CORRUPTION REGULATION

Additionally, the same facts constituting anticompetitive infringements could also imply infringements of the anti-corruption regulation, especially any conduct relating to collusive behaviour (bid-rigging) related to public procurement markets. This relationship between the regulations can produce the risk that legal provisions against corruption undermine the effectiveness of leniency programmes against bid rigging in public procurement.[73]

COMPETITION COMPLIANCE AND LABOUR LAW

Labour laws can both aid and be in dispute with competition rules. These two areas of corporate compliance go hand in hand, and through fostering a holistic approach to corporate governance, companies can assist in better compliance to competition rules through their employees.

For example, by creating bonuses and other incentives for employee performance regarding compliance programmes within the company, employers incentivise a culture of compliance. Similarly, through the existence of expedited channels for reporting anti-competitive conduct supported by a bounty system (i.e., the creation of rewards for whistleblowers), companies may be able to increase the rate of detection of anticompetitive conduct.

In other types of measures, companies may adopt 'negative' incentives for employees to respect compliance programmes, such as certain internal consequences, which might include the recalling of bonuses, civil damage claims by the employer and the loss of reputation.

All these measures must be stated within a company's internal rules; it is also recommended that they are included in employees' contracts.

On the other hand, as mentioned, labour laws can be in direct conflict with competition rules and proceedings. One of the clearest cases is when the need to investigate possible anticompetitive conduct by one or more employees clashes with the employees' right to privacy. While different legislation can have different thresholds regarding what is considered

private within the workplace, there is a general consensus that emails, computers and work phones may be monitored; however, it must be explicitly and clearly stated prior to any such monitoring being carried out, and be non-discriminatory (i.e., all employees must be subject to this a priori monitoring).

In Chile, both the FNE and the TDLC recommend that the review of email inboxes is the preferred method of monitoring the effectiveness of compliance programmes. Meanwhile, labour case law states that this kind of screening must be stated in a company's internal rules and be applied as a general, preventive and aleatory measure. The specific monitoring of an employee's email inbox, especially with investigative intent, in most cases is considered strictly prohibited except for when an employee consents to such an examination.

Problems arise when possible anticompetition behaviour by an employee is reported, as a company complying strictly with labour laws might not be able to investigate a possible infringement of competition rules.

There is also a growing interest among competition authorities in three types of conduct in which the affected good is the labour market: no-poach agreements, namely, agreements not to hire employees of competitors; wage-fixing agreements, which are agreements on salaries; and the exchange of information on prices and profits and other relevant variables.

ELEMENTS OF AN EFFECTIVE COMPETITION COMPLIANCE PROGRAMME

In general, legislation in Latin American jurisdictions does not provide specific requirements regarding competition compliance programmes, being a subject that has had to be developed by case law and by the guidelines of the different competition agencies in the region on this matter.

In the case of Chile, case law under both the FNE and the TDLC has established certain standards that work as indicators, or minimum requirements, for a programme to be effective, notwithstanding that its effectiveness will ultimately depend on how commercial policies are implemented and the particularities of each case.

Another issue relates to the effects of compliance programmes in the field of corporate liability. The TDLC has reduced fines based on the conscientious implementation of a compliance programme, and even raised the possibility of exemptions from liability, which radically differs from practice in the European Union.[74] However, the Supreme Court disagreed with the TDLC on that case, holding that compliance programmes do not constitute exemptions of responsibility, even though the court agreed with the TDLC regarding the possibility that a complete, real and serious programme can be considered when determining the amount of the fine.

Below are the requirements of an effective anticompetition compliance programme, according to FNE's and TDLC's standards. These criteria are not new to the region, and other countries have applied similar requirements for compliance programmes, including Peru,[75] Mexico,[76] Colombia[77] and Brazil.[78]

A good example: FNE's Guidelines on Competition Compliance Programmes

In 2012, the FNE published its Guidelines on Competition Compliance Programmes with the aim of encouraging economic agents to develop internal mechanisms that seek to prevent and detect anticompetitive conduct, by providing some of the markers that the FNE considers a competition compliance programme should contain.[79]

These Guidelines can be seen as the FNE's response to the then increasing trend by competition authorities, on an international level, of aiding the prevention and deterrence of anticompetitive conduct by encouraging the implementation of competition compliance programmes. The FNE's Guidelines have clearly been influenced by earlier guides and documents issued by other competition authorities. For example, the European Commission's Compliance Matters includes many of the same compliance measures: identification of risks, involving senior executives in the compliance policy, the establishment of reporting channels, permanently updating the compliance policy, monitoring and auditing. In September 2022, the FNE launched a public consultation procedure to update their Guidelines on Competition Compliance Programmes. An updated version of these Guidelines has not been published by the FNE yet.

Moreover, the FNE's Internal Guidelines for the Request of Fines from 2019 recognise the possibility of considering the existence of a robust compliance programme to reduce the amount of the fine to be requested to the TDLC, as long as several copulative requirements are met.

Furthermore, Chilean authorities have explicitly recognised the influence of the OECD's Policy Roundtable on Promoting Compliance with Competition Law Policy of 2011. In the summary document of that roundtable, the Chilean representative is quoted as saying: 'The FNE is currently in the process of evaluating what approach to take regarding these programmes, so this Roundtable is very timely for supporting our decision-making.' We can now see some clear correlation between the OECD's document and the FNE's guide (e.g., the evaluation of risks, commitment of the company, monitoring, audits, secure reporting channels, permanent assessment of compliance and use of incentives to promote compliance, among other things).

Other documents appearing around the same time, such as the US Department of Justice's FCPA Resource Guide, and later documents set out many of the same measures already mentioned multiple times.[80] This shows that most competition authorities agree about the minimum measures and characteristics of a competition compliance programme, with certain minimal differences between them depending on the specific characteristics of each jurisdiction.

For instance, in November of 2022, the Colombian antitrust authority, the Superintendencia de Industria y Comercio (SIC), issued the Guidelines for the Implementation of Compliance Programmes in Competition Law, through which it intends to express its intention to foster a national compliance culture. Through said Guidelines, the SIC established the importance of creating a competition law compliance programme, the minimum elements it should have, and the most important guidelines for its implementation. A similar document was issued in Ecuador in 2021, as the SCE published its Competition Compliance Guide,[81] with the objective of providing guidelines to prevent the commission of anticompetitive practices, established in the LORCPM.

For the FNE, a competition compliance programme must meet at least the following four conjunctive essential requirements:

A real commitment to comply with competition law, which must be transmitted through the actions of each agent, requiring that both internal and external policies are consistent with competition law.

The identification of current and potential competition risks applied to the specific entity and its different business areas or divisions, especially by recognising weak areas where those risks will probably occur. This requirement is especially important, since it will determine the characteristics of the company's compliance programme in accordance with the corresponding level and areas of risk and the characteristics of the market in which the firm operates. For these purposes, the FNE recommends a detailed study by experts in competition, which should be reviewed at regular intervals or in the event of any relevant change of circumstances.

The existence of internal structures and procedures in accordance with competition law and consistent with it, which relates closely to the first requirement. Some manifestations of a proper commitment would be, for instance, (1) incentives, compensation, bonuses and other benefits to workers who comply with competition law, (2) the establishment of appropriate communication channels for reporting possible anticompetitive conduct, (3) the establishment of a separate and independent pricing area that is distinct from the commercial area, and (4) the designation of a person in charge of the company's competition compliance programme (compliance officer).

The active participation of senior executives and board members of the company in the implementation and development of a compliance programme. All the previous requirements can only be achieved if all individuals within the company, especially those in senior positions, show the importance of compliance with competition law. Finally, the compliance officer should have full autonomy and independence within the company (e.g., responding directly to the board of directors and exhibiting precisely defined grounds for removal).

Additionally, the FNE mentions specific elements that compliance programmes can include to achieve a greater degree of effectiveness. The FNE describes them as having a 'pyramidal' structure: as the measures are progressively more intense and the cost is greater, their effectiveness also increases. The Guidelines establish five distinct elements, in increasing order: (1) manual; (2) training; (3) monitoring; (4) audits; and (5) disciplinary measures.

First, a competition compliance programme must have at the very least, a written manual that clearly and comprehensively explains the main aspects of competition law, potential risks, types of anticompetitive conduct, means of reporting this conduct, the person in charge of the programme, among other things. This manual must be available to all company personnel and must be permanently and easily accessible by all employees.

Second, training regarding proper compliance with the programme and the manual must be carried out within the company, ideally by an external competition expert. This training will encompass practical explanation of the extent of the programme, the internal competition policies of the agents and the internal procedures of the company regarding compliance with competition rules. Face-to-face training can be complemented with online courses or training, and its frequency will depend on the specific needs of the company. It is important to carry them out on a regular and updated basis, as competition is a very dynamic discipline, where doctrine and case law are constantly evolving.

As third and fourth measures, the FNE mentions monitoring and audits. Both are mechanisms that allow the identification of the level of effectiveness of the compliance programme, and both can be done by internal and external professionals. The FNE

recommends that an audit is carried out each time there is a report of a possible infraction, and to carry out general preventive audits.

Finally, the FNE recommends disciplinary action is imposed on workers who do not comply with the compliance programme, indicating expressly the penalties to be faced by an offending employee. At the same time, establishing incentives for those employees who duly comply with the programme can act as an incentive that will encourage compliance with competition rules.

RELEVANT CASE LAW ON COMPETITION COMPLIANCE PROGRAMMES IN LATIN AMERICAS

In Chile, the TDLC has imposed compliance programmes as corrective measures in cartel cases.[82] Although this case law provides certain guidelines as to what the competition authorities may consider an effective compliance programme, it should always be borne in mind that these programmes have been imposed as a specific penalty and corrective response and, therefore, no longer follow a fully effective preventive objective.

Compliance programmes imposed as penalty measures have several characteristics in common, as the TDLC typically requires: (1) the implementation of a compliance programme that satisfies the requirements established by the FNE Guidelines on Competition Compliance Programmes, as a sign of deference to the prosecuting entity; (2) the creation of a compliance committee (which must be established in the statutes of the company and be responsible for proposing the appointment and removal of a compliance officer to the board of directors, and ensuring the correct performance of the officer's duties); (3) that the instituted compliance officer performs his or her role full-time and reports directly to the board of directors; (4) the inclusion of comprehensive competition compliance training, carried out by economists or lawyers who are experts in competition matters, for senior executives and administrative personnel, and any other individuals indicated by the compliance officer; and (5) the implementation of frequent competition audits that must consider, at least, the review of corporate email inboxes and records of calls from corporate phones, the incentives established in work contracts, the participation of the company in tender processes and in trade associations, among other things.

In Peru, in November 2021, Indecopi sanctioned 33 construction companies and 26 executives for forming a bid-rigging type cartel to divide among themselves 112 public bidding processes between the years 2002 and 2016. As a sanction, the companies and executives involved were sentenced to pay high fines and were ordered to implement compliance programmes for a period of five years, with the purpose of discouraging the formation of cartels and promoting the timely detection of anticompetitive practices.

CONCLUSION

The evolution of competition regulation in several jurisdictions has significantly raised the standards and requirements for companies to mitigate the growing legal exposure associated with anticompetition infringements. This poses a challenge for companies in having to adapt to changes and new standards, especially for those agents with a relevant market power that participate in risky or complex markets. As a result, the implementation of an effective competition compliance programme – the minimum requirements for which have been set fairly uniformly by the authorities of most Latin American jurisdictions – and a real commitment to comply with competition law must be considered today as one of the most essential elements of corporate compliance in Latin America.

ENDNOTES

[1] Lorena Pavic and José Pardo are partners, and Raimundo Gálvez is an associate, at Carey.

[2] 'Chile – Accession Report on Competition Law and Policy'; OECD, 'Assessment of Merger Control in Chile', Report by the OECD Secretariat (2014), http://www.oecd.org/daf/competition/chile-merger-control-2014-en.pdf.

[3] This follows the European regulation regarding restrictions by object, Article 101(1) of the Treaty on the Functioning of the European Union.

[4] Criminal sanctions to cartels were in force until Law No. 19911 was enacted in 2003; however, they were never actually applied.

[5] This replaced the former fixed maximum amount, up to 30,000 tax units (approximately 19.5 billion Chilean pesos) for collusion and 20,000 tax units (approximately 13 billion Chilean pesos) for all other infringements.

[6] Decree-Law No. 211 (DL 211), Article 63.

[7] So far, the National Economic Prosecutor's Office (FNE) has analysed approximately 214 concentrations under the mandatory merger control.

[8] The FNE submitted its first two claims for alleged interlocking conduct in December 2021. See Case C 436-2021 of the TDLC, FNE's claim against Hernán Büchi Buc and others; and Case C 437-2021 of the TDLC, FNE's claim against Juan Hurtado Vicuña and others. The TDLC has not ruled yet on any of these cases. However, in November 2022 the FNE settled the first of the referred cases with Hernán Büchi Buc and Falabella, including the payment of approximately 1.4 billion Chilean pesos.

[9] Supreme-Decree No. 030-2019, Article 26.

[10] 'Guide to Combating Collusion in Public Procurement' (2018), https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas.

[11] https://www.indecopi.gob.pe/documents/51771/2962929/Gu%C3%ADa+de+Programa+de+Cumplimiento.

[12] https://wb2server.congreso.gob.pe/spley-portal-service/archivo/MTA2NDUx/pdf/31775-LEY.

[13] Greco, Esteban M; Quesada, Lucía; Volujewicz, Federico A, 'Argentina: Competition Authority', The Antitrust Review of the Americas 2019, https://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2019/1173674/argentina-competition-authority.

[14] https://servicios.infoleg.gob.ar/infolegInternet/anexos/380000-384999/383980/norma.htm.

[15] http://www.saij.gob.ar/proyecto-ley-bases-puntos-partida-para-libertad-argentinos-proyecto-ley-bases-puntos-partida-para-libertad-argentinos-nv40785-2023-12-27/123456789-0abc-587-04ti-lpssedadevon.

[16]

Comisión Federal de Competencia Económica. Legal and Regulatory Framework (in Spanish), https://www.cofece.mx/publicaciones/marco-juridico-y-normativo

[17] Instituto Federal de Telecomunicaciones, http://www.ift.org.mx/sites/default/files/contenidogeneral/conocenos/Modificacion_EOIFT_130718.pdf

[18] https://www.eleconomista.com.mx/empresas/Cofece-crea-direccion-para-supervisar-a-los-mercados-digitales-20200707-0041.html.

[19] [20] https://www.cofece.mx/wp-content/uploads/2024/04/ICNT24_web.pdf.

[20] https://cdn.cade.gov.br/portal-ingles/topics/publications/guidelines/compliance-guidelines-final-version.pdf

[21] https://cdn.cade.gov.br/portal-ingles/topics/publications/guidelines/GuidelinesCADEsAntitrustLeniencyProgram.pdf.

[22] https://www.gov.br/cade/pt-br/assuntos/noticias/cade-lanca-guia-de-analise-de-atos-de-concentracao-nao-horizontais.

[23] https://www.sce.gob.ec/sitio/wp-content/uploads/2023/06/LORCPM-Nuevas-Reformas-2023.pdf.

[24] https://www.sce.gob.ec/sitio/wp-content/uploads/2023/07/Resolucion-05-04-2023-EXP-SCPM-CRPI-027-2022-VERSION-NO-CONFIDENCIAL.pdf

[25] Case C 197-2009 of the TDLC, FNE's claim against Abercrombie & Kent SA and others.

[26] For example, there are only a few rulings of the TDLC on the standards and requirements for unilateral conduct. Indeed, currently the standards for many forms of unilateral conduct are only established by the FNE in the context of the closing of its investigations.

[27] Case C 304-2016 of the TDLC, FNE's claim against Cencosud SA and others.

[28] https://centrocompetencia.com/compliance-en-latinoamerica-de-dulce-y-agraz.

[29] https://one.oecd.org/document/DAF/COMP/LACF(2019)14/es/pdf.

[30] idem.

[31] In this regard, and for the effectiveness of a competition compliance programme, the FNE requires companies to always keep an updated analysis of the current and potential competition risks applied to the specific entity and its different business areas or divisions.

[32] This happens especially regarding more complex forms of anticompetitive conduct and in those cases where there are unclear standards, such as some cases of abuse of dominance.

[33] The training on competition compliance for executives and employees is one of the important requirements requested by both the FNE's Guidelines and the TDLC.

[34] Regarding the dissolution of companies, corporations or other legal entities, this measure has only been implemented in cartel cases with regards to trade associations, where the latter was used as a vehicle to organise and implement the collusive agreement. As an example, see: (1) Antitrust Court, Case No. 236-2011 of the TDLC, FNE's claim against Agrosuper SA and others, ruling from 25 September 2014 (confirmed by the Supreme Court on its ruling from 29 October 2015); and (2) Supreme Court, Case No. 5609-2015, FNE's claim against the Gynaecologists Trade Association (ruling from 7 January 2016).

[35] DL 211, Article 26, Paragraphs (a), (b) and (c).

[36] Law No. 1474, Article 410A.

[37] Conselho Administrativo de Defesa Econômica.

[38] https://documentos.bancomundial.org/es/publication/documents-reports/documentdetail/148021625810668365/fixing-markets-not-prices-policy-options-to-tackle-economic-cartels-in-latin-america-and-the-caribbean.

[39] See Ivaldi, Marc; Bruno, Jullien; Rey, Patrick; Seabright, Paul; Tirole, Jean (2003), 'The Economics of Tacit Collusion', Final Report for DG Competition, European Commission, https://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf.

[40] DL 211, Article 39 bis.

[41] 'Corte Suprema condena a laboratorios Sanderson y Fresenius por colusión en licitaciones públicas de medicamentos con multa total de US$15 millones', FNE (January 2020), https://www.fne.gob.cl/corte-suprema-condena-a-laboratorios-sanderson-y-fresenius-por-colusion-en-licitaciones-publicas-de-medicamentos-con-multa-total-de-us-15-millones ; see also https://www.fne.gob.cl/corte-suprema-condena-a-cmpc-y-sca-por-colusion-en-el-mercado-del-papel-tissue

[42] 'FNE acusa colusión de empresas productoras de alimentos para salmón y pide multas de US$ 70 millones al TDLC', FNE (December 2019), https://www.fne.gob.cl/fne-acusa-colusion-de-empresas-productoras-de-alimentos-para-salmon-y-pide-multas-de-us-70-millones-al-tdlc.

[43] See Case C-430-2021 of the TDLC, FNE claim against Brink's, Prosegur and Loomis.

[44] https://www.fne.gob.cl/wp-content/uploads/2023/12/Resolucion-Exenta-N.-683.pdf.

[45] 'CADE's General Superintendence recommends condemnation of companies for cartel in the national sea salt market', Administration Council for Economic Defence (CADE) (March 2017), http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-recommends-condemnation-of-companies-for-cartel-in-the-national-sea-salt-market.

[46] https://www.gov.br/cade/en/matters/noticias/estudio-muestra-la-actuacion-del-cade-en-la-defensa-de-la-competencia-en-2023

[47] https://sic.gov.co/sites/default/files/files/2023/Cartilla%20colusiones-7-12-23-1110am.pdf

[48] https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-025-2017.pdf.

[49] https://centrocompetencia.com/casos-exito-en-mexico-costa-rica-colombia-segun-autoridades.

[50] Alianza Estratégica Latinoamericana en Materia de Libre Competencia, Carta de Paris, www.cade.gov.br/noticias/cade-e-agencias-antitruste-do-chile-argentina-mexico-e-peru-assinam-declaracao-conjunta-com-melhores-praticas-sobre-leniencia/20181130-carta-de-paris-suscrita.pdf .

[51] 'Competition Agencies from Brazil, Chile, Mexico and Peru Strengthen the Latin American Strategic Alliance for Competition', Cofece (2018), https://www.cofece.mx/wp-content/uploads/2018/09/COFECE-037-2018-English.pdf.

[52] https://www.indecopi.gob.pe/documents/51771/4402954/ESP+Lineamientos+del+Programa+de+Recompensas.

[53] https://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines_Leniency_Cartel_Cases.pdf.

[54] In November 2021, the TDLC convicted Correos de Chile for abusive exclusionary practices (through the application of targeted retroactive rebates). The TDLC sentenced the Chilean state-owned company to pay a fine of 6,000 UTA (approximately US$4.6 million), without imposing additional measures. See Ruling No. 178/2021.

[55] DL 211, Title IV.

[56] id., at Article 49.

[57] id., at Article 48. There have been no FNE claims regarding failure to notify conduct thus far.

[58] id., at Article 49. There has been only one gun-jumping case brought to the TDLC, regarding early implementation of a transaction. The concentration was approved by the FNE after its closure, and it was finally settled before the TDLC between the FNE and the notifying parties. Case C 346-18 of the TDLC, FNE's claim against Minerva SA and others.

[59] https://www.fne.gob.cl/en/fne-actualiza-y-fortalece-regimen-de-control-de-operaciones-de-concentracion-con-nueva-guia-e-instructivo/.

[60] See Case C 433-2021 of the TDLC, FNE's claim against Navimag Carga S.A.

[61] Supreme-Decree No. 030-2019 (Peru), Article 26.

[62] SCPM, Resolution No. SCPM-DS-2020-019, https://res.cloudinary.com/gcr-usa/image/upload/v1587675683/RESOLUCI%C3%93N-SCPM-DS-2020-19_1_xr5ntg.pdf.

[63] Guidelines for the Analysis of Previous Consummation of Merger Transactions, CADE (2016), www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf.

[64] https://www.sic.gov.co/sites/default/files/files/Proteccion_Competencia/Integraciones_Empresariales/2019/Guía %20Integraciones%20Empresariales_agosto16_2019_%20(1).pdf.

[65] https://www.sic.gov.co/sites/default/files/normatividad/042021/TITULO%20VII%20Res27512021%20%281%29.pdf.

[66] id., at Article 62.

[67] Article 410-A.

[68] Article 384.

[69] Article 4, Law 8137/1990.

[70] https://cdn.www.gob.pe/uploads/document/file/1898027/Lineamientos%20CLC%20sobre %20demandas%20resarcitorias%20VF%20%281%29%20%281%29.pdf.pdf

[71] Superintendencia de Valores y Seguros.

[72] Case C 184-2008 of the TDLC, FNE's claim against Farmacias Ahumada SA and others.

[73] Luz, Reinaldo; Spagnolo, Giancarlo (2016), 'Leniency, Collusion, Corruption, and Whistleblowing', Working paper to Stockholm Institute of Transition Economics.

[74] Case C 304-2016 of the TDLC, FNE's claim against Cencosud SA and others.

[75] Guía de Programas de Cumplimiento de las Normas de Libre Competencia (Proyecto), Indecopi (September 2019), https://www.indecopi.gob.pe/documents/51771/2962929/Guía+de+Programa+de+Cumplimiento

[76] Recomendaciones para el cumplimiento de la Ley Federal de Competencia Económica dirigidas al sector privado, Cofece (August 2015), " target="_blank">https://www.cofece.mx/cofece/images/Documentos_Micrositios/RecomendacionesCumplimentosLFCE_021215.pdf

[77] 'Icontec Pretende Establecer Buenas Prácticas de Protección para la Libre Competencia', Fenalco, www.fenalco.com.co/gesti%C3%B3n-jur%C3%ADdica/icontec-pretende-establecer-buenas-pr%C3%A1cticas-de-protecci%C3%B3n-para-la-librepan>

[78] 'Guia para Programas de Compliance', CADE (January 2016), www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-compliance-versao-oficial.pdf

[79] 'Programas de Cumplimiento de la Normativa de Libre Competencia', FNE (June 2012), https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf

.

[80] For example, 'Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations', US Department of Justice, Antitrust Division (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

[81] https://www.sce.gob.ec/sitio/wp-content/uploads/2021/09/Guia-Compliance-en-Competencia-SCPM-INAC-DNPC-002-.pdf.

[82] Ruling No. 160/2017, Case C 299-2015, Case C 184-2008 of the TDLC, FNE's claim against CMPC Tissue SA and others; Ruling No. 165/2018, Case C 312-2016, FNE's claim against Fresenius and others; Ruling No. 167/2019, Case C 304-2016, FNE's claim against Cencosud and others; Ruling No. 171/2019, Case C 292-2015, FNE's claim against CCNI SA and others; Ruling No. 172/2020, Case C 321-2017, FNE's claim against Industrial y Comercial Baxter de Chile Ltda and others; Ruling No. 179/2022, Case C 393-2020, FNE's claim against Inaer Helicopter Chile S.A. and others.

Lorena Pavic lpavic@carey.cl
José Pardo jpardo@carey.cl
Raimundo Gálvez rgalvez@carey.cl

Chile

https://www.carey.cl/en/