GARRIGUES

Competition Regimes in Latin America: Brazil, Chile, Colombia, Ecuador, Mexico and Peru

March 2025

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This second edition of the publication renamed ***"Competition Regimes in Latin America: Brazil, Chile, Colombia, Ecuador, Mexico, and Peru"***, would not have been possible without the support of the team from the Center for Competition at Adolfo Ibáñez University in Chile (CeCo), particularly its Director, Felipe Irarrázabal, as well as Juan Pablo Iglesias and Ignacio Peralta, to whom we sincerely thank.

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Prologue

Competition law, as the market itself, is a cross-border phenomenon. Every year, multi-jurisdictional merger operations take place and diverse business conducts are carried out with extraterritorial effects. Nevertheless, the enforcement of this branch of law is predominantly territorial. This remains the case even in the European Union, where the interaction between the supranational system (led by the European Commission) and the national systems of each Member State is complex[1].

In Latin America, we have the Andean Community. However, only four countries are members (Bolivia, Colombia, Ecuador, and Peru) and to date its competition enforcement has played a secondary role[2]. Thus, competition enforcement in the region remains a national matter, focused on each country's own regulations and authorities. This seems reasonable, considering that each country in the region retains its sovereignty to decide on the degree of openness and expansion of its markets, as well as on the role and functions of the State in economic activities.

Therefore, while the strengthening of international cooperation among competition agencies creates various opportunities to improve enforcement, the reality is that practicing lawyers working on cross-border cases must navigate a host of regulatory divergences and idiosyncrasies specific to each jurisdiction. These differences may relate to the types of applicable procedures (administrative and judicial), notification thresholds, the presence or absence of criminal sanctions, the design of leniency programs, the categorization of anticompetitive conduct, damage compensation regimes, treatment of interlocking directorates, the existence of whistleblower programs, and the relationship between competition law and unfair competition regulations.

Against this backdrop, the work carried out by the law firm Garrigues in producing this second edition of the report "Status of Competition Law Regimes" is extremely valuable. This new edition adds two new and important countries, Brazil and Mexico, while also revises and enriches the analysis of the four countries covered in the first edition (Chile, Colombia, Ecuador, and Peru). For this task, Garrigues has had the valuable contribution of Mattos Filho (Brazil) and Pérez, Bustamante & Ponce (Ecuador). The report thus offers a harmonized, concise, and useful overview of the most relevant institutional aspects of the competition law regimes in these six countries.

[1] For instance, one may refer to the referral mechanism in the area of merger control (Article 22 of the EU Merger Regulation) and the judicial review of the interpretation of EU competition rules (Articles 101 and 102 of the TFEU) by national competition authorities.

[2] This stands in contrast to other areas also under the jurisdiction of CAN authorities, such as intellectual and industrial property, which have a higher volume of decisions.

Without a doubt, Garrigues' regional presence has enabled it to undertake and execute this project with high quality and precision[3]. At CeCo, we can only express our sincere thanks to all the lawyers who authored this report and look forward to its continued expansion to include additional jurisdictions in the years ahead.

March 2025

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[3] Garrigues has also collaborated with CeCo in other projects, as the "Perú Merger Panel".

Brazil

Brazil

Eduardo Frade, Paulo Luciano and Roney Olimpio (Mattos Filho)

Abbreviations

CADE	Administrative Council for Economic Defense
SRE	Brazilian Ministry of Economy's Secretariat of Economic Reforms
STF	Brazilian Supreme Court
STJ	Brazilian Superior Court of Justice
Brazilian Competition Law	Law 12,529/2011
CADE'S GS	General Superintendence of CADE
DEE	Department of Economic Studies of CADE
CGAA	Multiple Bodies of General Coordination of Antitrust Analysis

1. General Background

1.1 Legal framework

The Brazilian competition enforcement regime has a broad legal framework based on the following provisions:

(i) Brazilian Constitution: Articles 170 and 173 established an economic order under a market-oriented principle and a mandate for competition enforcement to repress conducts aimed at eliminating competition.[1]

(ii) Law 12,529/2011 ("Brazilian Competition Law"): This is the main legislation regarding Brazilian competition enforcement. It establishes the Brazilian System of Competition Defense, composed of the Brazilian Competition Authority, *Conselho Administrativo de Defesa Econômica* – "CADE" (Administrative Council for Economic Defense) and the Brazilian Ministry of Economy's Secretariat of Economic Reforms – "SRE".[2]

(iii) Law 8,137/90: This a criminal legislation regarding the Brazilian economic order as a whole. It includes specific provisions concerning anticompetitive behavior (such as cartels). It is solely focused on individuals – it is not enforced against companies or other entities.

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[1] Article 170: "The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: . . . IV - free competition . . ."

Paragraph 4 of Article 173 of the Constitution states: "The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits."

Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

[2] Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

(iv) CADE's Resolutions: CADE issues regulations on several aspects of the Brazilian competition enforcement regime. Under Brazilian Competition Law, CADE has issued 35 Resolutions, as amended from time to time. Main Resolutions include: (i) CADE's Internal Rules, which establish most of the rules regarding procedure; (ii) CADE's Resolution No. 33, which governs the notification of merger cases and establishes the fast-track filing proceeding; (iii) CADE's Resolution No. 24, which establishes gun-jumping and "call-in" proceedings; (iv) CADE's Resolution No. 17, which governs the notification of "collaborative agreements"; (v) CADE's Resolution No. 3, which defines the "lines of business" for the calculation of fines; (vi) CADE's Resolution No. 12, which establishes the Consultation proceeding.[3]

(v) Case Law: Although the Brazilian legal system is a Civil Law system and past decisions are not a formal source of law, there is some adherence to past decisions by Brazilian Supreme Court ("STF") and Brazilian Superior Court of Justice ("STJ"). In addition, in several aspects of Brazilian competition enforcement, CADE's decisional practice serves as a relevant guidance.

(vi) Soft law: CADE has a prolific record of guidelines regarding several aspects of Brazilian competition enforcement regime. Although they are not binding, these guidelines are very important in day-to-day practice because they indicate CADE's best practices and provide guidance to the private sector.[4]

(a) Guidelines for Horizontal Merger Review

(b) Guidelines for Non-Horizontal Merger Review

(c) Guidelines for the Analysis of Previous Consummation of Merger Transactions

(d) Guidelines for Competition Compliance Programs

(e) Guidelines for Settlement Agreements for Cartel Cases

(f) Guidelines for CADE's Antitrust Leniency Program

(g) Guidelines for Antitrust Remedies

(h) Guidelines for Fighting Cartels in Procurement

(i) Guidelines for Cartel Fines

(j) Guidelines for Submitting Evidence in Leniency Applications

(k) Guidelines for Submitting Economic Data to CADE's Department of Economic Studies

[3] Available at: https://www.gov.br/cade/pt-br/acesso-a-informacao/normas-e-legislacao/resolucoes-1.

[4] Available at: https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/guias-do-cade.

1.2 Institutional design

As indicated above, the Brazilian System of Competition Defense is composed of CADE and the SRE.[5]

CADE is responsible for investigating and ruling on potentially anticompetitive acts and also reviews merger cases. CADE is composed of three bodies: the General Superintendence ("CADE's GS"), the Administrative Tribunal ("CADE's Tribunal"), and the Department of Economic Studies ("DEE"). There are also two supporting bodies: the Office of the Attorney General at CADE and the Federal Prosecutor's Office at CADE.[6]

1.2.1 CADE's General Superintendence

CADE's GS reviews mergers and can either unconditionally clear them or oppose them before the CADE's Tribunal, arguing why they should either be blocked or approved subject to remedies, as the case may be. CADE's GS also investigates anticompetitive behavior, and issues non-binding opinions recommending CADE's Tribunal to dismiss cases or impose sanctions on the companies and/or individuals concerned.

CADE's GS is led by a General Superintendent, who is appointed by the Brazilian President and confirmed by the Senate. The General Superintendent has a two-year term, which can be renewed for another two years.

CADE's GS is internally divided into smaller units within two broader segments: (i) Merger Cases and Unilateral Conduct; and (ii) Cartels. Each of these two segments has a Deputy Superintendent responsible for coordinating the workflow, and they are appointed by the General Superintendent. These segments are further divided into smaller units (multiple bodies of General Coordination of Antitrust Analysis, or "CGAAs" in the Portuguese acronym), which are organized as provided below:

1.2.2 Merger cases and unilateral conduct

- CGAA 1: Focused on differentiated goods, pharmaceuticals, agribusiness, and technology sectors.
- CGAA 2: Focused on services, education, healthcare, financial, and retail segments.
- CGAA 3: Focused on base industries, chemicals, petrochemicals, and other commodities.
- CGAA 4: Focused regulated sectors such as telecommunications, energy, oil and gas, and transportation.
- CGAA 5: Focused mergers under the fast-track proceeding and investigates gun jumping cases.

[5] See Article 3 of Brazilian Competition Law. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

[6] See Articles 5, 15, and 20 of Brazilian Competition Law. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

1.2.3 Cartels

- CGAA 6: Focused on domestic cartels.
- CGAA 7: Focused on international cartels with actual or potential effects in Brazil.
- CGAA 8: Focused on bid rigging cartels.
- CGAA 9: Focused on the initial screening of behavior for referral to other CGAAs, dawn raids, and general investigations.
- CGAA 10*:* Focused on negotiating and executing leniency agreements.
- CGAA 11: Focused on unilateral conduct.

1.2.4 CADE's Tribunal

CADE's Tribunal issues final ruling in both merger review cases (if applicable) and antitrust investigations. It is composed of one President and six Commissioners, all appointed by the Brazilian President and confirmed by the Senate. The President and the Commissioners have 4-year terms, and their reappointment is prohibited.

CADE's Tribunal main responsibility is issuing final decisions on merger cases and antitrust investigations, including imposing or approving remedies on merger cases and imposing sanctions on antitrust investigations.

1.2.5 Department of Economic Studies

The Department of Economic Studies – "DEE"- supports CADE's GS and CADE's Tribunal with economic advice whenever requested by these two bodies. The DEE also prepares studies on specific markets, working papers, conducts economic analysis of draft regulations and policy measures from a competition advocacy standpoint, and conducts other scientific initiatives to improve CADE's expertise on competition matters.

The DEE is led by a Chief Economist, who is jointly nominated by the General Superintendent and the President of CADE's Tribunal.

1.2.6 Office of the Attorney General at CADE

The Office of the Attorney General at CADE is responsible for providing legal counsel and advisory services to CADE, representing CADE in judicial and extrajudicial matters, enforcing CADE's decisions, and ensuring the collection of CADE's credits (derived from the payment of fines) by registering them as active debt for administrative or judicial collection. Additionally, it takes necessary judicial measures to stop antitrust violations or to obtain documents for administrative processes, promotes judicial agreements in cases regarding antitrust matters (subject to Tribunal's authorization), and issues opinions when expressly requested by a Commissioner or the General Superintendent.

The Attorney General at CADE is appointed by the President of the Republic after Senate approval and has a 2-year term, with the possibility of reappointment for one additional term. The Attorney General at CADE can participate in Tribunal hearings without voting rights, providing assistance and clarifications as needed. The Office of the Attorney General at CADE also ensures compliance with the law and performs other tasks assigned by CADE's Internal Rules.

The Office of the Attorney General at CADE is divided in three units, set out below:[7]

(i) General Coordination of Studies and Opinions: focused on matters related to CADE's main activities and the monitoring of the extrajudicial compliance with CADE's decisions.

(ii) General Coordination of Administrative Matters: focused on matters related to bids, administrative contracts and agreements, human resources, disciplinary administrative procedures, and other matters related to CADE's secondary activities, such as preparing management reports and promoting the training of Federal Prosecutors; among others.

(iii) General Coordination of Judicial Litigation: represents CADE before the Brazilian courts and seeks the judicial enforcement of CADE's decisions.

1.2.7 Federal Prosecutor's Office at CADE

In general, the Federal Prosecutor's Office at CADE has the role of supervising the enforcement of Brazilian competition law during antitrust investigations, issuing non-binding opinions on these cases.[8] The person in charge of the Federal Prosecutor's Office at CADE is appointed by the General Federal Prosecutor.[9]

1.2.8 Secretariat for Economic Reforms

The SRE is a specific entity within Brazil's Ministry of Economy, responsible for the proposition and monitoring of microeconomic and regulatory reforms with the objective of improving the business environment in Brazil. Within the Brazilian System of Competition Defense, the SRE is responsible for competition advocacy, conducting sectoral studies, participating in public consultations by regulatory authorities, preparing recommendations and proposals for the revision of laws, regulations, and other normative acts of the public administration.[10]

1.3 Historical background

CADE was created by Law No. 4,137/1962, with the mandate of conducting competition enforcement in Brazil. However, CADE had limited role until Brazil moved towards a more market-oriented approach in the end of the 80s and beginning of the 90s with the enactment of the Brazilian Constitution in 1988.

The Brazilian competition enforcement regime started to become more relevant and structured with Law No. 8,884/94, which was enacted within the context of the modernization of the Brazilian regulatory framework. In 2011, the Brazilian Competition Law modernized the Brazilian competition enforcement regime even further. The new law defined with greater clarity the responsibilities of different bodies, eliminated redundancies, reformed several aspects of the old

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[7] Available at: https://www.gov.br/cade/pt-br/acesso-a-informacao/institucional/competencias/procuradoria-federal-especializada-cade.

[8] For more details on the Federal Prosecution Services at CADE, please refer to Resolution No. 1, jointly issued by CADE and the Federal Public Prosecutor's Office: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolucao_Conjunta_PGR_CADE_n_1.pdf.

[9] Article 20 of Brazilian Competition Law.

[10] For more information on the SRE and its activities, please see: https://www.gov.br/fazenda/pt-br/composicao/orgaos/secretaria-de-reformas-economicas.

regime, and established new procedural rules. The most significant change was the creation of a pre-merger control regime.[11-12]

After the reform, CADE worked to provide guidance and visibility to the private sector via the Resolutions and soft law discussed in the section 1.1. above.

1.4 Typology of infringements and material scope

Article 36 of Brazilian Competition Law has a broad provision which states that any anticompetitive act, under any form, by its very object or its potential effects, is subject to scrutiny under the Brazilian competition enforcement regime.[13] The notion of anticompetitive effects involves:

(i) Restricting competition;

(ii) Dominating a relevant market (although dominating a relevant market is not an infringement if this resulted from superior efficiency);

(iii) Arbitrarily raising profits; and[14]

(iv) E Abuse of dominance.

Article 36 also contains examples of specific conduct that may be deemed anticompetitive, and CADE has the authority to investigate other conducts as well. The conducts mentioned in Article 36 may be divided into two general categories of infringements:

(i) Cartel and other coordinated conducts: conducts like price fixing, output restriction, market division and customer allocation, and bid rigging are generally prohibited under Brazilian competition law. More recently, the exchange of competitively sensitive information is gaining prominence as a conduct that may be deemed illegal.[15]

[11] A detailed discussion on the evolution of the Brazilian Competition enforcement regime can be found at the book *Defesa da Concorrência no Brasil: 50 anos* (50 years of Brazilian competition enforcement): https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/livro-50-anos/livro-defesa-da-concorrencia-no-brasil-50-anos.pdf.

[12] Before Law 12,529/2011, CADE adopted a post-merger control regime whereby the merging parties had up until few days after the closing to notify the transaction with CADE.

[13] Brazilian Competition Law does not require effects have actually materialized.

[14] This provision has very limited application in practice, due to the inherent difficulties in demonstrating the negative effects of "abnormal" profits and/or prices if not resulted from other anticompetitive practices. For a seminal discussion, see Ragazzo, Carlos Emmanuel Joppert. "*A EFICÁCIA JURÍDICA DA NORMA DE PREÇO ABUSIVO*". *DE CONCORRÊNCIA* (2012): 199, available at: https://www.concorrencia.pt/sites/default/files/imported-magazines/Revista_CR07-08.pdf#page=199.

[15] See Article 36, paragraph 3, items I and II, of Brazilian Competition Law. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

(ii) Unilateral conduct or abuse of dominance: conducts such as resale price maintenance, price discrimination, refusal to deal, and other vertical restraints may be considered illegal under the Brazilian Competition Law.[16]

1.5 Personal or subjective scope

Brazilian Competition Law is applicable to any person or entity, regardless of its legal form, sector or if it is private- or state-owned, and even applies even to companies operating under a legal monopoly.[17]

In addition, companies are jointly and separately liable for the infringements committed by officers and employees, and companies within the same economic group are jointly and separately liable for the infringements committed by other group companies.[18]

1.6 Extraterritoriality

Brazilian Competition Law is applicable to acts with actual or potential effects in Brazil.[19] There is no *de minimis* exemption in relation to transactions or practices that could not be considered as having effects in Brazil.

The assessment of effects varies in regard to the categories of potentially anticompetitive acts and merger control review, although both follow the same principle. In merger control, for example, CADE may consider that a transaction produces actual or potential effects in Brazil if the parties have any presence in Brazil. Because of the latter, a party to the transaction will be considered as having presence in Brazil if it has either a physical presence or merely exports into Brazil. In general, the transactions that are not subject to CADE's jurisdictions are those foreigner-to-foreigner transactions where the parties have no Brazilian businesses and no sales into Brazil.[20]

As regards cartels and anticompetitive practices that happen abroad, actual or potential effects are deemed to exist if a conduct said conduct impacts Brazil by way of exports, or by way of a market division that apparently excludes Brazil or allocates Brazil to certain companies. CADE has launched several investigations related to international cartels involving multinational

[16] See Article 36, paragraph 3, items III to XIX, of Brazilian Competition Law. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

[17] See Article 31 of Brazilian Competition Law. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

[18] See Article 32 of Brazilian Competition Law. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

[19] See Article 2 of Brazilian Competition Law. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm

[20] For past cases discussing if the relevant transactions were under CADE's jurisdiction because they meet the "effects test", see, for example, Merger Cases No. 08700.001008/2019-26 (Chevron / Petrobras Americas), 08700.006742/2022-87 (FCA US / Samsung), and 08700.006890/2022-00 (ExxonMobil / QatarEnergy). For a discussion of cases outside CADE's jurisdiction due to lack of effects, see, for example, Merger Cases No. 08700.001204/2013-13 (Bosch / ZF) and 08700.007305/2018-02 (Denso / Aisin Seiki).

companies that were also under investigation in other jurisdictions, and discussions of effects tend to reinforce the broad language of the Brazilian Competition Law.[21]

2. Applicable sanctions

According to Articles 37 and 38 of Brazilian Competition Law, CADE has the authority to impose fines and other non-monetary sanctions for anticompetitive conduct (said non-monetary sanctions will be specified below).[22]

(i) Companies are subject to fines ranging from 0.1% to 20% of the gross revenues registered by the company, group, or conglomerate in the fiscal year prior to the launching of the formal investigation in the line of business in which the infringement occurred.

  (a) CADE's Resolution No. 3/2012 establishes the lines of business to calculate fines, which may be adjusted if the relevant lines of business result in fines clearly disproportionate.[23]

  (b) In general, CADE tends to consider the gross revenues of the involved company, not from the whole group or conglomerate.[24]

(ii) Directors and officers are subject to fines from 1% to 20% of the fine imposed on the company.

(iii) Other individuals and other entities which do not have entrepreneurial activities are subject to fines ranging from 50,000 to 2 billion Brazilian reais ("BRL").[25]

Article 45 of the Brazilian Competition Law provides that fines may vary in accordance with: (i) the gravity of the infringement; (ii) whether the involved company/individual has acted in good faith; (iii) the economic benefits to the company/individual under investigation aimed to achieve by means of the anticompetitive conduct; (iv) whether or not the company/individual has successfully achieved its goal; (v) the actual or potential harm to competition, the Brazilian economy, consumers, and/or third parties; (vi) the negative impacts of the conduct on the market; (vii) the economic condition of the involved company/individual; and (viii) recidivism. In case of recidivism, the applicable fine is doubled.

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[21] For a seminal case, see Administrative Proceeding No. 08012.004599/1999-18 (Vitamins cartel).

[22] Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm

[23] See Article 2-A of CADE's Resolution. Free translation: "*The CADE may, through a reasoned decision, adapt the lines of business to the specificities of the conduct when the relevant lines of business indicated in Article 1 are expressly disproportionate*". Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%203_2012%20-%20Ramos%20Atividade%20%28modificada%20pela%2018-2016%29.pdf

[24] *See* CADE's Guidelines for Cartel Fines. *See* Administrative Proceeding No. 08012.007043/2010-79; Administrative Proceeding No. 08012.002222/2011-09; Administrative Proceeding No. 08700.005638/2020-11; and Administrative Proceeding No. 08700.001164/2018-14.

[25] Equivalent to approx. USD 8,070.50 and USD 322.9 million. Exchange rate as of December 31, 2024: USD 1 = BRL 6.1923. Source: Central Bank of Brazil.

Any person or entity is subject to non-monetary sanctions. These include, among others:

(i) Prohibition from participating in public procurements and obtaining tax benefits and funds from public financial institutions for up to five years;

(ii) Publication of the decision in a major newspaper or in the company's website;

(iii) Spin-off or divestment;[26]

(iv) Mandatory licensing of Intellectual Property rights;

(v) Prohibition of individuals from exercising market activities on his/her behalf or representing companies, among others.

3. Proposed regulations under discussion

As of the elaboration of this chapter (15/01/2025), the most significant proposed regulation under discussion is Bill No. 2,768/2022, which seeks to regulate competitive aspects of digital platforms in Brazil, ranging from general search, social media, cloud storage, video sharing, among others. This proposed legislation was inspired by the European Digital Markets Acts ("DMA").

In parallel, the SRE has designed a legislative proposal that goes beyond Bill No. 2,768/2022, although no actual formal legislation has been proposed by the SRE or the current administration as of the elaboration of this chapter.

The SRE, with the support of CADE and other Brazilian agencies, issued a report proposing twelve changes in the Brazilian competition enforcement regime to address the challenges posed by digital platforms – especially those to be designated "systemically relevant platforms". The report's main proposals refer to: (i) creating specific obligations to these designated companies; (ii) creating a separate unit within CADE to monitor and enforce these obligations; (iii) revising Brazilian merger filing form to incorporate specific topics regarding digital platforms; (iv) adopting the long-form merger review proceeding in cases involving the designated companies; (v) cooperation with other Brazilian agencies such as Brazilian Telecom Agency (ANATEL), Brazilian Data Protection Agency (ANPD), among others federal bodies.[27]

[26] A spin-off is a specific type of divestment focused on creating a new independent entity, while the divestment regards to the sale of the relevant company's ownership in an existing entity or asset.

[27] For more details, see: https://www.gov.br/fazenda/pt-br/assuntos/noticias/2024/outubro/ministerio-da-fazenda-apresenta-propostas-para-aprimorar-a-defesa-da-concorrencia-no-ambiente-de-plataformas-digitais and the SRE's full report (in English), available at: https://www.gov.br/fazenda/pt-br/central-de-conteudo/publicacoes/relatorios/digital-platforms-competition-regulatory-recommendations-brazil-en.pdf.

4. Horizontal agreements

4.1 Relevant Law

The legal framework concerning horizontal agreements in Brazil is established in Article 36 of the Brazilian Competition Law.[28] As mentioned, this provision encompasses not only practices that produce actual anticompetitive effects but also those with the potential to do so.

Although Article 36 does not explicitly distinguish horizontal agreements from other forms of antitrust violations (i.e., unilateral conduct, abuse of dominance, or vertical agreements), it contains examples of horizontal agreements that may be deemed illegal. These include price fixing, market division, customer allocation, output restriction, bid rigging, and other concerted commercial practices.

Regarding the standard of analysis, CADE's decisional practice has established hardcore cartels as *per se* violations, that is, as conducts that by their very occurrence are considered illegal, irrespective of their effects. Other conducts have also been perceived by CADE as *per se* in some cases, such as soft cartels, or other types of concerted commercial practices, but standards regarding these types of conducts are inexistent. In addition, there is no concrete guidance on the standard applicable to standalone exchanges of competitively sensitive information as a horizontal conduct (that is, it is not clear if a *per se* rule should apply or not), but such conduct has increasingly been considered by CADE as an antitrust violation as well.

4.2 Statute of limitations

According to Article 46 of Brazilian Competition Law, investigations into anticompetitive conducts have a five-year statute of limitations,[29] except in cases where the investigated fact also constitutes a crime, in which case the statute of limitations is the one established in Brazilian criminal law. For cartels, which are deemed as a criminal as well and administrative offenses, the stature of limitations is twelve years. There is also a three-year statute of limitations for ongoing investigations with no relevant developments (either on the procedural or substantial matters).

The application of the rules of statutes of limitations can be interrupted by any investigative act of CADE, including the initiation of an administrative proceeding and the execution of a Leniency Agreement.[30-31] These may also be suspended during the force of a settlement agreement or merger control settlement.[32]

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[28] Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm

[29] Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm

[30] *See*, for instance, Administrative Proceeding No. 08700.004532/2016-14. Defendants: Arteche do Brasil Ltda., Ailton Fabiano Vendramini, Albano de Abreu Lima Junior, Alexandre Kiste Malveiro, et al. Commissioner Luiz Hoffmann.

[31] *See,* for instance, Administrative Proceeding No. 08700.003735/2015-02. Defendants: JTEKT Corporation, JTEKT Automotiva Brasil Ltda., NSK Brasil Ltda., NSK Europe Ltd., NSK Ltd., Showa Corporation, Showa do Brasil Ltda., TRW Automotive Ltda. e Yamada Manufacturing Co., Ltd., et al. Reporting Commissioner João Paulo de Resende.

[32] Under Brazilian Law, if the limitations period is interrupted, it will start running again from day zero. If a limitations period is suspended, it will start running again considering the relevant elapsed period.

4.3 Special powers of the authority

Among CADE' powers to investigate horizontal agreements are the following:

(i) *Compelled Production of Documents:* CADE has the authority to request information and documents from both defendants and third parties. Failure to comply or providing false or misleading information can result in fines.[33]

(ii) *Dawn raids*: CADE can conduct dawn raids in which it gathers evidence through a surprise inspection. These must be authorized by a court through a judicial process initiated by CADE's Attorney General.

CADE also has the power to conduct inspections, request oral statements from companies, individuals, and other authorities, to access case files of administrative proceedings of other Brazilian federal agencies, and to ask for access to police investigations, judicial case files and other administrative proceedings conducted by agencies at the city or state level.

CADE has been developing technology to detect the adoption of collusive practices by competitors. An example is the creation of an artificial intelligence tool, known as *Projeto Cérebro,* which analyzes patterns of collusive behavior in public bids to identify potential horizontal agreements between competitors.[34]

4.4 Leniency and Settlement Program

Companies and individuals may receive immunity against administrative and criminal sanctions related to horizontal agreements by signing a leniency agreement with CADE.

(i) *Immunity benefits:* immunity may be granted either fully or partially. Full immunity is available when CADE's GS was unaware of the reported conduct. If the reported practice was already known to CADE's GS, the applicant may still qualify for a reduction in fines ranging from one to two thirds, contingent upon the effectiveness of their collaboration with the investigation and their good faith. These benefits are subject to confirmation by CADE's Tribunal at the final ruling stage.

Immunity is limited to individuals who admit their role and sign the leniency agreement, meaning a company's leniency does not automatically protect its employees unless they also participate in the agreement. Similarly, if an individual applies for leniency, their company does not automatically receive immunity.

(ii) *Winner-takes-all approach: immunity from criminal and administrative penalties are granted only to the first applicant to report anticompetitive conduct and meet the necessary requirements.*

(iii) *Eligibility Requirements for Leniency:* To be eligible to apply for leniency in Brazil, the applicant must: (i) cease its involvement in the alleged conduct; (ii) provide information that CADE was not previously aware of and that is sufficient to launch an investigation; (iii) admit its involvement in the conduct and agree to describe it to CADE in the form of

[33] Please note that individuals and companies are protected by the constitutional right against self-incrimination, which imposes certain limits on CADE's ability to compel individuals to produce evidence.

[34] *See* https://agenciagov.ebc.com.br/noticias/202410/conheca-a-importancia-do-dia-nacional-de-combate-a-carteis.

a conduct statemen (*Histórico da Conduta*); (iv) agree to collaborate with CADE's investigation; and (v) identify other companies and individuals involved in the conduct and provide evidence of the reported antitrust violation.[35]

(iv) *Procedure To Apply for Leniency Benefits:* The leniency application begins with the request for a marker,[36] which certifies the applicant as the first to report the conduct and seek leniency. To obtain this marker, the applicant must contact CADE's GS[37] and provide details about the parties involved, the conduct, the affected market, the geographic scope, and the estimated duration of the horizontal agreement (it must mention the "who, what, where and when").

(a) The required level of information may vary depending on the case, as CADE's GS may need additional details to assess marker availability.

(b) If a marker is not available, the applicant can request a certificate indicating when it applied for leniency, which places it on a waiting list. Should the first applicant fail to finalize their marker or withdraw, the next applicant in line is invited to negotiate a leniency agreement.[38]

CADE's Guidelines for Submitting Evidence in Leniency Applications provide a series of recommendations regarding the types of evidence that has been accepted by CADE's Tribunal as proof of cartel participation, as well as the precautions applicants should take when submitting evidence in their leniency request.

4.4.1 Leniency Plus Program

CADE's Leniency Program also includes a "leniency plus" option, where a participant in one cartel can receive a one-third reduction in penalties by disclosing a second, previously unknown violation. In such cases, the applicant is granted full immunity in relation to the newly reported conduct if it is the first to come forward.

4.4.2 Settlement

Brazilian Competition Law also allows defendants to enter into Settlement Agreements with CADE in the context of investigations related to horizontal agreements. A Settlement Agreement can be proposed either by the defendants or by CADE, and its requirements are: (i) payment of a fine, (ii) admission of involvement in the conduct under investigation, and (iii) cooperation with CADE's investigation. The fine's ranges are the same as the ones that apply to defendants in case of conviction. However, settling parties are eligible to a discount on the fine depending on their position in proposing the settlement and the degree of its cooperation with CADE. CADE's Guidelines for Settlement Agreements for Cartel Cases provides that the first settling party is

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35. Brazilian Competition Law, Article 86. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

36. A detailed information on how to secure a marker and the procedure that should be followed is provided in CADE's Leniency Guidelines available at: http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf

37. A leniency applicant may secure a marker by calling, scheduling a meeting or filing a submission addressed to the Chief of Staff at the GS or to the Deputy General Superintendent.

38 The marker certificate may also be used to secure a place in line for a settlement negotiation. In this event, upon the execution of a leniency agreement, CADE's General Superintendence may invite the others in line to negotiate a settlement.

eligible to a discount from 30% to 50% in the applicable fine, while the second 25% to 40%, and the third up to 25%. Defendants that propose settlements once their cases have reached the Tribunal are only eligible to a discount of up to 15%, as they are not required to cooperate with the investigation of the facts.

Once approved by CADE's Tribunal, the settlement agreement suspends the investigation against the settling party until the final ruling, where CADE's Tribunal (if applicable) confirms full compliance with the settlement agreement. Once full compliance is confirmed, the investigation is dismissed in regard to the settling party.

For more details about the negotiation of Settlement Agreements with CADE (including for other conducts other than horizontal agreements), please refer to section 9, item viii.

4.5 Particular sanctions

For the more general aspects of sanctions in Brazilian Competition Law, *see Section 2 (applicable sanctions) above*.

In regard to more specific characteristics of cartel fines, although there are no specific sanctions for horizontal agreements, CADE's Guidelines for Cartel Fines provide more specific guidance:

(i) As a rule, fines will be imposed considering the revenues of the involved company. Business Conglomerates will only be targeted if the involved company registered minimal revenues and its conduct benefited other group companies.

(ii) As explained in Section 2 above, the fine imposed must range from 0.1% to 20% of the gross revenues registered by the company, group, or conglomerate in the fiscal year prior to the launching of the formal investigation in the line of business in which the infringement occurred.

CADE's Guidelines for Cartel Fines recommend imposing a base fine percentage of 17% (minimum of 14% and maximum of 20%) for bid-rigging cartels, 15% (minimum of 12% and maximum of 20%) for classic hardcore cartels, and 8% (minimum of 5% and may reach a percentage fine greater than 8% depending on the characteristics of the conduct) for soft cartels and other collusive conduct.

4.6 Criminal sanctions

According to Article 4 of Law No. 8,137/1990, criminal penalties for individuals may include imprisonment up to five years and fines. Criminal offenses are directed at cartel violations.

5. Abuse of dominance and other prohibitions

5.1 Abuse of dominance

According to Article 36, item IV of the Brazilian Competition Law, an abuse of dominance may be deemed as an antitrust infringement.

Paragraph 2 of Article 36 defines a dominant position as the ability of a company or a group of companies to alter market conditions unilaterally or coordinately or to have a share of 20% or more of a relevant market. This is a rebuttable presumption and may vary based on market

structure and specific economic analyses conducted by CADE, considering factors such as rivalry, barriers to entry, and the countervailing bargaining power of customers.

In practice, CADE focuses its enforcement against instances of abuse of dominance that have exclusionary effects, that is, cases in which actual or potential competitors would have their ability and incentives to compete with the dominant company reduced as a result of the investigated conduct. Over the years, CADE has analyzed several practices that may amount to abuse of dominance practices, such as exclusive dealing, resale price maintenance, tying and bundling, price discrimination, and refusal to deal, among others.

In Brazil, abuse of dominance practices are analyzed under the rule of reason standard, where CADE evaluates the existence of a dominant position, the conduct, its net effects on competition (considering both positive and negative competitive effects), as well as possible justifications and rationale.

5.2 Vertical restraints

Vertical restraints occur when a company imposes restrictions on other entities within the supply chain, such as suppliers, distributors, or retailers, potentially harming competition. These practices may be investigated under Article 36 of Law No. 12,529, which prohibits acts that limit, distort, or harm competition. In practice, CADE focuses its enforcement actions against vertical restraints in connection with abuse of dominance cases.

5.3 Others [e.g., Unfair competition, Interlocking, Infringements by the State]

In general, unfair competition practices are enforced under the Brazilian Intellectual Property Law (Lei nº 9.279/1996), which is outside the scope of the Brazilian System of Competition Defense.

Regarding interlocking directorates, these have not been investigated by CADE as a standalone anticompetitive conduct. However, CADE can assess if interlocking directorates may facilitate other anticompetitive conducts, such as cartels or the exchange of competitively sensitive information.

Finally, as discussed, the Brazilian Competition Law may be enforced against state-owned companies. Yet, this doesn't mean CADE has the authority to prevent other agencies, authorities or governmental bodies from adopting rules that may produce anticompetitive effects. In this respect, as discussed in section 1.2., CADE (via DEE) and SRE can conduct advocacy actions, providing comments on existing rules or rules yet to be enacted.

6. Merger Review

6.1 Relevant Law

The legal framework concerning merger control in Brazil is established in:

(i) Articles 88 to 91 of Brazilian Competition Law[39], which establish the pre-merger control regime and general procedural rules, define the notifiable transactions and general conditions for blocking or approving merger cases;

(ii) Articles 107 to 134 of CADE's Internal Rules, which regulate merger control proceedings in greater detail;[40]

(iii) CADE's Resolution No. 33/2022, which regulates: the definition of economic group for the purposes of Brazilian Competition Law; the notifiable transactions regarding shareholdings acquisitions; and establishes the fast-track procedure for the analysis of certain merger cases. Annexes I and Annexes II of this Resolution contain the short and long forms with the information to be submitted by merging parties;[41]

(iv) Guidelines for horizontal merger review, which provides guidance on how CADE will assess horizontal mergers;[42]

(v) Guidelines for non-horizontal merger review, which provides guidance on how CADE will assess non-horizontal mergers;[43]

Guidelines for antitrust remedies.[44]

6.2 Agencies

CADE is the agency responsible for antitrust merger control within the Brazilian competition enforcement regime. Mergers within certain economic sectors might be subject to control by sectorial regulatory agencies, such as the National Communications Agency (Anatel), the National Water Transports Agency (ANTAQ), among others.

6.3 Notifiable transactions

Any economic concentration is subject to merger control, regardless of its form, provided that the notification thresholds are met, as discussed below, including:[45]

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[39] Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm

[40] Available at (in both Portuguese and English): https://www.gov.br/cade/pt-br/centrais-de-conteudo/regimento-interno.

[41] Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL.

[42] See https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-for-Horizontal-Merger-Review.pdf.

[43] See https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/Guia%20V+/Guia-V+2024.pdf.

[44] See https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-Antitrust-Remedies.pdf.

[45] See Articles 90 of Brazilian Competition Law (concerning general types of concentration), available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm; Articles 9, 10 and 11 of CADE's Resolution No. 33/2022 (concerning shareholding acquisitions), available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-

(i) Merger of two or more previously independent firms;

(ii) Acquisition of sole or joint control;

(iii) Purchase or exchange of shares, quotas, securities, convertible bonds, or assets, whether tangible or intangible;

(iv) Certain minority acquisitions:

(a) Acquisition of 5% or more of the total or voting shares if the parties are either horizontally or vertically related;

(b) Acquisition of 20% or more of the total or voting shares if the parties are not horizontally or vertically related.

(v) Joint ventures, consortia and "collaborative agreements".

(a) A "collaborative agreement" under Brazilian Competition Law is an agreement that:

- Is entered by and between competitors in the market covered by that specific agreement;
- Creates a common enterprise to explore an economic activity;
- Provides for the sharing of risk and results between the parties[46]; and
- Lasts at least two years;
  - This minimum two-year term threshold shall be triggered whenever the total duration of the agreement exceeds two years upon renewal.
- The definition of "common enterprise", "sharing of risks and results" and "competitors" shall be assessed on a case-by-case basis.
  - In general, CADE considers that a common enterprise exists whenever the parties have a great degree of interdependence and a governance structure regulating how the parties will coordinate their activities in terms of strategies, prices, costs, and other competition-related decision-making.[47]

E7JynVgVAYniczU5wqJ6a4at3XodqUOL; and CADE's Resolution No. 17/2016 (concerning collaborative agreements), which is available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%20n%C2%BA%2017_18-10-2016.pdf.

[46] The criterion regarding the sharing of risks and results is cumulative and both must materialize in a given collaborative agreement.

[47] See, for example, Merger Cases No. 08700.003964/2024-18 (Decolar / TAM), and 08700.002276/2018-84 (Tim / Oi).

- The "sharing of risks and results" refers to implicit or specific provisions regarding the allocation of operational, financial or economic risks and revenues, cost reductions or other efficiencies.[48]

6.3.1 Exemptions from the duty to notify

Brazilian Competition Law contemplates some exemptions from the duty to notify:

(i) Joint ventures, consortia and "collaborative agreements" created for the purposes of participating in public procurement processes launched by the public administration;[49]

(ii) Additional acquisition of shares by the sole controlling shareholder.[50]

6.3.2 Special rules

Brazilian pre-merger control regime provides special rules for some situations where the standstill obligation should not apply by its very nature or due to emergencies.

(i) Public takeovers and stock exchange transactions: Those transactions can be completed before getting CADE's clearance. However, the use of the voting rights attached to the shares being acquired shall be suspended until the merging parties get the final merger control clearance, unless CADE expressly authorizes such an exercise to enable the acquirer to protect the full value of the investment.[51]

(ii) Derogation (*autorização precária*): CADE's Tribunal may preliminarily authorize the completion of a transaction before getting final merger control clearance if the following cumulative requirements are met: (i) there is no irreparable harm to competition arising from the transaction, (ii) the situation would be easily reversible in the event of a prohibition, and (iii) the target company will face serious financial losses in the absence of such a derogation.[52]

(iii) Convertible bonds: The acquisition of convertible bonds should only be notified if:[53]

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[48] See, for example, Merger Cases No. 08700.004121/2019-63 (Astrazeneca / Bayer / others) and 08700.002276/2018-84 (Tim / Oi).

[49] Article 90, sole paragraph 4, of Brazilian Competition Law, available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

[50] Article 9, sole paragraph, of CADE's Resolution No. 33/2022, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL.

[51] Articles 108 and 109 of CADE's Internal Rules, available at (in both Portuguese and English): https://www.gov.br/cade/pt-br/centrais-de-conteudo/regimento-interno.

[52] Articles 115 to 117 of CADE's Internal Rules, available at (in both Portuguese and English): https://www.gov.br/cade/pt-br/centrais-de-conteudo/regimento-interno.

[53] Article 11 of CADE's Resolution No. 33/2022, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL.

(a) The future conversion of the bonds into shares will result in the acquisition of control or of a minority shareholding sufficient to trigger one of the applicable minority acquisition thresholds (see section 7.3. above); and

(b) The convertible bonds being acquired already confer upon the acquirer the right to appoint members to the board, participate in the management or supervisory bodies of the issuer, or provide voting or veto rights regarding matters that are relevant from a competition law perspective.

6.4 Notification thresholds

Notification thresholds under Brazilian Competition Law are cumulative, meaning that a transaction is only notifiable in Brazil if all the three thresholds are met:

(i) Economic concentration: As described in section 7.3 above, the transaction must fall into in one of the hypotheses of notifiable transactions;

(ii) Revenues thresholds: This criterion is met if (i) at least one of the economic groups[54]-[55]-[56] involved in the transaction registered gross revenues of at least BRL750 million[57] in Brazil in the last fiscal year prior to the transaction; and (ii) at least another of the economic groups involved in the transaction registered gross revenues of at least BRL75 million in Brazil in the last fiscal year prior to the transaction.[58]

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[54] For the purpose of calculating the revenues of the economic groups, CADE adopts the following definition of economic group in case of companies: (a) the entity directly involved in the transaction; (b) the companies controlled by the same controlling shareholder that the entity directly involved in the transaction; and (c) all entities in which the entities listed under 'a' and 'b' directly or indirectly hold at least 20% of the voting or share capital. See Article 4 of CADE's Resolution No. 33/2022, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL.

[55] There is an ongoing discussion on whether the definition in item (b) of footnote No. 60 above, regarding the definition of economic groups, refers to "*any shareholder holding at least 20% of voting or share capital of the party directly involved in the transaction*" instead of the companies under common control. This debate is not settled yet, and the definition above reflects the original text of CADE's Resolution No. 33/2022. See Gun Jumping Cases No. 08700.000641/2023-83 (Digesto / Jusbrasil) and 08700.006369/2018-88 (Naspers / Delivery Hero).

[56] In the case of investment funds, the economic group encompasses the following entities: (i) the fund involved in the transaction; (ii) all portfolio companies in which the fund involved in the transaction holds, directly or indirectly, control or at least 20% of either the total share capital or the voting shares; and (iii) if applicable, the economic group of any investor holding at least 50% of either the total share capital or the voting shares of the fund involved in the transaction, directly or indirectly (either alone or via a quota-holders agreement). See Article 4 of CADE's Resolution No. 33/2022, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL.

[57] Approx. USD121 million. Exchange rate as of December 31, 2024: USD 1 = BRL 6.1923. Source: Central Bank of Brazil.

[58] Article 88 of Brazilian Competition Law, available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm; and Interministerial Resolution No. 994/2012, available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/portarias/Portaria%20994.pdf.

(iii) Effects in Brazil: as discussed in section 1.6 above, the transaction must produce actual or potential effects in Brazil.

6.5 Filing procedure and timeframes

Transactions must be submitted to CADE before their implementation and preferably after the execution of the definitive agreement. All parties, including the seller, are responsible for filing, and any of them can be sanctioned for gun jumping.[59]

CADE has up to 240 days to issue a decision to be counted from the date of filing, which may be extended by 60 days, at request of the parties, or by 90 days, as per CADE's discretion.[60]

Brazilian merger control has two proceedings: the so-called "fast-track" proceeding and the regular proceeding. Regardless of the proceeding, cases are initially investigated by CADE's GS, which can unconditionally clear them or oppose them before CADE's Tribunal, recommending remedies or prohibiting it. In case of a recommendation of remedies or prohibition, CADE's Tribunal will be responsible for the final ruling. In addition, if a transaction is cleared unconditionally by CADE's GS, third parties may challenge CADE's GS decision before CADE's Tribunal, or CADE's Tribunal may request to further review the case within 15 calendar days after clearance decision is published.[61]

6.5.1 Fast-track proceeding

Most transactions are reviewed under the so-called fast-track proceeding, which applies to simple transactions. CADE's Resolution No. 33/2022 provides that the following transactions are eligible to the fast-track proceeding: (i) joint ventures in which the parties will operate in new markets; (ii) transactions that do not result in any horizontal overlap or vertical relationship; (iii) transactions that result in horizontal overlap, but the combined market share is 20% or less, or the ΔHHI is below 200 points (as long as the combined market share resulting from the transaction is below 50%); (iv) transactions that result in vertical relationships, but none of the parties has 30% or more of any vertically related market.[62]

In fast-track cases, the parties are required to present the relevant transaction documents, and present the information required by Annex II of CADE's Resolution No. 33/2022, which involves mostly the corporate information of the parties and their economic groups, the relevant markets concerned and market shares for the year prior to the transaction.

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[59] Articles 107, caput, and paragraphs 1, 2; and Article 110 of CADE's Internal Rules, available at (in both Portuguese and English): https://www.gov.br/cade/pt-br/centrais-de-conteudo/regimento-interno.

[60] See Articles 88, paragraphs 2 and 9, of Brazilian Competition Law, available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm

[61] See Article 9, item X, of Brazilian Competition Law (concerning Tribunal's role in merger control proceedings); Article 13, item XII (concerning General Superintendence's role in merger control proceedings) of Brazilian Competition Law; and Article 65 of Brazilian Competition Law (concerning appeal and requests for further review). Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

[62] See Articles 6 and 8 of CADE's Resolution No. 33/2022, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL.

Cases under the fast-track proceeding must be cleared in up to 30 calendar days from formal notification or turned into the regular proceeding.[63] According to CADE, the average review period of fast-track cases was 13 days in 2023.[64]

6.5.2 Regular proceeding

Cases not eligible for the fast-track proceeding are analyzed under the regular proceeding. Under the regular proceeding, the parties are required to present the information required by Annex I of CADE's Resolution No. 33/2022. A greater amount of information and documents is required, including market data for the past five years, market studies, internal documents, and more detailed information on entry and rivalry, among others.

Although the timeframe for cases under the regular proceeding is up to 330 days, it may vary depending on the complexity of the case. According to CADE, the average review period for cases under the regular proceeding was 117 days in 2023.[65]

6.6 Voluntary notification and ex-officio investigations

There is no voluntary notification under Brazilian merger control regime. If a transaction does not meet the notification thresholds, CADE has the authority to demand its notification for up to a year after its conclusion.[66] These post-closing investigations may be initiated ex-officio by CADE or after complaints by third parties.

In general, post-closing investigations are rare and considered exceptional, focused only on cases that may give rise to competition concerns. As of now and based on public information, CADE has only initiated post-closing investigations in eight cases, and only applied (behavioral) remedies in two cases.[67-68]

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[63] Article 7, paragraph 2, of CADE's Resolution No. 33/2022, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YInBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL.

[64] See CADE's 2023 annual report, available at: https://cdn.cade.gov.br/Portal/acesso-a-informacao/Transpar%c3%aancia%20e%20Presta%c3%a7%c3%a3o%20de%20Contas/2023/RIG-2023.pdf.

[65] See CADE's 2023 annual report, available at: https://cdn.cade.gov.br/Portal/acesso-a-informacao/Transpar%c3%aancia%20e%20Presta%c3%a7%c3%a3o%20de%20Contas/2023/RIG-2023.pdf.

[66] See Article 88, paragraph 7, of Brazilian Competition Law.

[67] See Merger Cases No. 08700.006497/2014-06 (Greca / Betunel / Centro Oeste), 08700.009828/2015-32 (Guerbert / Mallinkcrodt), 08700.006355/2017-83 (SM / All Chemistry), 08700.005079/2019-06 (Sacel / Prosegur), 08700.003903/2020-19 (Fleury / Sabin / Wang & Andra), 08700.006454/2023-11 (Schwabe / Herbarium), 08700.004240/2023-01 (123 Milhas / Maxmilhas), and 08700.007319/2024-66 (Sintokogio / Elastikos).

[68] See Merger Cases 08700.006355/2017-83 (SM / All Chemistry) and 08700.005079/2019-06 (Sacel / Prosegur).

6.7 Pre-notification

CADE's Internal Rules provide that only cases to be submitted under the regular proceeding can have a pre-notification phase.[69] There is no specific proceeding. In general, parties are encouraged to have pre-notification discussions with CADE's case team before making the formal filing. In practice, parties should send a draft of the filing form to the case team and schedule a meeting with them, so as to gather their initial feedback. After that, the case team usually sends a request for additional information to be provided in the filing form. The parties usually are instructed to proceed with the formal filing once the requests are addressed. There is no specific timing in relation to the pre-notification phase, and it may vary depending on the workflow from the case team at CADE and also on the timing for parties to address the additional requests made. However, the pre-notification phase usually last between 1 to 3 months.

6.8 Non-compliance with the obligation to notify (gun jumping)

Transactions subject to notification with CADE cannot be closed or implemented before getting final merger control clearance.[70] Parties must remain independent until the final Brazilian merger control clearance is obtained, and shall refrain from:[71]

(i) Exchanging competitively sensitive information and business secrets, except to the extent that it is strictly necessary to negotiate the transaction;

(ii) Exercising any type of influence on the other party and its businesses;

(iii) Transferring any assets or rights to the other party;

(iv) Integrating operations; and

(v) More broadly, anticipating the implementation of the transaction.

Failure to comply with these rules exposes all parties to the following sanctions:

(i) Fines ranging from R$60K to R$60M[72];

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[69] Article 114 of CADE's Internal Rules, available at (in both Portuguese and English): https://www.gov.br/cade/pt-br/centrais-de-conteudo/regimento-interno.

[70] Article 88, paragraph 3, of Brazilian Competition Law, available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm.

[71] See Guidelines for the Analysis of Previous Consummation of Merger Transactions, available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guideline-gun-jumping-september.pdf.

[72] CADE's Resolution No. 24/2019 establishes a detailed methodology for calculating fines, which begins with a base penalty of R$60,000 and includes increases based on factors such as the duration of the delay (0.01% of the transaction value per day of delay) to notify the transaction, the gravity of the conduct (up to 4% of the transaction value), and intent (up to 0.4% of the average revenue of the economic groups involved). Additionally, reductions in fines are available depending on the timing of the notification: (i) 50% reduction for voluntary notifications before the launching of any investigative proceedings or third party complaint; (ii) 30% for voluntary notifications after a third party complaint but before any investigative proceedings; and (iii) 20% for voluntary notifications after the launching of an investigative proceeding but before CADE's Tribunal decision ordering notification. CADE is authorized to consider other criteria in exceptional cases, where fines following the methodology provided in Resolution would be disproportionate

(ii) Injunctions declaring null and void the acts undertaken in violation of the rules explained above; and

(iii) Investigation into the parties' behavior and potential liability for antitrust violations.

The use of antitrust protocols and clean teams is encouraged.

CADE has up to five years to bring an enforcement action against parties involved in a violation to the Brazilian Competition Law.

The law provides that the statute of limitations is applicable to enforcement actions, which, in the case of gun jumping violations, are: fines, opening of an antitrust investigation, and the declaration that the closing and posterior acts are null and void. However, the merger control analysis of cases subject to mandatory filing is not subject to statute of limitations, so CADE has the prerogative to analyze the merits of the case at any time.[73]

In terms of procedure:[74]

(i) CADE's GS has to launch a formal investigation before concluding that a gun jumping violation happened, in which the parties have the right to be heard (usually via written submissions). Upon hearing the parties, CADE's GS can close the investigation or apply the sanctions discussed above, and compel the parties to notify the transaction (in case the transaction has not been notified yet).

If CADE's GS decides to close the investigation, CADE's Tribunal can request a further review within 15 calendar days from the publication of the closing decision on the Brazilian Official Gazette.

(ii) The parties can appeal the General Superintendence's decision within 15 calendar days from the publication of the closing decision on the Brazilian Official Gazette, so that the case is sent to the Tribunal for final ruling.

The parties are required to make a formal filing within up to 30 calendar days after the decision ordering the parties to file the notification becomes final. The decision becomes final – and, consequently, the deadline for notification begins to run – when (i) CADE's Tribunal denies the parties' appeal seeking to exempt the transaction from mandatory filing; or (ii) the appeal period expires without the parties filing an appeal against the CADE's GS decision ordering the notification.

(iii) CADE can issue an interim measure to prevent the parties from adopting any action that may be harmful to competition and could not be reversed.

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and unreasonable Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%2024_2019.pdf.

[73] See Article 46 of Brazilian Competition Law, available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm. Regarding the CADE's case law discussion on the statute of limitations applicable to merger control analysis, *see* Administrative Proceeding for the Analysis of Previous Consummation of Merger Transactions No. 08700.002184/2021-08. Parties: Grand Brasil and Bis Distribuição de Veículos.

[74] See Articles 7 to 13 of CADE's Resolution No. 24, available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%2024_2019.pdf.

7. Antitrust investigations

(i) *Relevant Law:* regarding the substantive aspects of antitrust investigations, the relevant law is Article 36 of the Brazilian Competition Law, which sets forth examples of practices considered antitrust violations in Brazil. Articles 66 to 84 of the Brazilian Competition Law[75] and Articles 139 to 162 of CADE's Internal Rules[76] establish procedural rules for antitrust investigations conducted by CADE.

(ii) *Beginning of an investigation:* antitrust investigations are conducted by CADE's GS and may be launched:

(a) *Ex officio* (relying on information that CADE or its staff have had access to);

(b) Following an order from CADE's Tribunal;

(c) Based on information obtained through the negotiation of a leniency agreement; or

(d) Based on complaints by third parties (any market player or individual; the National Congress, including individual complaints from members of the Senate and the House of Representatives; the Brazilian Ministry of Economy's Secretariat of Economic Reforms; the Public Prosecutor's Office at CADE; CADE's Attorney General; and other regulatory agencies).

(iii) *Timeline:* in Brazil, there are three proceedings for antitrust investigations:[77]

(a) ***Preliminary Proceeding*** (*Procedimento Preparatório*) – CADE assesses whether the claims are within the scope of Brazilian Competition Law. Pursuant to CADE's Internal Rules, CADE's GS must decide whether (i) to proceed with the investigation and launch an Administrative Inquiry or (ii) to dismiss the investigation.

- If CADE's GS decides to dismiss the investigation, it is possible for CADE's Tribunal to review it and order CADE's GS to continue with the investigation.
- CADE's GS is not required to initiate the investigation through the preliminary procedure. If it deems that the complaints already provide sufficient indications of an antitrust violation, it may directly launch an Administrative Inquiry or an Administrative Proceeding.

(b) ***Administrative Inquiry*** (*Inquérito Administrativo*) – CADE assesses whether there is sufficient evidence to launch a formal investigation (Administrative Proceeding) against the investigated parties. Pursuant to CADE's Internal Rules, the Administrative Inquiry must be concluded within 180 days. However, this period may be extended by CADE's GS and there is no limit on the number of extensions. Therefore, there is no specific deadline for when the Administrative Inquiry must

[75] Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm

[76] Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/regimento-interno/Regimento-interno-Cade-versao-14-04-2023.pdf

[77] Although CADE's Internal Rules set specific timeframes for the duration of the Preliminary Proceeding and the Administrative Inquiry, there are no consequences for CADE's failure to comply with them.

be concluded. At the end, CADE's GS must issue its opinion by (i) closing the Administrative Inquiry or (ii) launching an Administrative Proceeding.

(c) ***Administrative Proceeding*** *(Processo Administrativo)* – CADE's GS will formally charge the investigated parties for an antitrust violation. In the Opening Note, CADE's GS will outline the facts and actions attributed to the investigated parties and will consider them as defendants. The defendants may present their defenses and request the production of evidence (such as hearings, experts and witness testimony, etc.). At the end, CADE's GS must issue an opinion with its findings and conclusions. Then, an Administrative Proceeding must be conducted in CADE's Tribunal, which is responsible for rendering a final decision. There is no specific deadline for when the Administrative Proceeding must be concluded by CADE's GS.

(iv) *Indictment*: the Opening Note of the Administrative Proceeding is considered the initial charging document, listing the defendants and the facts and actions attributed to them. Nevertheless, when submitting its final opinion to CADE's Tribunal, it is possible that CADE's GS may suggest the dismissal of the case concerning companies/individuals previously listed as defendants and charged in the Opening Note.

(v) *Defenses*: in accordance with the constitutional principles of due process and full defense, the investigated parties and defendants are entitled to submit their defenses, explanations, and evidence at any stage of the proceeding. However, the defendants are granted a 30-calendar-day period to present their defenses and request the production of any evidence they deem necessary, after the initiation of the Administrative Proceeding. This 30-day period only begins when the service of defendants is completed i.e., the process where CADE formally, by electronic means or postal service, makes the defendants aware that it has launched a formal investigation against them, sends them a copy of the Opening Note and requests them to present their defenses), and all the defendants are informed that the Administrative Proceeding is ongoing.

(vi) *Evidentiary stage and hearings:* all evidence that the defendants intend to produce (including expert and witness testimony) must be submitted together with their defenses following the initiation of the Administrative Proceeding.

The defendants have the right to request additional evidence to be produced over the course of the fact-finding phase. After this, CADE's GS will issue a decision granting (or denying) the request for the production of evidence made by the defendants.

The fact-finding phase is concluded with the issuance of a Final Note by CADE's GS and the referral of the case to CADE's Tribunal for final ruling.

(vii) *Agency decision:* after the fact-finding phase conducted by CADE's GS, CADE's Tribunal will review the evidence collected and determine whether it justifies a conviction for an antitrust violation. CADE's Tribunal must issue its decision by either (i) convicting the defendant(s) or (ii) closing the case.

(viii) *Settlement Agreements:* a settlement proposal can be submitted in any investigation proceeding (whether in cases involving horizontal agreements or other antitrust violations) and may be proposed by either the defendant(s) or CADE itself. When the case is still in the fact-finding phase, settlements are negotiated by CADE's GS and referred to CADE's Tribunal for approval, accompanied by a non-binding opinion from CADE's GS. However, when the case has already reached the trial phase, the proposal

is submitted by the defendant to the Reporting Commissioner for negotiation and presented to the full panel of CADE's Tribunal for approval.

Once approved, settlements suspend the investigation against the applicant. At the final ruling stage, CADE's Tribunal will confirm if the defendant has fully complied with the terms of the settlement and, if so, the investigation will be dismissed in relation to that defendant.

In any case, the approval of the settlement proposal depends on its convenience and opportunity (e.g., whether the evidence presented by the defendant is robust, whether CADE has not yet collected sufficient evidence against the defendant, etc.). Depending on the type of investigation, settlements will have different requirements, as detailed below:

(a) **Investigations related to horizontal agreements**: Refer to section 5.4 above.

(b) **Investigations related to abuse of dominance and other restrictions**: defendants are not necessarily required to pay fines, but may be required to do so. Defendants must cease the conduct under investigation and/or its effects that harm competition. To achieve these objectives, CADE's GS may impose additional commitments, such as requiring that compliance with the terms of the settlement be monitored by a trustee.

8. Judicial Review

CADE is the agency responsible for Brazilian competition enforcement at the executive branch level. However, CADE's decisions are subject to judicial review. Brazilian law allows parties affected by CADE's decisions to appeal on both procedural and substantive grounds.

Broadly speaking, judicial review of CADE's decisions typically begins in Brazilian Federal Courts (*Tribunais Regionais Federais*), both in trial court (*primeira instância*) and appellate court (*segunda instância*). Decisions may be ruled by the Brazilian Superior Court of Justice if said decisions are related to the interpretations of federal law (as is the case of Brazilian Competition Law). If the decisions involve constitutional issues, the matter may ultimately be appealed before the STF,[78] Brazil's highest court.

In 2020, the Brazilian Federal Supreme Court issued an important decision affirming that the Brazilian Judiciary must show deference to CADE's substantive decisions and refrain from reexamining competition-related discussions, as CADE is the authority with the technical expertise and institutional capacity to assess competition-related matters. With this, the Brazilian Federal Supreme Court established that judicial review should be limited to examining the legality of decisions issued by CADE. Nonetheless, the practical implications of this STF's decision are still evolving and it remains to be seen how the lower courts will consider this decision, particularly

[78] The primary functions of the Brazilian Federal Supreme Court pertain to the protection of the Constitution and the interpretation of constitutional provisions, while the jurisdiction of the Brazilian Superior Court of Justice is limited to disputes involving conflicts between provisions of federal legislation.

as companies are increasingly challenging CADE's decisions before courts on substantive grounds.[79-80]

9. Other procedures

9.1 Competition Advocacy Reports

As discussed in section 1.2 above, the SRE is responsible for competition advocacy within the Brazilian System of Competition Defense. It mostly participates in public consultations carried out by Brazilian regulatory agencies, but also publishes other advocacy documents discussing the economic effects of legislations.[81]-[82]

In parallel, CADE also exercises advocacy roles. For instance, CADE's DEE has released several reports covering competitive aspects of proposed and already existing legislation, and other regulatory initiatives. CADE's DEE has also participated in trade matters, discussing anti-dumping measures.[83]

9.2 Market Studies

CADE's DEE constantly releases market studies consolidating CADE's decisional practice on specific sectors, which may include specific analyses on mergers and conducts. To date, the DEE has released around 20 market studies on several sectors, including healthcare, education, port services and maritime transportation, payments, agricultural inputs, and digital platforms.[84]

9.3 Guidelines

See section 1.1 above.

9.4 Opinions to draft regulations

See section 11.1 above.

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[79] *See* Extraordinary Appeal No. 1.083.995/DF. Reporting Justice: Luiz Fux.

[80] For academic debate on this topic, see Marntis, Paulo; Vieira, Lucas. *Deferência judicial às decisões do conselho administrativo de defesa econômica (Cade): direito adquirido ou conquista diária?*. Revista Eletrônica de Direito Processual – UERJ. Ano 19. Volume 26. Número 1. Jan./abr. 2025. Available at: https://www.e-publicacoes.uerj.br/redp/article/download/74057/52813/333738. Access on January 8, 2025.

[81] See https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/estudos-economicos/advocacy.

[82] See https://www.gov.br/fazenda/pt-br/composicao/orgaos/secretaria-de-reformas-economicas/publicacoes/notas-informativas.

[83] CADE DEE's contributions and activities are available at: https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/estudos-economicos/notas-tecnicas and https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/estudos-economicos/advocacy.

[84] See https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/estudos-economicos/cadernos-do-cade.

9.5 Consultation

According to CADE's Resolution No. 12/2015, companies, trade associations and individuals can initiate a Consultation proceeding in order to obtain CADE's view on: (i) how to interpret the Brazilian Competition Law in relation specific mergers or conducts; (ii) if certain proposed or already in place conducts or contracts represent an anticompetitive infringement.

Consultation proceedings can only be initiated by those companies and individuals directly involved in the conduct or merger which will be discussed during the consultation, or trade associations that act on behalf of more than one company that is affected by certain conduct or merger. Consultation proceedings can only discuss specific and well-defined situations, and not hypothetical situations.

Consultations are submitted directly to the CADE's Tribunal, and one of CADE's Commissioners is responsible for being the Reporting Commissioner and bringing the case before the rest of the panel. The decision binds CADE's Tribunal and the applicant for five years from its issuance and can only be revised by CADE's Tribunal during this period if new information becomes available.

If CADE's Tribunal finds that the conduct may be illegal, it can decide to open an investigation against the applicant.

10. Torts

Article 47 of the Brazilian Competition Law allows any person or company to file lawsuits before Brazilian courts to recover damages caused by antitrust infringements and to seek a cease-and-desist order. Filing a lawsuit does not affect the administrative proceedings carried out by CADE.

Private lawsuits are not yet widespread, but there are precedents.

In 2022, Brazilian Congress introduced new provisions in Brazilian Competition Law, via Law No. 14,470/2022, in order to encourage damages claims. The main changes include: (i) plaintiffs now can obtain double damages in case of cartel infringements (in case of other anticompetitive practices, single damages still apply); (ii) leniency and settlement applicants are not subject to double damages (only single damages), and are not jointly and separately liable for the infringement of other persons/entities involved in the cartel; (iii) CADE's decisions convicting cartels allow courts to grant preliminary injunctions against involved companies in the context of private lawsuits; (iv) however, plaintiffs still have to shoulder the burden of proof in relation to the existence supracompetitive price and other harms caused by the cartel; (v) the limitations period for private lawsuits has been increased from three to five years from the day CADE's ruling is published in Brazilian Official Gazette.

Chile

Chile

Mario Ybar

Abbreviations

FNE	National Prosecutor's Office for Economic Affairs (*Fiscalía Nacional Económica*)
TDLC	Tribunal for the Defense of Free Competition (*Tribunal de Defensa de la Libre Competencia*)
DL 211	Decree Law No. 211
ICG	General Instruction
LDE	Law 21,595 of 2023 on Economic Crime (*Ley 21.595 de 2023 sobre Delitos Económicos*)
CLP	Chilean peso (currency)
UTA	Annual Tax Unit (*Unidad Tributaria Anual*)

1. General background

1.1 Legislative framework

The Chilean antitrust regime is contained in the following legal texts:

(i) Political Constitution of Chile: Article 19 No. 21 of the Political Constitution of Chile establishes the basis of the national antitrust system. This article guarantees the right to carry on any economic activity that is not contrary to morality, public order and national security.

(ii) Decree Law No. 211: DFL No. 1 of 2005 establishes the consolidated, coordinated and systematized text of Decree Law No. 211, which contains the Chilean competition rules ("DL 211" or the "Competition Law"). Pursuant to DL 211, the promotion and defense of free competition is the responsibility of the Tribunal for the Defense of Free Competition ("TDLC") and the National Prosecutor's Office for Economic Affairs ("FNE").

(iii) Other laws: Other relevant laws include:

(a) Law No. 19,733 on Freedom of Opinion, Information and the Practice of Journalism;

(b) Law No. 19,542 on the Modernization of the State Port Sector;

(c) D.F.L. No. 323, of 1931, the Gas Services Law;

(d) Law No. 20.920 on Waste Management, Extended Producer Liability and the Promotion of Recycling;

(e) Unfair Competition Law No. 20,169;

(f) Consumer Protection Law No. 19,496;

(g) Civil Procedure Code, which governs the procedural aspects of proceedings before the TDLC; and,

(h) Criminal Procedure Code, which applies on a supplementary basis in relation to the use of "intrusive" measures by the FNE in cases of collusion.

(iv) TDLC Regulations: The TDLC has issued 30 internal regulations (*Autos Acordados*). Nineteen of these are currently in force,[1] the main ones being Nos. 5, 16 and 19. The first of these internal regulations establishes the manner of processing claims or requirements, on the one hand, and consultations, on the other, when they relate to the same facts, in relation to the application of the so-called "non-contentious" procedure. The second regulates the procedure for the declaration of confidentiality and secrecy of documents submitted to the TDLC, and for the preparation of their respective public versions, while the third refers to the electronic processing of proceedings.

In addition, the TDLC also has the power to issue "General Instructions" (ICG) that private parties must take into account. This regulatory power has been exercised by the TDLC on a limited number of occasions, of particularly note being the following: **(i)** ICG No. 5 on the Conditions of Competition in the Market for Means of Payment with Credit Cards, Debit Cards and Payment Cards with Provision of Funds;[2] **(ii)** ICG No. 1 on the Market for Collection, Transportation and Disposal of Household Solid Waste Services;[3] and **(iii)** ICG No. 2 on the Provision of Mobile Telephony Services and the Joint Offering of Telecommunications Services[4] (as amended by ICG No. 4[5]).

(v) Case law: Chile is governed by the continental law system so that judicial precedent does not bind the courts. However, the decisions of the TDLC and the judgments of the Supreme Court have provided much of the content of DL 211, which is a relatively short legal text. The same occurs with the decisions of the FNE, in relation to the system of prior and mandatory merger control (which is in charge of this authority).

(vi) Soft law*:* The FNE frequently prepares guides through which it orients users with respect to the criteria or requirements that it will take into consideration when initiating investigations for the commission of a certain unlawful act, reviewing mergers, preparing market studies, and so on. Although they are not binding, these guidelines are frequently taken into account by private parties in antitrust proceedings. In addition, they acquire particular importance when they are intended to guide users with respect to administrative procedures that are the exclusive competence of the FNE, such as the procedure for the preventive control of mergers, or leniency applications. The main guidelines issued by the FNE are:

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[1] See the TDLC's rulings at the following link: https://www.tdlc.cl/auto-acordados/.

[2] Available at: https://www.tdlc.cl/wp-content/uploads/2022/08/ICG_5-2022.pdf.

[3] See consolidated text at: https://www.tdlc.cl/wp-content/uploads/instrucciones_generales/Instruccion_General_03_2013.pdf

[4] See original text at: https://www.tdlc.cl/wp-content/uploads/instrucciones_generales/Instruccion_General_02_2012.pdf.

[5] See modification at: https://www.tdlc.cl/wp-content/uploads/instrucciones_generales/Instruccion_General_04_2015.pdf.

(a) Internal Guidelines for Fine Requests;[6]

(b) Internal Guidelines for the Filing of Complaints for the Crime of Collusion;[7]

(c) Internal Guidelines on Carrying Out Market Research;[8]

(d) Guidelines for the Assessment of Horizontal Mergers;[9]

(e) Practical Guidelines for the Application of Notification Thresholds for Mergers in Chile;[10]

(f) Guidelines on the Assessment of Vertical Constraints;[11]

(g) Competition Guidelines (of the FNE to assess mergers);[12] and

(h) Remedy Guidelines.[13]

1.2 Institutional framework

In the current system, an administrative agency - the FNE - investigates and presents cases before a tribunal - the TDLC - which for these purposes performs the functions of a court (resolving conflicts with the effect of *res judicata*). Its decisions can be appealed to the Supreme Court.

In addition, the TDLC is vested with the extra-jurisdictional powers of an administrative body (Article 18, Nos. 2 to 4 of DL 211). These powers consist of: **(i)** the issuance of General Instructions that must be complied with by those operating in a given industry or market; **(ii)** the recommendation to the President of the Republic of regulatory amendments to statutory or regulatory provisions that it deems contrary to free competition, as well as the need for legislation when necessary to promote competition; and **(iii)** the resolution of consultations related to facts, acts or agreements that could affect free competition.[14]

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[6] See August 2019 document at: https://www.fne.gob.cl/wp-content/uploads/2019/08/Gu%C3%ADa-de-multas.pdf.

[7] See June 2018 document at: https://www.fne.gob.cl/wp-content/uploads/2018/06/Gu%C3%ADa-de-Querellas-final-definitiva.pdf.

[8] See May 2017 document at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia_Estudios_Mercado_Final_oct2017.pdf.

[9] See May 2022 document at: https://www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-castellano.pdf.

[10] See 2019 document at: https://www.fne.gob.cl/wp-content/uploads/2019/08/Guia_Umbrales-08.2019.pdf.

[11] See 2014 document at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Gu%C3%ADa-Restricciones-Verticales-1.pdf.

[12] See 2017 document at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-competencia.pdf.

[13] See 2017 document at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-remedios-.pdf.

[14] The original purpose of this power was to provide legal certainty for market operators, who may have doubts as to whether a certain fact or act carried out, or to be carried out, may infringe the competition rules, without there being a "conflict" of legal significance. However, in practice, this procedure has been used to resolve matters that are more suited to contentious proceedings. See Mario Ybar, "*Hoja de ruta para la libre*

The FNE, however, also has different powers from those traditionally delegated to supervisory bodies or administrative investigators (article 39 of DL 211), such as: **(i)** preparing market studies; **(ii)** proposing to the President of the Republic regulatory amendments to statutory or regulatory provisions that it considers contrary to free competition, or the issuance of these when necessary; and, **(iii)** processing and resolving requests for merger operations subject to preventive control.

1.3 Evolution of the system

The first statute related to free competition in Chile was Law 13,305. Enacted in 1959, it reproduced ideas and concepts contained in the Sherman Act and created a Commission to hear claims for anti-competitive conduct.

However, the current antitrust system was established in 1973, through DL 211. This law has been amended on several occasions, for example: **(i)** Law No. 19,911 of 2003, which created the TDLC, ensuring the independence, specialization and dedication of the authorities; **(ii)** Law No. 20,361 of 2009, which introduced a series of changes with the purpose of making the FNE's investigations more effective. Of particular note in this regard are the increase in fines, the introduction of powers for the interception of telephone conversations and searches of premises, the creation of the leniency program and the extension of the statute of limitations period for anticompetitive conduct; and **(iii)** Law No. 20,945 of 2016, in relation to which the following reforms are worthy of note:

(i) Criminalization of hardcore cartels;

(ii) Elimination of the requirement that agreements involving "competitors with each other" give the parties market power in the case of hard-core cartels;

(iii) Prohibition on interlocking between competing companies;

(iv) *Ex post* reporting of acquisitions of minority stakes in competing firms;

(v) Increase of fines by up to 30% of the turnover for the period in question or double the profit obtained;

(vi) Creation of a system of preventive control of mergers; and,

(vii) Granting the TDLC the power to hear actions for damages arising from antitrust infringements.

The most recent reform to DL 211 was made in 2023 by Law 21,595 on Economic Crimes (the LDE). The changes made by the LDE to the competition rules are minor, and can be summarized as follows: **(i)** the third and fourth paragraphs of article 62 of DL 211, which established a "special" system for grading sanctions, are repealed, reference being made instead to the framework established in the LDE, with the special circumstances contemplated for mitigating circumstances due to the rules on cooperation (article 63 of the LDE); and **(ii)** the disqualification sanctions were removed from the second subsection of article 62 of DL 211 and included in the general provisions of the LDE.

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competencia en Chile: Una propuesta", Diálogos CeCo (March 2022), pp. 33-36, https://centrocompetencia.com/dialogo-hoja-de-ruta-para-la-libre-competencia-en-chile-una-propuesta/.

1.4 Definition of antitrust acts and scope of action

The general offense established by DL 211 is defined in the first paragraph of article 3, which prohibits the implementation or performance, individually or collectively, of any fact, act or agreement that prevents, restricts or hinders free competition, or that tends to produce such effects.[15] This means that the rule is open and indeterminate, rather than being limited to specific examples of infringements of competition.

Thus, the Supreme Court or the TDLC are the bodies that must give content to DL 211 through their resolution of individual cases, while adopting, however, public policy definitions that are relevant to free competition.

Notwithstanding the foregoing, the second paragraph of article 3 provides specific examples of conduct that are considered facts, acts or agreements that prevent, restrict or hinder free competition, or that tend to produce such effects.[16] These are:

(i) Agreements or concerted practices: Agreements or concerted practices that involve competitors "among themselves" and that consist of fixing sales or purchase prices, limiting production, allocating markets on a territorial basis or according to market shares, or that affect the results of tender processes are contrary to free competition. For their part, horizontal agreements that do not include the above-mentioned variables will be contrary to the competition rules to the extent that it is proven that the agreement or practice is capable of conferring market power on the parties involved[17]).

(ii) Abusive exploitation of a dominant position in the market: various examples of abuse of a dominant position that may be considered contrary to free competition (such as requiring in a sale, the sale of another product) are given. This exploitation can be carried out by one or more economic operators.

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[15] DL 211, art. 3.

[16] The second paragraph of article 3 provides as follows:

"The following shall be considered, inter alia, as facts, acts or agreements that prevent, restrict or hinder free competition or that tend to produce such effects:

a) Agreements or concerted practices involving competitors that consist of fixing sales or purchase prices, limiting production, allocating geographical areas or market shares or affecting the result of tender processes, as well as agreements or concerted practices that, conferring market power on competitors, consist of determining marketing conditions or excluding current or potential competitors.

b) Abusive exploitation by an economic operator, or a group of them, of a dominant position in the market, by fixing purchase or sale prices, imposing in a sale that of another product, allocating geographical areas or market shares or imposing similar abuses on others.

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

d) The simultaneous holding by a person of significant executive or managerial positions in two or more competing companies, provided that the business group to which each of the companies in question belongs had annual revenues from sales, services and other business activities that exceed one hundred thousand Unidades de Fomento [approximately USD 3,900,000] in the last calendar year. However, this infringement will only exist if after ninety calendar days from the end of the calendar year in which the aforementioned threshold was exceeded, the simultaneous holding of such positions is maintained.

[17] On this point, see: TDLC, Ruling 187/2023, C17. Available at: https://centrocompetencia.com/jurisprudencia/fne-calquin-pegasus-faasa-colusion/

(iii) Predatory or unfair competition practices: these two situations are regulated together and are considered unlawful to the extent that they are carried out with the purpose of achieving, maintaining or increasing a dominant position.

(iv) The simultaneous holding by one person of significant executive positions in two or more competing firms: this provision, known as the interlocking prohibition, is only applicable to the extent that both firms exceed an annual sales revenue threshold established in the same statute.[18]

Article 3 bis, on the other hand, defines the different possible infringements of the duty to notify mergers that are subject to the mandatory prior control regime i.e. gun jumping.[19]

1.5 Defendants in antitrust actions

Complaints may be filed against anyone "*who executes or enters into, individually or collectively, any fact, act or agreement that prevents, restricts or hinders free competition, or tends to produce such* effects",[20] regardless of whether they are natural or legal persons, or public or private entities.

The settled case law of both the TDLC and the Supreme Court recognizes the so-called "single economic entity doctrine", according to which the defendant in a case, whether initiated privately or by the FNE, may include all the companies that are part of the same economic group. In this regard, a decisive factor is to distinguish when a parent company can exercise decisive influence over its subsidiary.[21]

1.6 Extraterritoriality

The TDLC has declared its jurisdiction over conduct carried out abroad that produces effects in Chile:

> "(...) it should be noted that this Tribunal has repeatedly stated that, if the arguments raised by the defendant Whirlpool were to be followed, the alleged unlawful conduct would be reduced only to the place where it is allegedly committed, concluded or agreed, without reaching the place where its actual or potential effects would be produced. The logical conclusion of this argument is that it would be impossible for the Chilean courts to have jurisdiction over any restrictions on competition carried out abroad but that affect any of our markets, or over conduct that occurs in Chile but does not produce competitive effects in

[18] 100,000 *Unidades de Fomento* (equivalent to approximately USD 3,900,000).

[19] Article 3, Bis: "The measures set forth in Article 26, as well as such preventive, corrective or prohibitive measures as may be necessary, may also be applied to those who: (a) violate the duty of notification established in Article 48; (b) violate the duty not to conclude a concentration operation notified to the National Prosecutor's Office for Economic Affairs and which is suspended in accordance with the provisions of article 49; (c) Fail to comply with the measures with which a concentration operation has been approved, in accordance with the provisions of articles 31 bis, 54 or 57, as the case may be; d) conclude a concentration operation contrary to the provisions of the decision or judgment that has prohibited such operation, pursuant to the provisions of articles 31 bis or 57, as the case may be; and, e) notify a concentration operation, pursuant to Title IV, by submitting false information."

[20] DL 211, art. 3.

[21] See Nicolás Palma, "Doctrina de la Única Unidad Económica en el Derecho de la Competencia: Aplicación y Límites", *Investigaciones CeCo* (August 2022), https://centrocompetencia.com/doctrina-unidad-economica-derecho-competencia/.

> this country. This would undermine DL No. 211, the purpose of which is to ensure, within the territory of the Republic of Chile, the competitive development of its markets".
>
> "A position contrary to the one described above would generate the perverse incentive of leaving unpunished those who, wishing to infringe the competition rules in Chilean markets, were to adopt their anticompetitive decisions or carry out actions aimed at implementing them outside Chile, traveling to another country for that purpose, or using means of communication or intermediaries located outside Chile, since even if the effects of those decisions and actions affected our markets, there would be no way of bringing them to the attention of this Court."[22]

This position was confirmed by the Supreme Court, which held in the same case as follows:

> "(...) taking into account the fact that the purpose of the provisions of Decree Law No. 211 is to protect free competition in Chile, it is clear that our courts do have jurisdiction to hear those infringements against this legal right that have had effects in Chile or were able to do so, regardless of the place where they are implemented or concluded."[23]

Likewise, Article 6 of the Organic Code of Courts (*Código Orgánico de Tribunales*, COT) in its numeral 11°, expressly establishes that the criminal offense of collusion (as defined in Article 62 of DL 211) is subject to Chilean jurisdiction when it is perpetrated outside Chile but affects Chilean markets. To date, however, no proceedings have been brought with respect to this type of criminal offense.

All of the above is consistent with certain free trade agreements signed by Chile, which oblige the signatory States to apply their competition rules to all commercial activities carried out in their territory, while also recognizing the possibility (and possible mechanisms) of having jurisdiction over conduct engaged in outside their territory that produces effects within it.[24]

2. General sanctions regime

Article 26 of DL 211 allows the TDLC to impose different types of administrative sanctions, including the following:

(i) Modify or terminate acts, contracts, agreements, systems or arrangements that are contrary to the provisions of this law;

(ii) Order the modification or dissolution of firms, corporations and other private-law legal entities that have been involved in the acts, contracts, agreements, systems or arrangements referred to in paragraph (i) above;

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[22] TDLC Decision No. 122 (2012) "*FNE v. Tecumseh Do Brasil Ltda. and another*", c. 6 and 7, https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_122_2012.pdf.

[23] Supreme Court (2013), Case No. 5308-2012, "*FNE v. Tecumseh Do Brasil Ltda. and another*", c. 2, https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_122_Corte_Suprema.pdf.

[24] See, for example: Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Chapter 16 "Competition Policy", available at https://www.subrei.gob.cl/docs/default-source/tratado-tpp11/16--politica-de-competencia.pdf?sfvrsn=51c0d4da_2; and Chile-Peru Free Trade Agreement, Chapter 8 "Competition Policy", available at https://www.subrei.gob.cl/docs/default-source/acuerdos/peru/capitulos-peru/9-capitulo-8-pol%C3%ADtica-de-competencia.pdf?sfvrsn=1321fe64_2.

(iii) Apply fines on taxable profit up to an amount equivalent to thirty percent (30%) of the turnover of the infringing party corresponding to the line of products or services associated with the infringement during the period for which it has been extended or up to twice the economic benefit attributable to the infringement. Where it is not possible to estimate the economic benefit or sales, fines of up to 60,000 Annual Tax Units (UTAs), equivalent to approximately USD 49,000,000,[25] may be imposed.

Fines may be imposed on the legal entity concerned, its directors, executives and any person involved in carrying out the act in question.[26]

The FNE has also produced Internal Guideline on Fine Requests, which establishes the methodology according to which the FNE will determine the fines that it will request from the TDLC in each case,[27] although it has no binding force with respect to the fines actually imposed by the TDLC and, ultimately, the Supreme Court.

3. Draft legislation

In March 2020, the Government submitted to Congress a bill introducing several reforms to DL 211 (Bulletin No. 13925-03). This Bill has not made any legislative progress since April 2020. The main proposed reforms are:

(i) **Powers of the FNE in cases of collusion:** The Bill proposes granting additional investigative powers to the FNE in cases of collusion, such as requesting the lifting of banking secrecy and photographing, filming and recording individuals.

(ii) **Increased prison sentence for collusion:** The Bill proposes punishing collusion on essential goods or services with five to ten years' imprisonment (instead of three to ten years' imprisonment, as is currently the case for collusion regarding such goods and services and others).

(iii) **Anonymous whistleblower:** The bill proposes the creation of the concept of individual anonymous whistleblowers, in addition to the regulation on leniency, and the possibility of filing a complaint with the FNE requesting the confidentiality of the whistleblower's identity.

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[25] Conversion made on the date of writing this document.

[26] For example, decisions in which fines have been applied to individuals include Decisions nos. **145** (2015), "*FNE v. Asociación Gremial de Ginecólogos Obstetras de la Provincia de Ñuble y otros"* (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_145_2015.pdf); **133** (2014) "*FNE v. Pullman Bus Costa Central y otros*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_133_2014.pdf); **128** (2013), "*FNE v. ACHAP A.G. and others*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_128_2013.pdf); **74** (2008), "*FNE v. AM Patagonia S.A. and others*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_74_2008.pdf"); and 185 (2023) "*FNE v. Pegasus South America Servicios Integrales de Aviación SpA and Inaer Helicopter Chile S.A.*" (https://centrocompetencia.com/wp-content/uploads/2023/09/Sentencia_N_185_2023-3-1.pdf).

[27] FNE, "Internal Guidelines for Fine Requests from the National Prosecutor's Office for Economic Affairs" (August 2019), available at: https://www.fne.gob.cl/wp-content/uploads/2019/08/Gu%C3%ADa-de-multas.pdf.

Notwithstanding the above, it seems unlikely that these amendments will be approved by Congress.

4. Institutional structure

4.1 National Prosecutor's Office for Economic Affairs (articles 33 to 45 of DL 211)

(i) Composition: The National Prosecutor for Economic Affairs represents the general interest of society in economic affairs and is head of the FNE. He or she must be a lawyer, with ten years' professional experience or at least three years' service with the FNE.

(ii) Appointment: By the President of the Republic from a short list of three candidates provided by the Senior Public Management Council, after a candidate selection process through this mechanism.

(iii) Terms: 4 years, renewable.

(iv) Removal:

(a) The end of the legal term of his or her appointment;

(b) Voluntary resignation accepted by the President of the Republic;

(c) Removal for manifest negligence in the exercise of his or her duties; or,

(d) Incapacity.

These last two grounds must be ordered by the President of the Republic, on the basis of a favorable report issued by the Supreme Court, at the request of the Minister of Economy, Development and Reconstruction.

(v) Number of professionals: According to public information provided by the FNE, as of December 2024, there were 109 permanent employees working at the institution (whether forming part of the positions laid down by law or contracted for transitional purposes).[28]

(vi) Internal Units: The National Prosecutor for Economic Affairs is supported by the Deputy National Prosecutor. In addition, the FNE has the following Divisions or Units:

(a) Litigation;

(b) Antitrust (mainly for investigations of abuse of a dominant position, vertical agreements, and reports on tenders);

(c) Anti-Cartel;

[28] See information available at: Transparency Portal [official website], Active Transparency, National Prosecutor's Office for Economic Affairs https://www.portaltransparencia.cl/PortalPdT/directorio-de-organismos-regulados/?org=AH005.

(d) Mergers;

(e) Market Studies; and,

(f) Audit.

(vii) Budget: The budget allocated to the FNE in 2024 was $8,158,970,000 CLP, equivalent to approximately $8,652,000 USD.[29]

(viii) Investigative powers: Pursuant to article 39 a) of DL 211, the FNE may conduct the investigations it deems appropriate to verify violations of said law. For this purpose, the FNE will have the following powers:

(a) To request the public agencies and services to make available to it the background information which it considers necessary for the investigations, complaints or criminal complaints it is conducting or in which it is required to intervene. [30]

(b) To request from the technical agencies of the State the reports which it deems necessary and to hire the services of experts or technicians;[31]

(c) To request from individuals such information and background information as it deems necessary in connection with the investigations it conducts;[32]

(d) To summon to give evidence, or request a written statement from, the representatives, directors, advisors and employees of the entities or persons who may have knowledge of the facts, acts or agreements that are being investigated;[33] and,

(e) In serious cases of investigations aimed at accrediting conduct described in article 3 a) of DL 211, request, by means of a substantiated request and with the prior approval of the TDLC, authorization to the corresponding judge of the Court of Appeals of Santiago, so that the *Carabineros* or the Investigative Police, under the direction of the FNE official indicated in the request, may proceed to execute the so-called "intrusive" powers referred to in point 5(iii) below.[34]

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[29] This information was obtained using as a reference the fiscal contribution of the budget corresponding to the FNE, available at: Transparency Portal [official website], Active Transparency, National Prosecutor's Office for Economic Affairs https://www.dipres.gob.cl/597/articles-299085_doc_pdf.pdf.

[30] Art. 39 g) of DL 211.

[31] Art. 39 k) of DL 211.

[32] Article 39 g) of DL 211. According to the fourth paragraph of this provision, "*those who, with the purpose of hindering, diverting or evading the exercise of the functions of the National Prosecutor's Office for Economic Affairs, conceal information that has been requested by the Prosecutor's Office or provide false information, shall be sentenced to a minimum to medium term of imprisonment".*

Moreover, according to the fifth paragraph, *"those who are required to respond to requests for information made by the National Prosecutor for Economic Affairs and unjustifiably fail to do so or do so only partially, shall be fined up to two annual tax units for each day of delay.*"

[33] Article 39 j) of DL 211.

[34] Article 39 n) of DL 211.

(ix) Technical perception: According to a survey of the most prominent lawyers in Chile in end 2023, the FNE was well regarded for the detailed nature of its economic and legal analysis.[35] In addition, according to the lawyers surveyed, the FNE scored well as regards: **(i)** being up-to-date with changes in comparative law and international standards in competition-related matters;[36] **(ii)** safeguarding confidential information provided in proceedings;[37] **(iii)** professionalism and treatment in all its areas;[38] and **(iv)** performance in litigation[39] and the processing of mergers.[40]

4.2 Tribunal for the Defense of Free Competition (DL 211, articles 5 to 32):

(i) Composition: The TDLC has five full members of which three must be lawyers and two must have a first degree or a postgraduate degree in economics. One of the lawyers acts as chair and he or she must have 10 years' professional practice and an outstanding professional or academic record. There are also two alternate members (one from each professional area).

(ii) Appointment: The Chair of the TDLC is appointed by the President of the Republic from a list of five candidates drawn up by the Supreme Court by means of a public competition based on merit. Two members, one from each professional area, are appointed by the Council of the Central Bank after a public competition based on merit and the other two members, also one from each professional area, are appointed by the President of the Republic, from two lists of three candidates, one for each appointment, drawn up by the Council of the Central Bank, also by means of a public competition based on merit.

(iii) Terms of office: The office of the incumbent and alternate minister of the TDLC is for six years, and they may be appointed for only one additional term.

(iv) Removal:

(a) The end of the legal term for which he or she was appointed;

(b) Voluntary resignation;

(c) Dismissal for notable neglect of duties;

(d) Surviving incapacity; or

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[35] Regarding the detailed nature of its legal analysis, the lawyers surveyed evaluated the FNE with an average rating of 4,94 (on a scale of 1 to 7), while the average rating obtained in its economic analysis was 5,21 (on a scale of 1 to 7). See: CeCo and GWU: "*Estudio de Percepción de la Institucionalidad de Libre Competencia 2024 en Argentina, Brasil, Chile, Colombia, Ecuador, México y Perú*". (April 2024), available at https://centrocompetencia.com/wp-content/uploads/2024/04/Informe-Encuesta-CeCo-2024-1.pdf.

[36] Average rating of 5,38 (on a scale of 1 to 7). See: Idem, p. 48.

[37] Average rating of 6,19 (on a scale of 1 to 7). See: Idem, p. 54.

[38] All obtained an average rating higher than 4,88 (on a scale of 1 to 7). See: Idem, p. 67.

[39] Average rating of 5,40 (on a scale of 1 to 7). See: Idem, p. 60.

[40] Average rating of 5,66 (on a scale of 1 to 7). See: Idem, p. 80.

(e) Failure to comply with the rules on exclusive dedication.

The measures contained in options (a), (b) and (c) above shall be enforced by the Supreme Court, at the request of the President of the Tribunal or two of its members, without prejudice to the disciplinary powers of the Supreme Court.

(v) Number of professionals: According to public information provided by the TDLC, in December 2024 there were 23 permanent professionals, in addition to the five regular members and two alternate members.[41]

(vi) Internal units: In addition to the Principal and Alternate Members, the TDLC has a secretary, who is a qualified lawyer responsible for supervising: **(i)** the team of lawyers; **(ii)** the team of economists; **(iii)** a research unit; **(iv)** a judicial office; **(v)** the administration and finance area; **(vi)** a computer and technology unit; and **(vii)** the registry. The team of economists, aided by the team of lawyers, supervises the work of the external lawyers.[42]

(vii) Budget: Although information about the TDLC's budget for 2025 has not yet been published, in 2024 the figure was $2,649,467,000 CLP, equivalent to approximately $2,809,000 USD.

(viii) Technical perception: According to the same survey of the most prominent lawyers in Chile in early 2023, prepared by Deloitte at the request of CeCo, the TDLC was highly valued for the detailed nature of its economic and legal analysis.[43] In addition, according to the perception of the lawyers surveyed, the TDLC rated highly for: **(i)** independence;[44] **(ii)** being up-to-date with the advances in comparative law and international antitrust standards;[45] and **(iii)** protecting confidential information provided during proceedings.[46]

5. Horizontal agreements

(i) **Applicable law**: As already mentioned, the general offense contained in the first paragraph of article 3 establishes that:

> *""Anyone who executes or enters into, individually or collectively, any fact, act or agreement that prevents, restricts or hinders free competition, or tends to produce*

[41] See information available at: Tribunal for the Defense of Free Competition [official website], the Tribunal, Personnel Team, https://www.tdlc.cl/dotacion-de-personal/.

[42] See information available at: Tribunal for the Defense of Free Competition [official website], the Tribunal https://www.tdlc.cl/organigrama/.

[43] Regarding the detailed nature of its legal analysis, the lawyers surveyed gave the TDLC an average rating of 5,53 (on a scale of 1 to 7). On the other hand, the average rating obtained regarding their economic analysis was 5,57 (on a scale of 1 to 7). See: CeCo and GWU: " *Estudio de Percepción de la Institucionalidad de Libre Competencia 2024 en Argentina, Brasil, Chile, Colombia, Ecuador, México y Perú*." (April 2024), available at https://centrocompetencia.com/wp-content/uploads/2024/04/Informe-Encuesta-CeCo-2024-1.pdf.

[44] Average rating of 6,13 (on a scale of 1 to 7). See: Idem, p. 30.

[45] Average rating of 5,62 (on a scale of 1 to 7). See: Idem, p. 48.

[46] Average rating of 5,98 (on a scale of 1 to 7). See: Idem, p. 54.

such effects, shall be sanctioned with the measures indicated in Article 26 of this Law, without prejudice to the preventive, corrective or prohibitive measures that may be taken in each case with respect to such facts, acts or agreements".[47]

The article is then supplemented by four sub-paragraphs that provide examples of anticompetitive conduct. Thus, the first paragraph lays down the general rule as regards conduct, capable of covering various examples of collusive agreements, while letter a) of the second paragraph of article 3 goes on to give specific examples of anticompetitive facts, acts or agreements:

"Agreements or concerted practices involving competitors that consist of fixing sales or purchase prices, limiting production, allocating geographical areas or market shares or affecting the result of tender processes, as well as agreements or concerted practices that, conferring market power on competitors, consist of determining marketing conditions or excluding current or potential competitors."[48]

Given the amendment introduced by Law No. 20,945 (2016), the new Article 3 (a) considers two types of collusive conduct: **(i)** those that, in order to be sanctioned, require proof that market power has been conferred on those implementing the conduct (determining marketing conditions or excluding current or potential competitors); and those in which **(ii)** it is not necessary to prove that those implementing the conduct thereby acquired market power (fixing sales or purchase prices, limiting production, allocating geographical areas or market shares or affecting the outcome of tender processes). As indicated above, the *per se* rule would be applicable to this second type of conduct.

(ii) **Limitation period**: The general rule is that actions based on infringements of the competition rules prescribe after three years, which runs from the time of "*the carrying out of the conduct infringing free competition on which they are based*" (art. 20 DL 211).

However, actions against agreements between competitors described in letter a) of article 3 have a special limitation period of five years that does not begin to run until the effects attributable to the conduct in question are felt in the market.

(iii) **Specific powers**: The FNE may request, giving grounds, and with the prior approval of the TDLC, an order from a judge of the Court of Appeals of Santiago, authorizing two of Chile's main law enforcement and security forces (*Carabineros* and the Investigative Police) to: **(i)** enter public or private premises and, as the case may be, break the lock of the place in question and search it; **(ii)** search and seize all kinds of objects and documents that make it possible to prove the existence of the infringement; **(iii)** authorize the interception of all kinds of communications, and **(iv)** order any company that provides communications services, to provide copies and records of those that have been transmitted or received by it. All of the above will take place under the supervision of the official determined by the FNE.

These measures (colloquially referred to as "intrusive") may only be adopted in "*serious and qualified* cases *of investigations aimed at proving conduct described in letter a) of Article 3"*, i.e., solely and exclusively for cases of collusion for the conduct defined in letter a) described above.

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[47] DL 211, art. 3.

[48] DL 211, art. 3.

(iv) ***Leniency*:** Those who participate in any of the conduct referred to in Article 3 a) of DL 211 and comply with the requirements of leniency may be exempted from: **(i)** the penalty of dissolution of the legal entity contained in Article 26 b); **(ii)** the fine imposed under Article 26 c); and **(iii)** criminal liability for the offense of collusion.[49] However, those benefitting from leniency are not protected from possible private actions for damages brought against those who obtained an advantage from the unlawful conduct in question.

According to article 39 bis of DL 211, in order to obtain the benefit of leniency, the whistleblower must:

(a) be the first person to provide "*accurate, truthful and verifiable information*" to the FNE that represents an effective contribution to the compilation of sufficient evidence to support a claim before the TDLC;

(b) refrain from disclosing the application until the FNE issues the public complaint, orders the case to be closed, or expressly authorizes its disclosure; and

(c) terminate its participation in the conduct immediately after submitting its leniency request.

On the other hand, the benefit of the leniency may be revoked if it is proven that the applicant: **(1)** was the organizer of the unlawful conduct; and **(2)** coerced others to participate in it.

Chilean legislation also contemplates the benefit of leniency for the second applicant, who may obtain a 50% reduction of the fine and a one degree reduction of the sentence in relation to the criminal offense of collusion. To be successful, in addition to complying with the requirements applicable to the first to apply, the second leniency applicant must provide additional background information that is "*accurate, truthful and verifiable, and represents an effective contribution to the compilation of sufficient evidence in support of a public complaint*." In March 2017 the FNE published the "Internal Guide on Leniency in Cases of Collusion",[52] which replaced the "Internal Guide on Benefits of Exemption and Reduction of Fines in Cases of Collusion" of October 2009.

(v) **Special sanctions:** DL 211 establishes a special sanction applicable only to the unlawful act of collusion:

> *"The prohibition on contracting in any capacity with centralized or decentralized State administration bodies, with autonomous agencies or with institutions, agencies, companies or services in which the State makes contributions, with the National Congress and the Judiciary, as well as the prohibition on being awarded any concession granted by the State, for up to five years from the date on which the final judgment is* enforceable".[53]

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[49] See arts. 39 bis and 63 of DL 211, and: FNE, "Internal Guidelines on Leniency in Cases of Collusion," dated March 2017, available at: https://www.fne.gob.cl/wp-content/uploads/2017/03/Guia_Delacion_Compensada.pdf.

[52] https://www.fne.gob.cl/wp-content/uploads/2017/03/Guia_Delacion_Compensada.pdf

[53] DL 211, art. 3 d).

(vi) **Criminalization:** The 2016 reform created a special type of offense of collusion, defined in article 62 of DL 211 (which is quite similar -although not identical- to the definition of anti-competitive conduct contained in article 3 a) of DL 211[54]). Article 62 sanctions those:

> "[...] *who enter into or order others to enter into, executes or organizes an agreement involving two or more competitors among themselves, to fix prices for the sale or purchase of goods or services in one or more markets; to limit their production or supply; to divide, allocate or distribute market areas or shares; or to affect the outcome of tenders carried out by public companies, private providers of public services, or* public *bodies*".[55]

The sentence for this offense can range from a minimum of three to a maximum of ten years in prison.

Criminal investigations for the crime of collusion are initiated by a complaint filed by the FNE, which can only be filed after the existence of the agreement has been previously established by an enforceable final judgment of the TDLC (or the Supreme Court, as the case may be).

The decision to file a criminal complaint against individuals convicted of the offense of collusion is taken by the National Prosecutor for Economic Affairs, who must issue a reasoned decision explaining why he or she decided not to file the criminal complaint, where that is the decision he or she takes.[56]

However, the National Prosecutor for Economic Affairs is obliged to initiate criminal proceedings when the case concerns *facts that seriously compromise free competition in the markets.*[57]

The criteria applied and the assessment carried out by the FNE to determine which cases correspond to each scenario are described in the Internal Guidelines for the Filing of Complaints for the Crime of Collusion.[58]

In addition to imprisonment, the EDL establishes a series of ancillary sanctions, consisting of being disqualified from: **(i)** holding public office; **(ii)** contracting with the State; **(iii)** holding managerial, directorship or chief executive positions in any company subject to the supervision of the Financial Market Commission. Such disqualifications may last between three and ten years, depending on the aggravating and mitigating circumstances (see articles 30-39 of DL 211).

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[54] The differences are that (i) Article 62 specifies that the type of bids that come within the rule are those carried out by public companies, private companies providing public services and by public bodies, and (ii) Article 62 does not refer to concerted practices.

[55] DL 211, art. 62.

[56] As of the date of writing, there is one case in which the National Prosecutor for Economic Affairs decided not to prosecute due to the existence of a number of elements that made the case less serious (the agreement was not secret, there was no awareness of the unlawfulness, etc.). See: FNE, Exemption Decision No. 683, "Issuing a Reasoned Decision based on paragraph 3 of Article 64 of Decree Law No. 211 of 1973", available at: https://www.fne.gob.cl/wp-content/uploads/2023/12/Resolucion-Exenta-N.-683.pdf.

[57] Article No. 64(2) of DL 211.

[58] Available at: https://www.fne.gob.cl/wp-content/uploads/2018/06/Gu%C3%ADa-de-Querellas-final-definitiva.pdf

(vii) **Trends:** The FNE has been highly successful in collusion proceedings brought before the TDLC, obtaining convictions upheld by the Supreme Court in the vast majority of cases. That said, the leniency system as a means of prosecuting cartels seems to have lost impetus in recent years.[59]

However, it should be noted that, as of the date of writing, no criminal proceedings have been initiated in relation to the offense of collusion. This would be explained by the fact that, since the legal reform that introduced the criminalization of this conduct (Law 20,945 of 2016), only one case has reached a procedural stage in which it could be criminally prosecuted (and in this case, the National Prosecutor for Economic Affairs decided not to file a criminal complaint).[60]

Another relevant trend is that the National Prosecutor for Economic Affairs, during the celebration of Competition Day 2024, announced the creation of the Intelligence Unit, a multidisciplinary team which currently comprises a chief lawyer, a data scientist and a software developer. This team's purpose is to develop digital investigative tools to strengthen the prosecution of cartels. This, together with the announcement of a new market study on e-commerce, shows that the analysis of digital markets has become a priority for the FNE.

(viii) **Particular situation of cooperation agreements:** Although the literal wording of article 3 a) of DL 211 seems to include some collaboration agreements between competitors within the *per se* offenses, both the TDLC and the Supreme Court have pointed out that such agreements must be subject to an analysis that weighs up risks and efficiencies in accordance with the first paragraph of article 3 of DL 211. [61]

(a) However, a shortcoming of the Chilean system is that there is no effective and generally applicable institutional mechanism for the parties to a collaboration agreement to voluntarily request its *ex ante* review in order to obtain legal certainty as to its compatibility with the competition rules.[62] Indeed, the non-contentious consultation procedure described above, the nature of which would appear to make it appropriate for the resolution of this type of matter, is excessively long. This has discouraged its use for these purposes.[63]

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[59] This is notwithstanding the fact that in 2024 proceedings were initiated by the current administration in two cases concerning collusion in the gaming casinos and industrial gases industries based on applications for leniency.

[60] See Exemption Decision No. 683 of 2023, already referred to in a previous footnote.

[61] See: Juan Pablo Iglesias, "*Acuerdos de I+D, Derecho de la Competencia y Propiedad Intelectual: Una Propuesta de Puerto Seguro para Chile*," Diálogos CeCo (May 2023), pp. 48-49, available at: https://centrocompetencia.com/wp-content/uploads/2023/05/Acuerdos-ID-Derecho-competencia-y-PI-Juan-Pablo-Iglesias-1.pdf.

[62] Mario Ybar, "*Hoja de ruta para la libre competencia en Chile: Una propuesta*", Diálogos CeCo (March 2022), p. 27, available at: https://centrocompetencia.com/dialogo-hoja-de-ruta-para-la-libre-competencia-en-chile-una-propuesta/.

[63] According to previous CeCo research, *the average number of days it takes the TDLC to adopt a decision in a non-contentious matter is 432: CentroCompetencia, "¿Cuánto tarda el Tribunal de Defensa de la Libre Competencia y la Corte Suprema en resolver asuntos de Libre Competencia? (2022)*", Investigaciones CeCo (July 2022), p. 6, available at: https://centrocompetencia.com/cuanto-tarda-el-tribunal-de-defensa-de-la-libre-competencia-y-la-corte-suprema-en-resolver-asuntos-de-libre-competencia-2022/.

(b) Thus, the only collaboration agreements open to preventive review on a voluntary basis are those that meet the requirements to be considered a merger, i.e. when two or more firms choose to merge under any form to give rise to an independent economic operator, distinct from each other, that performs its functions on a permanent basis.[64]

6. Abuse of a dominant position and other anticompetitive conduct

6.1 Abuse of a dominant position

(i) Applicable regulations: As mentioned above, the founding legal principle of the Chilean competition rules is contained in article 3 of DL 211. According to this provision, "*any fact, act or agreement that prevents, restricts or hinders free competition, or that tends to produce such effects, will be sanctioned* (...)"[65] .

In addition, the article is complemented by four paragraphs that provide examples of anticompetitive conduct, two of which - letters b) and c) - refer to unilateral conduct: abuse of dominant position, on the one hand, and predatory practices and unfair competition, on the other.[66]

(ii) Dominant position: According to the TDLC, a dominant position is held in the following situation:

"An economic operator that has substantial market power and can act independently of other competitors, customers and suppliers, because there is no effective competitive pressure that can be exercised against it - that is, the power of actual or potential competitors or a countervailing power - so that it is in a position to set conditions that would not have been obtained in the absence of such high market power."[67]

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[64] It is worth mentioning, however, that with the enactment of Law 20,920 on Extended Producer Liability, the possibility was included that waste producers who must comply with the recycling obligations and goals established in the same law may do so through a collective management system. This system must necessarily be managed by a different legal entity, which does not distribute profits and to which the producers must be associated (it is not independent). In addition, both its bylaws and the bids for the management of its waste must be previously reviewed by the TDLC, through a non-contentious procedure (identical in its regulation to that of the Consultation). In this sense, the experience of the TDLC and the FNE in the compliance and processing of Law 20,920, could be useful for the design of an eventual reform that gives market players certainty before entering into this kind of agreements.

[65] DL 211, art. 3.

[66] DL 211, art. 3 b) and c):

"b) Abusive exploitation by an economic operator, or a group of them, of a dominant position in the market, by fixing purchase or sale prices, imposing in a sale that of another product, allocating geographical areas or market shares or imposing similar abuses on others.

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

[67] Decision 174 (2020), "*Banco BICE v. Banco Estado*" c. 88, (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_174_2020.pdf) and, in the same sense, Decision No. 176 (2021),

Supplementing this definition, given that DL 211 neither defines "dominant position" nor provides further guidelines for its assessment, different rulings have established some matters that may indicate its existence, such as:

(a) The number of companies and the level of concentration in the relevant market;[68]

(b) A firm's market share;[69]

(c) The presence of barriers to entry and expansion;[70]

(d) The size of competitors;[71]

(e) Whether a product has substitutes;[72]

(f) The cost structure of a firm;[73]

(g) The importance of innovation;[74]

(h) Product differentiation;[75]

(i) Market instability;[76]

"*Sindicato de Trabajadores Independientes Chile Taxi v. Maxi Mobility Chile II SpA. y otros*", c. 76 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_176_2021.pdf).

[68] Decisions Nos. 7 (2004), "*FNE v. Lechera del Sur, et al.*", c. 46; and 9 (2004), "*Consulta AGIP sobre conducta de Supermercados Líder*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_09_2004.pdf), C. 16; "*Voissnet S.A. v. Compañía de Telecomunicaciones de Chile S.A.*", c. 43.

[69] Decision Nos. 31 (2005) "*FNE v. Rendic Hnos. S.A.*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_31_2005.pdf), C12; and 26 (2005), "*Philip Morris v. Chiletabacos*", C10 and 11 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_26_2005.pdf).

[70] Decisions Nos. 26 (2005), TDLC, C15; 39 (2006), "*Quimel S.A. v. James Hardie Fibrocementos Ltda*", C6; 55 (2007), "*FNE v. LAN*", C33; and 176 (2021), "*Sindicato de Trabajadores Independientes Chile Taxi v. Maxi Mobility Chile II SpA*", C98.

[71] Decisions Nos. 103 (2010), "*Comercial Arauco Ltda. v. D&S y otro*", C24; 110 (2011), "*Sociedad Will S.A. v. Claro Chile S.A*", C18.

[72] Decisions Nos. 97 (2010), "*Voissnet S.A. v. Compañía de Telecomunicaciones de Chile S.A.*", C33-35; and 100 (2010), "*Nutripro S.A. v. PTLA and the Treasury*", C29.

[73] Decisions Nos. 78 (2008), "*GPS Chile S.A. v. Entel PCS S.A.*", C16; 99 (2010), "*Comasa v. Capel*, C23. *Entel PCS S.A.",* C16; 99 (2010).

[74] Decision No. 161 (2018), "*TVI v. VTR*", C37.

[75] Decisions Nos. 80 (2009), "*Reebok Chile S.A. v. Reebok International Limited y otro*", C45-48; 154 (2016), "*Conadecus v. Telefónica Móviles Chile S.A. y otros*", C47.

[76] Decisions Nos. 29 (2005), "*FNE v. Transbank*", C°30-32; 55 (2007) "*FNE v. Lan Airlines S.A. and Lan Chile Cargo S.A.*", C33; 97 (2010), "*Voissnet S.A. v. Compañía de Telecomunicaciones de Chile S.A.*", C44; 78 (2008), "*GPS Chile S.A. v. Entel PCS S.A.*", C25; 78 (2008), "*GPS Chile S.A. v. Entel PCS S.A.*", C25; 103 (2010), "*Comercial Arauco Ltda. Entel PCS S.A.*", C25; 103 (2010), "*Comercial Arauco Ltda. v. D&S y otro*", C34; and 161 (2018), "*TVI v. VTR*", C37.

(j) The presence of an essential input or facility;[77] etc.

Regarding the party holding a dominant position, article 3 of DL 211 considers both the existence of individual and collective dominant positions.

(iii) Abusive behavior: This can be classified as:

(a) Exclusive: These constitute the majority of cases of abuse of a dominant position investigated and ruled on by the TDLC. They include, *inter alia*, refusal to sell, margin squeeze, predatory pricing, tied sales, bundling, exclusivity contracts and conditional discounts.

With respect to "predatory practices" and "unfair competition", article 3(c) only requires that they be carried out *"with the aim of achieving, maintaining or increasing a dominant position"*, so it is not a *sine qua non* requirement that they be carried out by companies holding a dominant position prior to the conduct taking place.

(b) Exploitative (pricing-related): Although the decisional practice of the TDLC has fluctuated, the current majority position is that, in extreme cases, exploitative acts may be sanctioned in competition proceedings.

The exploitative abuse test has been developed for excessive pricing, and is divided into two stages: **(a)** determining that the defendant has a dominant position that is not the result of past investments or innovations, and that there are high and non-transitory barriers to entry; and **(b)** determining that the prices charged are extremely high compared to certain benchmarks (or "thresholds").[78] [(-)] .[79]

Recent TDLC decisional practice has also clarified that the barriers to entry must be higher than those commonly required for cases of exclusive abuses of dominant position, so that in cases of exploitative abuses a position of "supra dominance" should be held.[80] Likewise, other decisions of the TDLC would open the door to the

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[77] Decisions Nos. 47 (2006), "*FNE v. Sociedad Punta de Lobos S.A.*", C60; 104 (2010), "*FNE v. Telefónica Móviles de Chile S.A. and others*", C19; 124 (2012) "*FNE v. Cámara de Comercio de Santiago A.G.*", C30; and 129 (2013), "*AFEX and another v. Banco de Chile*", C9-11.

[78] Decision No. 140 (2014), "*Condominio Campomar v. Inmobiliaria Santa Rosa de Tunquén Ltda.*", C16-18 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_140_2014.pdf). The decision was adopted on a 3-2 majority in which the minority position rejected the possibility that the competition rules should be used for sanctioning excessive prices.

[79] On benchmarks, see: Eduardo Saavedra and Javier Tapia, "*El control de los precios excesivos en el derecho de la libre competencia: análisis y propuesta*", Revista Estudios Públicos, Vol. 153 (Summer 2019), pp. 95-140, available at https://www.estudiospublicos.cl/index.php/cep/article/view/34/39; and Sebastián Cañas, "*Explotación de datos personales como precio excesivo: Una revisión del caso Bundeskartellamt vs. Facebook*," CeCo Research (October 2023), available at https:// https://centrocompetencia.com/explotacion-de-datos-personales-como-precio-excesivo-una-revision-del-caso-bundeskartellamt-c-facebook/.

[80] Decision No. 181 (2022), "*Redtec v. Walmart*", C60 (https://centrocompetencia.com/wp-content/uploads/2022/06/Sentencia_181_2022.pdf).

sanction of discriminatory conduct with exploitative effects by operators with a dominant position.[81]

(c) Exploitative (non-pricing): There is a third type of conduct sanctioned by the TDLC referring to exploitative conduct not linked to prices.[82]

(iv) Trends: Most of the complaints for abuse of a dominant position have been filed by private operators rather than the FNE, which has not been especially active in this area. In addition, in most of the decisions to date in this area the defendant has been found not liable, which has prevented the development of a solid body of case law in this area.

6.2 Vertical restraints

(i) Applicable Law: Article 3 of DL 211 does not expressly mention, within the examples provided in its different paragraphs, vertical restraints as conduct that may be contrary to free competition. However, it is generally understood that such cases may be heard and ruled on in accordance with the general rule established in the first paragraph of that provision.

In addition, the FNE issued the Vertical Restraints Guidelines which, although not binding on the TDLC or the Supreme Court, are of relevance in the assessment.[83]

(ii) *De minimis* rule and exceptions: According to the Vertical Restraints Guidelines, the FNE's assessment focuses on the effects of vertical restraints, rather than the form they take. Thus, it will evaluate:

(a) The parties' market shares;

(b) The risks associated with the vertical restraint; and,

(c) The efficiencies associated with the vertical restraint.

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[81] Decision No. 186 (2023), "*FNE v. BCI*", C189 (https://centrocompetencia.com/wp-content/uploads/2023/11/Sentencia-TDLC-FNE-v.-BCI.pdf); and Decision No. 78 (2023), "*Socofar consultation on marketing conditions of pharmaceutical laboratories*", para. 72 (https://centrocompetencia.com/wp-content/uploads/2023/07/Resolucion_N%C2%B078_2023.pdf).

[82] Decision Nos. 76 (2008), "*GTD Teleductos S.A. v. EFE*" (. EFE" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_76_2008.pdf); 85 (2009), "*Constructora e Inmobiliaria Independencia Ltda. v. Aguas Nuevo Sur Maule S.A.*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_85_2009.pdf); Decision No. 100 (2010) *Nutripro S.A. v Puerto Terrestre Los Andes; and Supreme Court* (2019), Case No. 24.828-2018, "*Consultation of Cruz Verde on Transbank's tariff system*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Resolucion_53_2018.pdf).

[83] See 2014 document at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Gu%C3%ADa-Restricciones-Verticales-1.pdf

The FNE establishes a *de minimis* rule, according to which, in principle, if both parties involved in a vertical restraint have a market share of less than 35%, it will not open an investigation. [84]

(iii) Trends: The FNE has not filed lawsuits regarding restrictions on competition arising from vertical agreements, nor are there any judgments finding the existence of any liability in such cases. That said, many vertical agreements have been known and/or sanctioned with respect to the party imposing the restriction as an abuse of a dominant position.[85]

6.3 Unfair competition

(i) Applicable Law: Article 3 of the Unfair Competition Law provides that "*any conduct contrary to good faith or morality that, by illegitimate means, seeks to divert customers from a market operator is an act of unfair competition*". Referring to this law is necessary, as it complements the provisions set forth in DL 211 regarding unfair competition.

In Chile, unfair competition cases are generally heard by the ordinary civil courts but when the act of unfair competition is capable of allowing the party in question to achieve or maintain a dominant position, it can be sanctioned by the TDLC under DL 211.[86]

In this regard, letter c) of Article 3 of DL 211 provides that "*predatory or unfair competition practices carried out with the purpose of achieving, maintaining or increasing a dominant position*" will be considered as facts, acts or agreements that prevent, restrict or hinder free competition or that tend to produce such effects.

(ii) Classification (types of conduct): There is case law from the TDLC regarding certain conduct constituting unfair competition:[87]

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[84] Vertical Restraints Guidelines p. 7-8. This threshold does not constitute an absolute safe harbor, since it will not apply if the vertical restraints agreed by parties whose market share does not exceed 35% produce a cumulative effect in the market, or in other cases determined by the FNE (such as resale price fixing). *Ibid.*

[85] Decisions Nos. 26 (2005), "*Philip Morris v. Chiletabacos*", Co. 23; 90 (2009), "*FNE v. Cía. Chilena de Fósforos S.A.*", Co. 99 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_90_2009.pdf).

[86] See: Decision No. 176 (2021), "*Sindicato de Trabajadores Independientes Chile Taxi v. Maxi Mobility Chile II SpA. y otros*", Co. 32.

[87] According to the TDLC, the legal definition of the concept of unfair competition, contained in Law 20,169, makes it possible to interpret article 3 c) of DL 211, the only difference being that it is also required to prove an affected public interest (free competition). In this regard see judgment No. 164 (2018), "*Morales v. Trefimet*", Co. 6 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_164_2018.pdf).

In this regard, article 4 of the Unfair Competition Law provides examples of acts constituting such conduct:

"a) Any conduct that takes undue advantage of another's reputation, inducing confusion of one's own goods, services, activities, distinctive signs or establishments with those of a third party.

b) The use of signs or the dissemination of incorrect or false facts or assertions that mislead as to the nature, origin, components, characteristics, price, mode of production, trademark, suitability for the purposes intended, quality or quantity and, in general, as to the advantages actually provided by the goods or services offered, whether their own or those of third parties.

c) All incorrect or false information or assertions about the goods, services, activities, distinctive signs, establishments or commercial relations of a third party, which are likely to undermine its reputation in the market. Expressions aimed at discrediting or ridiculing them without objective reference are also unlawful.

(a) Abuse of rights: The TDLC has established certain elements to identify when the use of judicial and administrative actions may be being abused.[88] These are:

- The defendant must have brought the actions;
- These must unequivocally seek to restrict or hinder the entry of competitors into the market;
- Where the defendant has brought two or more actions, these must be contradictory; and,
- The actions must have prevented or delayed the entry of competitors, or tended to produce such effects.

These criteria have been applied by the TDLC in cases in which defendants have been accused of abuse of rights, resulting in both convictions and acquittals.[89]

(b) Taking undue advantage of the reputation of others: The imitation of distinctive signs, such as trademarks or logos, could constitute an anticompetitive practice if it is capable of giving rise to or maintaining a dominant position.[90]

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d) Aggravating manifestations that deal with the nationality, beliefs, ideologies, private life or any other personal circumstance of the third party affected and that have no direct relation with the quality of the good or service provided.

e) Any comparison of its own or third parties' goods, services, activities or establishments with those of a third party, when it is based on any background that is not truthful and demonstrable, or when in any other way it infringes the provisions of this law.

f) Any conduct that seeks to induce suppliers, customers or other contractors to infringe the contractual obligations contracted with a competitor.

g) The manifestly abusive filing of lawsuits in order to hinder a market operator.

h) The imposition by a firm on a supplier of contracting conditions for itself, based on those offered by the same supplier to firms competing with the former, in order to obtain better conditions than the latter; or, the imposition on a supplier of contracting conditions with firms competing with the firm in question, based on those offered to the latter. For example, this includes verbal or written pressure exerted by a firm on a smaller supplier whose income depends significantly on the former's purchases, in order to obtain a discount calculated on the basis of the price agreed upon by the same supplier with a competitor of the first firm.

i) The establishment or application of contractual clauses or abusive conduct to the detriment of the suppliers, the systematic breach of contractual duties contracted with them or of the deadlines set forth in Law No. 19,983 for compliance with the obligation to pay the unpaid balance contained in the invoice."

[88] Decision No. 125 (2012), "*Laboratorio Recalcine S.A. v. Roche Chile Ltda.*", Co. 22 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_125_2012.pdf). For its part, the FNE has closed investigations into the matter based on the infringement of such requirements. See recitals 28-30 of the FNE's file report of 2014, in relation to "complaint of trade association against Colbún for potential anticompetitive behavior".

[89] See, for example, Decisions Nos. 46 (2006), "*Recalcine S.A. v. Novartis S.A.*" and 47 (2006), "*FNE v. Sociedad Punta de Lobos S.A.*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_47_2006.pdf).

[90] Decision No. 24-2005, "*Laboratorio Knop Ltda., against Farmacias Ahumanda S.A. and others.*", co. 9 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_24_2005.pdf).

(c) Acts of discrediting: Sending letters or carrying out verbal communications or advertising campaigns aimed at discrediting a competitor's product or service may infringe DL 211, if they are capable of achieving or maintaining a dominant position.

(d) Misleading advertising: False advertising regarding the characteristics of a certain product or service that may lead to the purchase by mistake of a product that, in the absence of such advertising, would not have been purchased, could eventually be capable of achieving or maintaining a dominant position in the market.[91]

(iii) Trends: Recent decisional practice of the TDLC and case law of the Supreme Court in unfair competition cases point to the fact that, when unfair competition is based on the existence of "illegal" acts for which authorities other than the TDLC have jurisdiction, a decision of such authorities is first required.[92]

6.4 Interlocking

(i) Applicable Law: Law 20,945 defined this conduct as an infringement of the competition rules by adding a new paragraph (d) to article 3 of DL 211. This rule prohibits:

"The simultaneous participation of a person in senior executive or management positions in two or more competing firms, provided that the business group to which each of these firms belongs has annual revenues from sales, services and other business activities of more than one hundred thousand "Unidades de Fomento" in the last calendar year".

(ii) Administrative/case-law treatment: The FNE has initiated two proceedings against different firms and individuals linked to the financial markets[93] for alleged violations of such regulations. As of the date of this document, both cases are pending resolution, although they were partially settled with respect to certain parties.

It is clear from the FNE's statement that it considers there to be an infringement *per se*, which does not require proof of any effects, which merits a serious response, as can be seen from the significant fine requested. This not only covers the case of direct interlocking, in which the same executive performs relevant functions in two competing firms, but also indirect interlocking (of the "parent-subsidiary" type) in which functions are performed in the parent company of the company that competes with another where executive functions are also performed.

These criteria, however, have not yet been ruled on by either the TDLC or the Supreme Court.

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[91] Decision No. 58-2007, "*Ricardo Rodríguez y Cía Ltda. v. Epson Chile S.A.*", Co. 21 (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_58_2007.pdf), and Decision No. 103 (2010), "*Comercial Arauco Ltda. v. D&S*" (https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia_103_2010.pdf).

[92] Decision No. 176 (2021), "*Sindicato de Trabajadores Independientes Chile Taxi v. Maxi Mobility Chile II SpA. y otros*", Co. 32.

[93] See the following cases: C-437-2021 FNE proceeding against Juan José Hurtado Vicuña and others and C-436-2021 D FNE proceeding against Hernán A. Büchi Buc and others.

6.5 Acts of authority

(i) Applicable law, soft law and special laws: The first paragraph of article 3 of DL 211 is "neutral" with respect to who may infringe the antitrust rules ("*Whoever executes or enters into, individually or collectively, any fact, act or agreement* [...]"). Thus, Chilean law does not exempt any body -public or private, or with a specific corporate structure- from compliance with DL 211, nor does it establish any sectoral exceptions to its application.

Both the FNE and private companies have regularly brought actions against the State for antitrust infringements and there have even been convictions. Moreover, the FNE has developed two sets of guidelines aimed at the public sector: "The Public Sector and Free Competition[94] and "Guidelines on the Preparation of Public Tenders for Interurban Land Terminals".[95]

In addition, article 4 of DL 211 establishes that "*No concessions, authorizations or acts that imply the granting of monopolies for the exercise of economic activities may be granted, unless authorized by law.*" It is worth examining the exception mentioned at the end of Article 4, as a state entity may engage in prima facie anticompetitive behavior when expressly authorized by law**.**

(ii) Classification (types of conduct): According to the Guidelines entitled "The Public Sector and Free Competition", State bodies may infringe the competition rules in two ways: **(i)** through the direct carrying on of activities of an economic nature, that is, as a buyer or supplier of goods and services; or **(ii)** through the exercise of their discretionary powers in establishing the legal and institutional framework in which markets operate.

7. Concentrations

7.1 Applicable regulations and soft law

Law No. 20,945 established, in the new section IV of DL 211, the system of prior control of concentrations, which came into force in June 2017.

This Law has been complemented by various decisions and guidelines issued by the FNE and other authorities, including the following:

(i) Exemption Decision No. 157 (2019), which establishes the thresholds for concentration notifications;[96]

(ii) The Concentration Regulation of November 2, 2021, which establishes the information that must accompany the notification;[97]

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[94] Available at: https://www.fne.gob.cl/wp-content/uploads/2012/06/Guia-final-sector-publico.pdf

[95] Available at: https://www.fne.gob.cl/wp-content/uploads/2022/06/Guia-para-la-elaboracion-de-bases-Terminales-Consulta-Publica.pdf

[96] Available at: https://www.fne.gob.cl/wp-content/uploads/2019/03/Resoluci%C3%B3n-exenta-157.pdf

[97] Available at: https://www.fne.gob.cl/wp-content/uploads/2021/11/Reglamento-N%C2%B041-D.O.-02.11.2021.pdf

(iii) The ordinary and simplified notification forms, which clarify and interpret the Regulation;[98]

(iv) The FNE's June 2017 Competition Guidelines, which explain the judicial criteria used in assessments;[99]

(v) The FNE Remedies Guidelines, which provide the FNE's view of the mitigation measures offered to it;[100]

(vi) The 2019 Threshold Interpretation Guidelines, which describe how to account for sales for the purpose of determining whether reporting thresholds are met;[101]

(vii) Instructions on the pre-notification of concentration transactions;[102] and

(viii) Guidelines for the Assessment of Merger Transactions, dated May 2022, which establishes the substantive scope within which the FNE will analyze concentration transactions notified to it.[103]

7.2 Authorities

The authority in charge of the concentration control system is the FNE. It receives the notifications, investigates and finally decides whether to approve them outright, make them subject to the conditions offered by the parties to mitigate their effect, or reject them. The TDLC may intervene only if the parties to the transaction file a special review (*recurso de revisión especial*) appeal against the FNE's decision when it prohibits the transaction. Additionally, the Supreme Court has exceptionally intervened in this procedure. This occurred when one of the parties in a prohibited transaction filed a complaint appeal, resulting in the Supreme Court approving a merger that had been rejected by both the FNE and the TDLC.[104]

7.3 Notifiable transactions

A transaction that can be notified to the FNE is any fact, act or agreement, or series of them, that has effects in Chile, by virtue of which "two or more economic operators that are not part of the same business group and that are previously independent of each other, cease to be independent in any area of their activities by any of the following means" (Article 47):

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[98] Available at: https://www.fne.gob.cl/wp-content/uploads/2021/11/Formulario-de-Notificacion-02.11.2021.pdf

[99] Available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-competencia-.pdf

[100] Available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-remedios-.pdf

[101] Available at: https://www.fne.gob.cl/wp-content/uploads/2019/08/Guia_Umbrales-08.2019.pdf

[102] Available at: https://www.fne.gob.cl/wp-content/uploads/2021/05/20210416.-Instructivo-Pre-Notificacion-rev-CI-30.04.pdf

[103] Available at: https://www.fne.gob.cl/wp-content/uploads/2021/05/Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-mayo-VF.pdf

[104] See the CeCo Note: "Approval of the Nueva Masvida and Colmena Merger by the Supreme Court: A Critical Analysis of a Puzzling Ruling." Available at: https://centrocompetencia.com/aprobacion-fusion-nueva-masvida-y-colmena-por-la-suprema-analisis-critico-fallo-desconcertante/

Table No. 1
Types of transactions covered by DL 211

Type of transaction	Comment
a) Merger, whatever the form of corporate organization of the merging entities or of the entity resulting from the merger.	
b) Acquisition, by one or more parties, directly or indirectly, of rights that allow them, individually or jointly, to decisively influence the management of another.	Decisive influence is a concept specific to competition law, with a different meaning from that used in securities law. It refers not only to active control, but also to examples of passive control, by means of relevant veto rights. In this regard, changes from individual to joint control and vice versa, as well as the change of passive joint controller, are also notifiable.
c) Association in any manner to form an independent economic operator that performs its functions on a permanent basis.	The independence referred to here does not only refer to legal independence (a legal entity distinct from the parties that set it up), but also to economic independence, i.e. the entity in question is capable of performing, independently of its founders, the functions normally performed by entities present in the market.
d) Acquisition, by one or more parties, of control over the assets of another party in any capacity whatsoever."[105]	

Transactions that do not imply a cessation of independence between two previously independent economic operators (for example, restructurings within the same business group), that do not have any effect in Chile, or that do not materialize through any of the four ways described above must not and cannot be notified to the FNE, nor can they be known by it within the framework of the system of preventive merger control.

7.4 Mandatory notification thresholds

A merger must be notified to the FNE before it takes place, when the double threshold provided for in Article 48 of DL 211, and set by the FNE itself, is met:[106]

(i) Joint threshold: The sum of the annual turnover in Chile of the acquiring firm and its economic group, as well as of the acquired firm and those over which it exercises control, corresponding to the financial year prior to the transaction, must be equal to or greater than 2,500,000 *Unidades de Fomento* (approximately US$102 million, in 2024); and,

[105] DL 211, art. 47.

[106] The last thresholds were set by the FNE through Exemption Decision No. 157 of 2019. Available at: https://www.fne.gob.cl/wp-content/uploads/2019/03/Resoluci%C3%B3n-exenta-157.pdf

(ii) Individual threshold: The annual turnover in Chile of at least two of the firms involved in the transaction for the tax year prior thereto must be equal to or greater than 450,000 *Unidades de Fomento* (approximately US$18 million in 2024).

7.5 Voluntary notification and *ex officio* investigation

The mergers that, while complying with the requirements set forth in Article 48 a) and b) of DL 211, do not meet the notification thresholds referred to therein, may also be voluntarily notified to the FNE, which must subject its analysis to the same procedure as the mandatory notifications.

On the other hand, the FNE may, within a period of one year from their completion, investigate *ex officio* those transactions that, while meeting the aforementioned requirements, do not meet the notification thresholds, although in this case such investigation will be subject to the general rules (investigation by the FNE, and decision by the TLDC) rather than the procedure provided for in the new Title IV. The FNE exercised this power in 2024.[107]

7.6 Pre-notification

The FNE allows and encourages the parties to contact the Merger Division before notifying a transaction in order to make pre-notification consultations. Through this mechanism, matters such as the following can be discussed:

(i) Whether or not the transaction can be legally defined as a merger, in accordance with article 47 of DL 211;

(ii) The existence of a real and serious intention of the Parties to enter into a merger;

(iii) The way used to conclude the merger, in relation to article 47 of DL 211;

(iv) The moment chosen to conclude a merger;

(v) The existence or non-existence of interrelated and/or successive transactions;

(vi) The geographic connection of the concentration with Chile;

(vii) The criteria for aggregating sales for the purpose of calculating the thresholds in relation to article 48 of DL 211;

(viii) The existence or non-existence of product and geographic overlaps;

(ix) Difficulties in defining relevant markets; and

(x) Scope and type of information that must be submitted in accordance with the Regulation on the Notification of a Merger Transaction.

[107] https://www.df.cl/empresas/industria/la-fne-pone-la-lupa-sobre-dos-operaciones-ya-cerradas-abre

7.7 Procedure and timing

Depending on whether there are horizontal or vertical overlaps, and the extent of such overlaps, or whether joint control relationships exist prior to the acquiring entity's acquisition of individual control, the transaction must be notified using the simplified or ordinary notification form.[108]

The ordinary notification procedure requires a greater amount of information than in the case of simplified procedure. As for timing, this will depend mainly on the risks identified by the FNE in its analysis, and the consequent review phases. These phases are as follows:

(i) Phase I: The FNE has 10 business days (i.e., other than Saturdays, Sundays or holidays) from the notification to determine whether the latter is complete. If it is, it must order the initiation of the investigation and notify the decision to the notifier. If it is not complete, it must inform the notifying parties of this fact within the 10-day period referred to above.

Once a new notification has been filed, the FNE will again have 10 business days to declare whether the filing is complete. Neither DL 211 nor any guidelines establish a maximum number of times that the FNE may declare the filing incomplete.

Once the investigation has been initiated, Phase 1 begins, which lasts for a maximum of 30 business days. During this phase, the investigation file is confidential, so that neither the parties nor any third parties have access to it.

During the investigation, the FNE may use all the powers conferred on it by article 39 of DL 211 for the investigation of conduct, with the exception of those that are exclusive to cases of collusion. Within thirty days from the date on which the investigation was initiated, the FNE must: **(i)** approve it purely and simply (without conditions), if it concludes that it is not liable to *"substantially lessen competition*"; **(ii)** approve it, subject to compliance with the commitments offered by the notifying party, if it is convinced that such measures will result in it not being likely to substantially lessen competition, or **(iii)** extend the investigation for up to ninety additional days ("Phase II"), when it considers that, if completed purely and simply or subject to the measures offered by the notifier, if any, it may substantially lessen competition. In Phase I, the procedure may be suspended once, by mutual agreement between the FNE and the parties, for up to thirty business days. It is also suspended for an additional 10 business days each time the notifying parties offer measures to mitigate the effect of the merger. According to FNE statistics, in 2023, the average duration of the procedures which ended in Phase I with unconditional approval was 23 business days, while the procedures completed in this same phase but made subject to conditions took, on average, 35 business days.[109]

Note that these deadlines do not take into account the time that elapses between the filing and the moment the FNE declares it complete, which, according to a CeCo study, takes an average of 32 calendar days.[110]

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[108] These situations are set forth in article 4 of the Merger Notification Regulation and are described in more detail in the FNE's "Merger Notification Form".

[109] See: FNE [official website], Mergers, Statistics, available at: https://www.fne.gob.cl/wp-content/uploads/2024/06/Estadisticas-Division-Fusiones-Ano-2023.pdf

[110] CentroCompetencia, *"¿Cuánto tardan las investigaciones de la Fiscalía Nacional Económica en materia de fusiones?* (2022)," Investigaciones CeCo (July 2022), available at: https://centrocompetencia.com/cuanto-tarda-fne-fusiones-2022/

(ii) Phase II: If the FNE decides to extend the investigation to Phase II, it must issue a decision to that effect and inform the authorities directly concerned and the economic operators that have an interest in the transaction. The latter, as well as any third party interested in the merger, may provide background information to the FNE within twenty days. According to FNE statistics, for 2023, the average length of cases which were finalized in Phase II was 142 business days.[111]

During Phase II the file is public, notwithstanding the fact that the National Prosecutor for Economic Affairs may order - *ex officio* or at the request of the interested party - the secrecy or confidentiality of certain parts of the file, in accordance with the terms of article 39 a).

7.8 Appeals

The decision prohibiting a transaction may be challenged by the notifier before the TDLC, within 10 days of its notification. This mechanism is called the Special Review Appeal "*Recurso de Revisión Especial*". The decision clearing a transaction cannot be challenged.

7.9 Failure to notify (gun jumping) and other conduct

As already mentioned, article 3 bis contemplates a series of situations of breach of the duty to notify in advance a merger that complies with the thresholds already described (gun jumping). This provision states that the measures of article 26 of DL 211 "as well as those preventive, corrective or prohibitive measures that may be necessary" may be applied to those who: (i) violate the duty to notify a merger; and (ii) contravene the duty not to conclude a merger notified to the FNE.

In addition, the same article penalizes those who (i) fail to comply with the measures with which a merger has been approved; (ii) conclude a merger contrary to the provisions of the decision or judgment that has prohibited such operation; and (iii) notify a merger by providing false information.

Additionally, in the case of non-compliance with the obligation to notify a merger, the TDLC may apply, in addition to the penalties already mentioned, a fine of up to twenty annual tax units for each day of delay counted from the completion of the merger.

7.10 Substantive test in each type of transaction

The standard of merger analysis enshrined in the rule is that of a "*substantial lessening of competition"*. This may occur as a result of unilateral risks and coordinated risks.

The significance of the former will depend on the conditions of entry, as well as the degree of concentration of the industry and participation of the parties in homogeneous markets, while in heterogeneous markets, the degree of competitive proximity between the parties will also be considered. On the other hand, the FNE, in its Guidelines for the Assessment of Horizontal Mergers, has pointed out that transactions affecting markets whose concentration indexes do not

[111] See: FNE [official website], Mergers, Statistics, available at: https://www.fne.gob.cl/wp-content/uploads/2024/06/Estadisticas-Division-Fusiones-Ano-2023.pdf

exceed a certain concentration threshold[112] usually have little potential to substantially reduce competition.[113]

7.11 Mitigation measures

Pursuant to article 53 of DL 211, the parties can always offer the FNE the measures they deem appropriate to mitigate the risks that the transaction may have for free competition. The FNE, for its part, must limit itself to accepting them as sufficient or rejecting them, without being authorized to impose commitments unilaterally.

On the other hand, the Guidelines on Remedies establishes that the measures must: **(i)** be effective (or "suitable") to prevent the concentration transaction modified through them from being capable of substantially lessening competition; **(ii)** be feasible to implement, enforce and monitor; and, **(iii)** be proportionate to the competition problem detected.

Regarding the effectiveness of the measures, the FNE has indicated a preference for structural measures, stating that:

> *"In general, the FNE will require that in the case of horizontal mergers, the measures proposed by the parties involve the divestiture of assets to a suitable buyer. This does not preclude the adoption of other remedies to supplement the divestiture measures".*[115]

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[112] This will occur when the concentration index is: a) lower than HHI 1500; b) higher than HHI 1500 and lower than HHI 2500, with a projected variation of HHI of less than 200; and c) higher than HHI 2500 (index expressive of a highly concentrated market), with a projected variation in the HHI of less than 100.

[113] With the following exceptions:

a) When one of the parties involved in the Transaction is a potential competitor, or a recent newcomer, with a small market share that does not necessarily reflect the share it could reasonably achieve in the near future;

b) When one of the parties involved in the Transaction is an important innovator or a particularly vigorous and independent competitor (a *maverick* economic operator) in a sense that is not reflected in its market shares;

c) When the merging parties are close competitors;

d) When there are relevant links between the respective market players, either structural (e.g. minority shareholdings) or contractual (e.g. cooperation, collaboration or supply agreements, financing agreements, etc.), which may reduce their independence and/or competitive autonomy;

e) When the market reflects a structure tending towards coordination, or there have been indications of coordination in the recent past;

f) When there are relevant objections from consumers in relation to the effects of the Transaction, or similar concerns about the competitive dynamics of the respective market or industry;

g) When, in similar operations in Chile or at a comparative level, the corresponding authority has concluded that risks to competition exist; and/or

h) When there is evidence or any other indication of possible competitive risks in connection with the Transaction. Idem, paragraph 36.

[115] FNE, Remedies Guidelines, para. 35.

7.12 Minority interests

Law No. 20,945 included a new article 4 bis, which establishes the obligation to inform the FNE no later than sixty days after its implementation "*the acquisition by a company or any entity of its business group of a direct or indirect participation in more than 10% of the capital of a competing company".*

Such reporting obligation only applies when the acquiring company, or its corporate group (as the case may be), and the company whose interest is acquired have, each separately, annual revenues from sales, services and other business activities that exceed one hundred thousand *unidades de fomento* in the last calendar year.

So far, there have been very few cases related to this new regulation, all of which have been concerned acquisitions of unreported minority shareholdings or where they have been reported after the deadline.[116]

8. Proceedings before the FNE

8.1 Applicable legislation

Articles 39 to 42 of DL 211 and Internal Instructions for the carrying on of FNE investigations.[117]

8.2 Commencement

Investigations may be initiated *ex officio* or following a complaint, either on the FNE's web page[118] or in writing to the FNE's offices.

8.3 Admissibility

All complaints are subject to an examination of their admissibility in order to determine whether or not it is appropriate to investigate, in accordance with articles 39, paragraphs 1[119] and 41[120] of DL 211.

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[116] See: *Centro Competencia*, "*Primeros requerimientos de la FNE por no notificar participación en competidores*", Actualidad (February 2020), available at https://centrocompetencia.com/primeros-requerimientos-de-la-fne-por-no-notificar-participacion-en-competidores/; and Decision providing the clearance of the TDLC of the Extrajudicial Settlement No. 15-18, between FNE and International Minstream Renewable Power Limited.

[117] Available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Instr._investigaciones_2013-1.pdf

[118] www.fne.gob.cl

[119] "*The National Prosecutor for Economic Affairs may conduct such investigations as he or she deems appropriate to verify violations of this law*".

[120] "*In order to determine whether to investigate or dismiss the complaints filed, the Prosecutor's Office may, within 60 days of receiving the complaint, request information from private individuals, as well as summon any person who may have knowledge of the facts alleged to give evidence."*

8.4 Time limits

According to the Instructions, "*the FNE's investigations must be carried out within a reasonable period of time*".[121]

Thus, the FNE's investigations are not subject to legal time limits, the only limit being the statute of limitations.

8.5 Discretionality

According to Article 39 of DL 211, the National Prosecutor for Economic Affairs may "*defend the interests entrusted to him or her in the manner he or she deems appropriate by law, according to his or her own* assessment".[122]

This rule, together with the need for an agreement between the President of the Republic and the Supreme Court regarding the need to remove the National Prosecutor for Economic Affairs, constitute the essential aspects of rules aimed at guaranteeing his or her independence and autonomy in the performance of his or her duties.

8.6 Results of the FNE's investigations

Investigations may be terminated in the following ways:

(i) Decision to close the investigation,[123] which may be made conditional upon the fulfillment of certain commitments offered by the investigated parties.

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[121] Internal Instructions for the Carrying Out of Investigations of the National Prosecutor's Office for Economic Affairs, No. 38.

[122] Emphasis added.

[123] The Prosecutor may order the investigation to be closed by issuing a reasoned decision, in particular in the following cases:

(i) When it has not been possible to prove the existence of facts, acts or agreements that constitute violations of DL 211, or the participation in them of one or more natural or legal persons;

(ii) When there is insufficient background information in the investigation to justify an action before the TDLC or the courts of justice; (iii) When there is insufficient information in the investigation to justify an action before the TDLC or the courts of justice;

(iii) When there is a previous declaration of the TDLC or the courts of justice regarding the matter;

(iv) When there has been a change in circumstances, so that anticompetitive effects have ceased to be observed. The above, without prejudice to the commitments of the relevant economic operators that may be considered as the background and basis for the decision;

(v) When there are reasons of efficiency and efficacy that make it inappropriate to persevere in the investigation, in view of its nature, the persons affected by it and the effects on the market(s);

(vi) When, in accordance with article 39 paragraph 1 of DL 211, according to its own appraisal, it does not seem proportional or justified in the general interest with respect to economic affairs or for the protection of free competition in the markets, to continue the investigation. Internal Instructions for the Carrying Out of Investigations of the FNE. Paragraph 88. Available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Instr._investigaciones_2013-1.pdf

(ii) The submission of actions, requests or reports to the TDLC.[124]

(iii) The conclusion of an out-of-court settlement, regulated in article 39 ñ) of DL 211. The FNE has the power to reach agreements with the investigated parties, which are binding once their approval by the TDLC has been executed.

9. Court proceedings

9.1 Pre-trial measures

(i) Interim measures. Article 25 of DL 211 states that the TDLC may order all interim measures that may be necessary to prevent the negative effects of the conduct of which it becomes aware and to protect the common interest.

The broad power of the TDLC in terms of interim measures means that applying for such measures is a good alternative in terms of preparing for trial and ensuring the outcome. However, applying for interim measures entails a procedural burden, since a public or private complaint must be filed within twenty business days of the date of notification of filing or any longer period set by the court. Otherwise, it will be null and void.

(ii) Preliminary evidentiary measures. Additionally, with respect to the general regulation of the ordinary procedure, the TDLC makes it possible to request the pre-trial production of evidence to be used in support of a future contentious action. Thus, the production of documents that are requested in an application to the TDLC allows parties to obtain the necessary evidence to comply with the requirements for the claim to be admissible.

In this regard, although similar to the Anglo-American legal concept of discovery, the pre-judicial evidentiary measure is limited in that it must comply with two general requirements: (i) the information is known to be in the possession of the party requested to produce it and (ii) it is relied on to support the action to be brought in court. Thus, it is a limited power that cannot be compared to the powers of seizure that the FNE has in the

[124] Among these possibilities are:

a) File proceedings with the TDLC, for violations of DL 211;

b) Initiate a consultation or promote a non-contentious matter before the TDLC, regarding facts, acts or existing or future agreements;

c) Request, by means of an application to the TDLC, the issuance of general instructions to be followed by private parties in order to protect free competition;

d) Request, by means of an application to the TDLC, the issuance of a report, in accordance with the provisions of article 31 of DL 211, insofar as they are entrusted to the TDLC by virtue of special legal provisions;

e) Request the TDLC to propose to the President of the Republic, through the corresponding Minister of State, the repeal or modification of legal or regulatory provisions that it deems contrary to free competition, or the enactment of those that are necessary to promote competition or regulate the exercise of certain economic activities that are provided under non-competitive conditions; or,

f) Submit reports or provide background information in those cases in which the law so provides or the TDLC so requests. Internal Instructions for the Carrying Out of Investigations of the FNE. Paragraph 87. Available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Instr._investigaciones_2013-1.pdf

investigative phase; instead, it is related to known background information that may support an action in court.

9.2 Complaint and defense

The contentious procedure begins with the filing of a complaint, which may be filed by a private party (*demanda*) or public, if it is filed by the FNE (*requerimiento*), through which a public or private entity is accused of having infringed the competition rules, and the TDLC is asked to: **(i)** declare the existence of an infringement; **(ii)** sanction the breach of the competition rules and, **(iii)** where appropriate, adopt measures aimed at preventing such acts from being committed in the future.

The subsidiaries or agencies of a foreign company that are set up in Chile may be notified of the public or private complaints that are made against them for violations of this law, the statutory limitations generally applicable to any such subsidiary or agency not being valid for these purposes.

Once the public or private complaint has been allowed to proceed, it is served so that those against whom it was filed may answer within fifteen business days or such longer term as the TDLC may indicate, which may not exceed thirty days.

9.3 Settlement

After the period for filing the defense has expired, the TDLC may summon the parties for a hearing in an attempt to reach a settlement. If the parties reach an agreement, the TDLC must approve it, provided that it does not violate the competition rules. The TDLC's decision may be appealed against by those who have been excluded from the settlement agreement.

9.4 Evidence phase

If the TDLC considers that it is not necessary to call the parties to a settlement hearing, or if this procedure fails, it must "open the taking of evidence phase" which lasts for a period of twenty business days.

Once this period has commenced, the parties have five business days to submit a list of witnesses.

Documentary evidence may be submitted up to 10 days before the date set for the hearing of the case.

9.5 Decision

The final decision must be "reasoned", i.e., it must "state the factual, legal and economic grounds on which it is based" (article 26). In addition, it must contain the grounds for any minority.

The decision is taken in forty-five days, counted from the time the case is "ready to be ruled on". However, this is the period that applies to the TDLC, and therefore failure to issue the decision within it does not give rise to any procedural sanction for the parties concerned.

9.6 Appeals

DL 211 establishes two types of appeals for decisions issued in contentious proceedings: **(i)** the appeal to the same administrative authority (*recurso de reposición*); and **(ii)** the appeal (*recurso de reclamación*). The former is where the party "aggrieved" by an interim decision of the TDLC

requests that this same administrative authority amend it in accordance with the law. By contrast, the latter type of appeal is only against the final decision pursuant to which one of the parties is found liable or not liable as regards the application of the measures established in article 26 of DL 211.[125]

This latter type of appeal, in terms of its scope, resembles what is typically referred to in comparative law simply as an appeal, as opposed to an appeal on a point of law or for annulment.[126]

As regards legal standing, the appeal may be filed by the National Prosecutor for Economic Affairs or any of the parties, within 10 business days of notification of the decision appealed against.

Although this appeal is filed with the TDLC, the court in charge of resolving it is the Supreme Court (specifically, the Third Chamber).

The filing of any appeal does not suspend the enforcement of the judgment, except as regards the payment of fines. However, at the request of one of the parties, the Supreme Court may suspend the effects of the judgment, in whole or in part.

9.7 Threshold of evidence

The TDLC must appreciate the evidence in accordance with the rules of sound judgment (*sana critica*). This requires the judge to be persuaded of the merits of the case not by applying any particular rule, but rather on the basis of a reasoned analysis expressly set forth in the judge's ruling, taking into account his or her experience, the laws of logic and scientifically established knowledge.

9.8 Burden of proof

The burden of proof of the existence of anticompetitive conduct and its effects is on the party filing the complaint, while the defendant must prove any claimed efficiencies or justifications associated with the conduct in question.

9.9 Confidentiality

The duty of confidentiality has the status of law. DL 211 regulates this obligation in general terms, establishing, in the first place, that in investigations conducted by the National Prosecutor for Economic Affairs, the latter may order that certain parts of the file be reserved or confidential, provided that: **(i)** their purpose is to protect the identity of those who have made statements; **(ii)** they contain formulae, strategies or trade secrets whose disclosure could significantly affect the competitive position of their owner; or **(iii)** it is necessary to safeguard the effectiveness of the FNE's investigations.[127]

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[125] If the TDLC refuses to grant this remedy, the aggrieved party may appeal directly to the Supreme Court on the facts, asking it to amend the erroneous decision issued by the TDLC, consequently allowing the appeal.

[126] For this entire section, see: CentroCompetencia, "Recursos Procesales", CeCo Glossary, available at https://centrocompetencia.com/recursos-procesales/.

[127] DL 211, art. 39 a).

Likewise, other FNE officers must keep confidential all information, data or background information that may be obtained in the course of their work, especially those obtained by virtue of certain powers, such as: **(i)** conducting investigations; **(ii)** requesting background information from authorities; **(iii)** requesting information from individuals; or **(iv)** receiving notifications of merger operations**.** Sanctions for infringement of this prohibition range from suspension of employment and disciplinary measures to fines and even imprisonment.[128]

Likewise, under Title IV of Merger Transactions, there are rules on publicity regarding both the file (in the second phase of investigation) and certain decisions issued by the FNE (in the first phase). In the event of containing confidential information that must be published, public versions of the same will be required in these proceedings, where sensitive information will be redacted.[129] On the other hand, in proceedings before the TDLC, the latter may order confidentiality with respect to third parties that are not parties to the action. In addition, it may even order confidentiality with respect to the other parties to those instruments that contain information whose disclosure could significantly affect the competitive position of their holder.[130]

9.10 Other jurisdictions

In principle, the only judicial authority that intervenes in competition matters, other than the TDLC and the Supreme Court, is the judge of the Court of Appeals of Santiago in charge of authorizing the *Carabineros* or the Investigative Police, under the direction of the official of the National Prosecutor's Office for Economic Affairs that indicates the request to proceed with the intrusive measures referred to in section 3 c).

Outside the scope of the TDLC and the Supreme Court, certain antitrust cases have been referred to other courts such as the Constitutional Court. [131]

9.11 Statistics

As of 2023, contentious proceedings lasted on average 763 days (2.09 years) before the TDLC and 428 days (1.17 years) before the Supreme Court. These times have been increasing in recent years in parallel with the growing number of lawsuits and consultations (see next section) in the field of antitrust.[132]

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[128] DL 211, art. 42.

[129] DL 211, arts. 51 et seq.

[130] DL 211, art. 22.

[131] See: CentroCompetencia, "*El Tribunal Constitucional reafirma la facultad del TDLC para dictar instrucciones*", Actualidad (May 2023), available at https://centrocompetencia.com/tc-reafirma-la-facultad-del-tdlc-para-dictar-instrucciones/.

[132] See: CentroCompetencia, *"¿Cuánto tarda el Tribunal de Defensa de la Libre Competencia y la Corte Suprema en resolver asuntos de libre competencia (2022)",* Investigaciones CeCo (July 2022), available at https://centrocompetencia.com/wp-content/uploads/2022/07/CeCo-UAI-2022-Cuanto-tarda-el-TDLC-y-la-CS-en-Libre-Competencia.pdf

10. Non-contentious proceedings before the TDLC

As mentioned above, the TDLC may exercise administrative (also called "non-contentious") functions through different procedures regulated by DL 211:

10.1 Consultation procedure

Under this procedure the TDLC may:

> *"Hear, at the request of those who are parties or have a legitimate interest in the facts, acts or contracts existing or to be entered into other than the mergers referred to in Title IV, or of the National Prosecutor for Economic Affairs, matters of a non-contentious nature that may infringe the provisions of this law, for which purpose it may set the conditions to be complied with in relation to such facts, acts or agreements."*[133]

By virtue of this procedure, the consulting party asks the TDLC to rule on whether certain facts, acts or agreements are in accordance with the competition rules and, if not, to establish the necessary conditions so that they can be carried out without harming free competition.

The facts, acts or agreements forming the subject matter of the consultation may concern the consulting party itself or a third party. In the latter case, doubts always arise (and the case law is not settled) regarding the dividing line between the Consultation and Contentious Proceedings.

10.2 General instructions

Under this procedure the TDLC may:

> *"Issue general instructions in accordance with the law, which must be considered by individuals in the acts or contracts that they execute or enter into and that are related to free competition or that could threaten it".*[134]

It is a regulated, public and participatory procedure, which concludes with a reasoned decision, through which the TDLC issues rules of general application to individuals in acts or contracts (regulatory power), to the extent that they are related to free competition or may threaten it.

This power is limited to the scope reserved by the Constitution to the law and may not contravene rules governing the exercise of the regulatory power of the President of the Republic, as well as technical matters of sectoral competence.

This power has been exercised very restrictively.[135]

10.3 Legislative Recommendations

Through this procedure the TDLC may:

> *"Propose to the President of the Republic, through the appropriate Minister of State, the modification or repeal of legislative and regulatory provisions that it deems contrary to free*

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[133] DL 211, art. 18, No. 2.

[134] DL 211, art. 18, No. 3.

[135] See *above:* Regulatory framework

competition, as well as the enactment of legislative or regulatory provisions when necessary to promote competition or regulate the performance of certain economic activities that are provided under anti-competitive conditions."[136]

In this case, the purpose of this non-adversarial procedure is to decide whether it is appropriate to propose to the executive branch of government the repeal, amendment or creation of legislation in order to promote free competition. As its name indicates, this procedure only results in a non-binding recommendation being made to the executive branch.

11. Damages derived from anticompetitive unlawful acts

According to article 30 of DL 211:

"The action for damages arising from the issuance by the Tribunal for the Defense of Free Competition of an enforceable final decision will be brought before the same Tribunal and processed in accordance with the summary procedure.

The TDLC must base its decision on the facts established in its judgment that serve as background to the claim, assessing the evidence in accordance with the principle of sound judgment (*sana crítica*).

This rule establishes in Chile a "*follow-on action"* type of damage compensation system, i.e., it requires the existence of a prior judgment in which the defendant has been found liable in a competent court (which declares the existence of the unlawful conduct).[137]

Regarding legal standing to bring the action for damages, the following distinctions must be made:

(i) Damage to consumers

According to Article 51 of Law 19,496 (on consumer rights protection), when, as a result of anticompetitive conduct, the collective or diffuse interest of consumers is affected, the action may be brought by:

(a) The National Consumer Service;

(b) A Consumer Association that has existed for at least 6 months; and

(c) A group of 50 or more consumers affected by the same interest.

In these cases, the action for damages will be subject to the rules of the special procedure for the protection of the collective or diffuse interest of consumers, regulated by Law 19,496, in particular article 51.

(ii) Damage to firms

[136] DL 211, art. 18(4).

[137] The prior decision establishing liability must be "enforceable", i.e., there must be no appeals pending against it.

The action for damages must be filed by the firms directly affected by the conduct accredited in an infringement proceeding, proving the causal link between the sanctioned conduct and the alleged damage. In these cases, the action will be subject to the rules of the summary procedure, laid down in the Civil Procedure Code (article 30 of DL 211).

Colombia

Colombia[1]

José Miguel de la Calle

Abbreviations

EPS	Health Service Entities
HHI	Herfindahl and Hirschman Index
PBC	Collaboration Benefits Program
SIC	Superintendency of Industry and Commerce
SMLMV	Statutory Minimum Monthly Wage

1. General background

1.1 Legislative framework

Antitrust law in Colombia is governed by the following sources of law:

(i) Political Constitution of Colombia: Article 333[2] of the Constitution enshrines a series of principles regarding antitrust law: (i) economic activity and private initiative are unrestricted provided that they come within the limits of the common good; (ii) free economic competition is a right of all Colombians that implies responsibilities; (iii) businesses fulfill a social function; and (iv) the State will prevent any restriction of free competition and any abuse by individuals or firms of their dominant position in the market.

(ii) Rules with the status of primary law:

(a) Law 155 of 1959, "*Pursuant to which certain provisions on restrictive business practices are enacted.*" This law contains the general prohibition on competition and prohibits in an indeterminate manner "*all kinds of practices, procedures or systems tending to limit free competition*". Likewise, it included the first legal provisions in Colombia with respect to mergers and unfair competition.

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[1] Especiales agradecimientos al equipo de CeCo, en particular al Dr. Carlos Andrés Uribe Piedrahita y a Sebastián Cañas Oliger por sus comentarios y valiosas contribuciones en la elaboración de este texto.

[2] Article 333 of the Political Constitution of Colombia establishes the following: "*Economic activity and private initiative are unrestricted, provided that they come within the limits of the common good. For their exercise, no one may demand prior permits or requirements, unless this is authorized by law.*

Free competition is a universal right that entails responsibilities.

The firm, as the basis for development, has a social function that implies obligations. The State will strengthen cooperative organizations and stimulate business development.

The State, by law, will prevent the obstruction or restriction of economic freedom and will prevent or control any abuse by individuals or companies of their dominant position in the national market.

The law will restrict the scope of economic freedom when so required by the social interest, the environment and the nation's cultural heritage."

(b) Decree 2,153 of 1992: This Decree initially set up the Colombian antitrust authority, the Superintendency of Industry and Commerce ("**SIC**"). It also established prohibitions on acts contrary to free competition, agreements contrary to free competition and abuses of a dominant position. Although it is a Decree, it has the status of primary law.

(c) Law 256 of 1996, "*Pursuant to which rules on unfair competition are issued*". This law develops the unfair competition regime and includes the general prohibition on unfair competition.

(d) Law 1,340 of 2009, "*Pursuant to which regulations are issued regarding the protection of competition*". This legislation updated the competition rules. Thus, it modified the general sanctions regime, developed the merger control rules, introduced benefits for collaboration and strengthened the SIC's powers.

(iii) Other relevant legislation:

(a) Decree 4,886 of 2011, amended by Decree 092 of 2022, "*Pursuant to which the structure of the Superintendency of Industry and Commerce is modified, the functions of its agencies are determined and other provisions are issued*". This Decree amends Decree 2,153 of 1992 and defines the general functions of the SIC, its Superintendent (Head) and its different Units. It has the legal status of a Decree.

(b) Decree 663 of 1993, "*Pursuant to which the Organic Statute of the Financial System is updated and its title and numbering is modified*". This Decree, which has the force of law, and its amending regulations, regulate concentrations involving financial institutions or insurance companies supervised under articles 55 *et seq*.

(c) Aeronautical Regulations of Colombia (RAC 5), adopted pursuant to article 1 of Decision No. 01174 of June 21, 2021. Paragraph a) of numeral 5,160 of RAC 5 establishes the provisions applicable to mergers between operators of commercial aviation services.

(d) Special regimes: Some specific sectors have rules that limit free competition that differ from those already mentioned. First, in the health sector, Article 15 of Law 1,122 of 2007 governs mergers between Health Service Entities ("**EPS**"), while in the energy sector mergers are governed by article 74 of Law 143 of 1994.

(e) Andean Community: Decision 608 of 2005 set up the System for the Protection and Promotion of Free Competition in the Andean Community. In the context of constant cross-border transactions, it is an important rule.

(iv) Internal regulations issued by the SIC: The SIC, in the implementation of its powers, issues through the Single Circular[3] the administrative acts of a general nature that include all the regulations and general instructions. Its purpose is to make it easier for supervised parties and officials to consult the acts issued by the authority and the rules applicable to specific situations that fall within its scope of competence. In particular, Title VII and

[3] The Single Circular of the SIC is available at https://www.sic.gov.co/circular-unica

Annexes 9.1 and 9.2 of the Single Circular deal with matters related to free competition, mergers and unfair competition by public administrations.[4]

(v) Decisional practice: Under article 24 of Law 1,340 of 2009, the SIC has the burden of compiling and updating periodically the unappealable decisions adopted in relation to the competition rules. It also established the criterion of the probable doctrine (i.e. the doctrine which is likely to be applied by the courts) when there are three uniform unappealable decisions on the same matter. In Decision C-537 of 2010, the Constitutional Court specified that the probable doctrine criterion regarding the SIC's decisions only applies to the entity in question but not to judges who must hear cases related to the matter, whether before the SIC or other courts.

1.2 Institutional framework

The national competition authority in Colombia is the SIC, headed by the Superintendent of Industry and Commerce. It is an administrative entity and is attached to the Ministry of Commerce, Industry and Tourism, part of the executive branch of government. Within the SIC there are different units; one of these is the Antitrust Unit, which is responsible for handling complaints, conducting preliminary inquiries and, if found to have merit, going ahead with investigations concerning potential restrictions of free competition.

Once the investigation phase has been completed, the Unit produces a Reasoned Report in which it recommends that the Superintendent of Industry and Commerce either to close the investigation or sanction the investigated conduct. Based on the Reasoned Report, the evidence in the file and the opinion of the Advisory Committee, the Superintendent of Industry and Commerce reaches a decision by means of a particular and reasoned administrative act, against which an appeal to the same administrative authority may be filed. Once the administrative stage has been exhausted, the sanctioned parties may file an action for judicial review of administrative acts which imposed sanctions through different means, such as simple annulment or annulment and the reestablishment of rights.

For its part, the SIC's Judicial Matters Unit exercises judicial functions in cases related to consumer protection, unfair competition and industrial property. Thus, this Unit is in charge of giving judicial rulings on the rights of private individuals or private entities, while the Antitrust Unit adopts decisions applying administrative functions in favor of the protection of the collective rights of free competition. The rulings of the Judicial Matters Unit may be appealed to other national courts.

In addition, pursuant to Law 1,340 of 2009, merger control in specific sectors is entrusted to entities other than the SIC. In this regard, the Special Administrative Unit for Civil Aeronautics may evaluate, approve or reject commercial transactions between aircraft operators. Likewise, the Financial Superintendency of Colombia (the administrative entity that inspects, supervises and controls the financial sector), is responsible for ruling on the viability of corporate mergers or restructurings which exclusively involve entities for which it has responsibility.

[4] See Title VII of the SIC's Single Circular available at https://www.sic.gov.co/sites/default/files/normatividad/042021/TITULO%20VII%20Res27512021%20%281%29.pdf Annex 9.1 of the Pre-evaluation Guidelines for Mergers available at www.sic.gov.co/sites/default/files/normatividad/022021/Anexo_No_9.1.pdf and Annex 9.2 , Background Study Guidelines for Mergers available at https://www.sic.gov.co/sites/default/files/normatividad/022021/Anexo_No_9.2.pdf

1.3 Evolution of the system

Law 155 of 1959 was the first law enacted for the protection of free competition in Colombia and it continues to be partially in force today. Article 1 establishes the "general prohibition" clause of the competition rules. This article includes all practices, procedures or systems that restrict free competition. It is an independent prohibition within the competition rules and is intended to encompass all conduct that potentially restricts competition but which was not expressly prohibited by the rules.

Decree 2,153 of 1992, issued by the Government in implementation of Transitional Article 20 of the Political Constitution of 1991, modified and modernized the administrative structure of the SIC; in addition, it established a series of prohibitions on agreements, acts and abuse of a dominant position. Currently, the structure of the SIC, including the functions related to free competition, is regulated by Decree 4,886 of 2011, as amended by Decree 092 of 2022.

Law 256 of 1996 regulates acts of unfair competition, establishing one (1) general prohibition and twelve (12) specific prohibitions, which include customer poaching, acts causing disorganization, confusion, deception, discrediting other firms, comparison, imitation, exploitation of the reputation of others, violation of secrets, inducement to engage in breach of contract, violation of rules and unfair exclusivity agreements.

A fundamental reform of the free competition regime in Colombia was introduced by Law 1340 of 2009. This statute strengthened the functions of the SIC, especially by establishing this entity as the National Authority for the Protection of Competition and increasing its capacity to impose sanctions. In addition, it regulated issues related to mergers, enshrined the current regime on the collaboration benefit plan and modified the system of offering guarantees.

Subsequent to Law 1,340 of 2009, as a mechanism for providing greater deterrent capacity to the competition regime, Law 1,474 of 2011, known as the "Anti-Corruption Statute", was enacted, which added Article 410A of the Colombian Criminal Code, which criminalizes collusion in public tenders ("bid rigging").

1.4 Definition of antitrust acts and scope of action

The general scope of the Colombian competition rules is that "*relating to restrictive business practices, i.e. agreements, acts and abuses of a dominant position, and the rules on mergers*".[5] More specifically, the prohibitions are described below:

(i) General prohibition

As mentioned, article 1 of Law 155 of 1959 contains a general prohibition on anti-competitive conduct. This provision prohibits *"(...) in general, all kinds of practices, procedures or systems tending to limit free competition and to maintain or determine inequitable prices."* In this regard, this article does not lay down any definitions as such; instead, it covers all conduct that may have this result in the market.

[5] Art. 2 of Law 1340 of 2009, which adds article 46 of Decree 2,153 of 1992.

(ii) Abuse of a dominant position

This is defined in Article 50 of Decree 2,153, and comprises six (6) types of prohibited conduct, mainly types of exclusionary conduct.

(iii) Anti-competitive agreements

Article 47 of Decree 2,153 sets forth ten (10) different types of agreements that restrict competition. Article 45 of the same Decree defines agreements as "any contract, agreement, concertation, pact or consciously parallel practice between two or more companies", pointing out the range of different forms that may come within agreements restricting competition against which legal action may be taken.

(iv) Infringement of the duty to notify a merger (*gun jumping*):

Article 13 of Law 1,340 of 2009 regulates the order of reversal of a merger "*when this was not notified or was carried out before the expiration of the term that the Superintendency of Industry and Commerce had to declare, if it is determined that the operation thus carried out entailed an undue restriction on free competition, or when the operation had been objected to or when the conditions under which it was authorized are not complied with*". In addition to the above, article 25 establishes fines of up to 100,000 SMLMV (the Statutory Minimum Monthly Wage) for "*failure to comply with the obligations to report a concentration or the obligations related to its approval subject to conditions*."

(v) Unfair Competition:

Law 256 of 1996, on unfair competition, establishes that such acts must be carried out in the market and have a competitive purpose in order to come within the scope of the statute. Law 256 defines competitive purposes as the ability of the conduct in question to be objectively capable of maintaining or increasing the market share. Likewise, unfair competition is defined as "*any act or fact that is carried out in the market for competitive purposes, when it is contrary to sound commercial customs, to the principle of good commercial faith.*"[6]

Notwithstanding the foregoing, Article 6 of Law 1,340 of 2009 also contemplates the possibility of the SIC imposing administrative sanctions for violations of the unfair competition regulations.

(vi) Interlocking:

This concept is regulated in three different pieces of legislation in Colombia. The first is Law 155 of 1959, which expressly includes it through a *per se* prohibition, as regards senior executives who sit on the boards of two companies "*which have as their purpose the production, supply, distribution or consumption of the same goods or the provision of the same services, provided that such companies, taken individually or jointly, have assets worth twenty million pesos.*"[7] The second is Decree 2,153, article 46 of which prohibits all conduct that affects free competition in the markets. Finally, it could also be

[6] Article 7 of Law 256 of 1992.

[7] Article 5 of Law 155 of 1959.

understood as forming part of the mandatory merger control regime, regarding the concentration of management positions in companies.

1.5 Defendants in antitrust actions

Article 25 of Law 1,340 highlights the fact that sanctions can be imposed "*for each infringement and on each infringer (...)*". It is emphasized that the article does not make distinctions between natural or legal persons; thus, the rule does not require a defined subject to be a defendant. Likewise, Article 2 of Law 1,340 indicates that the provision applies with respect to anyone who operates an economic activity, or affects or may affect the operation thereof, and in relation to conduct that has or may have total or partial effects in the national markets. In addition, Article 26 of the same statute empowers the SIC to impose fines of up to 2,000 SMLMV on any person who collaborates, facilitates, authorizes, executes or tolerates conduct that infringe the competition rules.

As regards unfair competition, article 22 of Law 256 of 1996 provides that unfair competition proceedings may be brought "*against any person whose conduct has contributed to the performance of the act of unfair competition*" where that conduct has been carried out in the market and for competitive purposes. Likewise, the same article clarifies that when the unfair act has been carried out by workers in the exercise of their functions and contractual duties, proceedings must be brought against their employer.

1.6 Extraterritoriality

Article 2 of Law 1,340 of 2009 provides that the scope of the competition rules covers all conduct capable of having an effect on the Colombian market. In addition, with respect to the unfair competition regime, article 4 of Law 256 of 1996 establishes that the law shall apply to all acts of unfair competition whose main effects are felt in the Colombian market. Therefore, this regime also covers conduct engaged in outside Colombia territory, if its effects are felt inside the country.

2. General sanctions regime

Article 2 of Decree 2,153 empowers the SIC to *"impose the relevant sanctions for violation of the rules on restrictive trade practices and the fostering of competition"*. Regarding the amount of the fines, these are classified according to the nature of the participation in the unlawful behavior. Article 25 of Law 1,340 of 2009 empowers the SIC to fine any economic operator that violates the competition rules up to 100,000 SMLMV or up to 150% of the profit attained through the unlawful conduct, whichever is higher. For the purposes of setting the fine, the following criteria will be taken into account: (i) the impact that the conduct has on the market, (ii) the size of the market affected, (iii) the benefit obtained by the infringer through the conduct, (iv) the degree of participation of the party involved, (v) the procedural conduct of those investigated, (vi) the market share of the infringer, as well as the portion of its assets and/or sales involved in the infringement, and (vii) the net worth of the infringer.

As indicated above, the competition rules also empower the SIC to impose fines of up to 2,000 SMLMV on any person who collaborates, facilitates, authorizes, executes or tolerates conduct in violation of such rules. For the purposes of the fine, the SIC will take into account the following criteria: (i) the persistence in the infringing conduct, (ii) the impact that the conduct has on the market, (iii) the repetition of the prohibited conduct, (iv) the procedural conduct of the person under investigation, and (v) the degree of participation of the person involved.

In cases of unfair competition concerning the acts of public administrations, which come within the responsibility of the Antitrust Unit, the SIC is empowered to impose the same sanctions described above for economic operators and facilitators.

For some types of conduct, such as bid rigging, special sanctions apply. These will be examined in relation to each specific concept.

3. Draft legislation

As at the date of writing this document, there is currently no draft antitrust legislation in Colombia.

4. Institutional structure

The main characteristics of the SIC's organizational structure, which can be found in Decree 4886 of 2011, are as follows:

(i) Composition: the Superintendent of Industry and Commerce is the head of the SIC and the person who runs it. The Superintendent exercises the jurisdictional functions assigned to him or her, through Units (these are internal working groups appointed by the Superintendent).

(ii) Appointment: The President of the Republic appoints the Superintendent, since the SIC is attached to the Ministry of Commerce, Industry and Tourism and is part of the Executive Branch.

(iii) Period: 4 years

(iv) Removal:

  (a) The expiry of the legal term of his or her appointment;

  (b) Resignation accepted by the President of the Republic;

  (c) Withdrawal from service: The President may declare the Superintendent to no longer hold office and remove him or her, since the position is one to which a person may be freely appointed and removed.

(v) Number of professionals: As of March 2023, there were 581 career civil servants and 46 holding positions not as civil servants i.e. to which they were appointed and can be removed, giving a total of 627 permanent staff.

(vi) Internal units: The Superintendent is the head of the agency. However, the SIC is composed of different units and each unit focuses on a different area and is headed by a Deputy Superintendent. There are the following divisions:

  (a) Office of the Superintendent.

  (b) Office of the Deputy Superintendent for the Protection of Competition.

  (c) Office of the Deputy Superintendent for Industrial Property.

(d) Office of the Deputy Superintendent for Consumer Protection.

(e) Office of the Deputy Superintendent for the Protection of Personal Data.

(f) Office of the Deputy Superintendent for Judicial Matters.

(g) Office of the Deputy Superintendent for Legal Measurement.

(h) General Secretariat.

(i) Advisory and Coordination Bodies.

The Deputy Superintendent for the Protection of Competition is in charge of the Competition Unit and is the person in charge of the investigations related to antitrust practices.

The Antitrust Unit is made up of different working groups, including the following: the Mergers Group, the Group for the Protection and Promotion of Free Competition, the Restrictive Practices Group, the Advocacy Group, the Elite Anti-Collusion Group and the Compliance Department. Each working group has a different focus, as its name indicates.

(vii) Budget: The SIC had a budget for 2023 of $283,152,290,816 COP[8] (approximately 64 million dollars).

5. Horizontal agreements

5.1 Applicable Law

Article 47 of Decree 2,153 of 1992 refers to agreements restricting competition in general, without differentiating between vertical or horizontal agreements.

Thus, under Article 47 of Decree 2,153 of 1992 the following agreements are considered to be anti-competitive:

(i) Agreements for direct or indirect price fixing;

(ii) Agreements on discriminatory sales and marketing conditions;

(iii) Market-sharing agreements;

(iv) Agreements for the allocation of production or supply quotas;

(v) Agreements for the allocation, distribution or limitation of sources of supply of inputs and outputs;

(vi) Agreements for the limitation of technical developments;

[8] https://www.sic.gov.co/presupuestos-para-la-vigencia

(vii) Tied sales agreements: making the supply of a product subject to the acceptance of additional obligations that are not related to the transaction in question;

(viii) Agreements to affect the production levels of a good or service;

(ix) Collusive agreements in public procurement processes (bid rigging);

(x) Agreements to obstruct third parties' access to the market or to marketing channels.

5.2 Statute of limitations

Under Article 27 of Law 1,340 of 2009, the limitation period as regards the SIC's ability to sanction anti-competitive practices is 5 years from the last event constituting the infringement in question.

5.3 Specific powers of the SIC

The collection of the necessary items of evidence to prove a breach of the competition rules is subject to the principle of freedom of evidence. The SIC is empowered to gather all kinds of evidence that may help prove the commission of the anticompetitive conduct in question. Among the authorized evidentiary means are the following:

(i) Dawn raids: the gathering of all kinds of evidence at the headquarters of firms operating in the market. These inspections are normally carried out by surprise, without prior notification.

(ii) Gathering of information (physical and digital): "natural and legal persons may be requested to provide data, reports, books and commercial documents required for the proper exercise of their functions" (article 1(63) of Decree 4,886 of 2011).

(iii) Witness statements: the SIC may question any person who is of interest to it to determine the existence of an anti-competitive practice.

5.4 Leniency Program

The Leniency Program was introduced in Colombia through Article 14 of Law 1,340 of 2009, which stated as follows:

> *"The Superintendency of Industry and Commerce may grant benefits to natural or legal persons that have participated in conduct that violates the competition rules, if they inform the competition authority about the existence of such conduct and/or collaborate with the delivery of information and evidence, including the identification of the other participants."*

This rule was implemented by Decree 2,896 of 2010 and subsequently amended by Decree 1,523 of 2015, which lays down two different types of requirements for leniency applicants to comply with:

(i) The necessary requirements to access the program. The application for access to the program requires: (i) an acknowledgement of the applicant's participation in the anticompetitive agreement; and (ii) at least brief information on the existence of the agreement, how it works, the product(s) involved and the participants.

(ii) The requirements that must be satisfied before a firm can enter into a Leniency Agreement: (i) acknowledgement of participation in the anticompetitive agreement; (ii) providing useful information or evidence about the agreement and its operation; (iii) timely compliance with the requirements or requests made by the SIC in the course of the negotiation of the Agreement; and (iv) termination of its participation in the anticompetitive agreement as set by the SIC.

At any time before signing the Agreement, the applicant may withdraw its application. Likewise, if the application does not meet the requirements to be admitted to the Leniency Program, the evidence produced may be withdrawn within ten (10) business days.

5.5 Particular sanctions

Article 27 of Law 1,474 of 2011, known as the Anti-Corruption Statute, established the following sanction only applicable to the illicit act of bid rigging in public tenders: "*Whoever in a public tender process, public auction, abbreviated selection or contest agrees with another in order to unlawfully alter the contractual procedure*" shall be disqualified from contracting with state entities for eight (8) years.

5.6 Criminal sanctions

As mentioned, Law 1,474 of 2011 made collusion in public tenders a criminal offense. This Law added Article 410A to the Colombian Criminal Code and provided that *"anyone who, in a public tender, abbreviated selection procedure or official competition ("concurso") reaches an agreement with another in order to unlawfully alter the contractual procedure, shall be imprisoned for a period of between six (6) and twelve (12) years".* So far, only one judgment regarding this offense has been handed down.

5.7 Trends

In recent years, the Competition Authority has stood out for initiating inquiries and investigations into alleged anti-competitive practices, targeting both private and public entities across various sectors of the economy. In this context, the Authority has frequently relied on the general prohibition of anti-competitive practices established in Article 1 of Law 1.959 as the basis for its actions.

6. Abuse of a dominant position and other prohibitions

6.1 Abuse of a dominant position

6.1.1 Applicable regulations

The Colombian Constitution provides in general terms that the State's functions include "*preventing or controlling any abuse by persons or companies of their dominant position in the national market.*"

This mandate was later developed by Decree 2,153 of 1992, article 50 of which lists, in an exhaustive manner, six (6) types of conduct that may be considered to be abuses of a dominant position.

It should be noted that if a given type of conduct does not come within the assumptions listed in Article 50 of Decree 2,153, the SIC may still sanction this practice by applying the general prohibition contained in Article 1 of Law 155 of 1959.

6.1.2 Dominant position

Article 50 of Decree 2,153 defines a dominant position as "*the possibility of determining, directly or indirectly, the conditions of a market*."

In this regard, the SIC has stated that an economic operator will have a dominant position in a market:

> "*When it has the capacity to significantly and unilaterally modify any relevant variable of the market, that is, if it has sufficient market power to manipulate the competition variables and to behave independently in relation to its competitors and where such decision is intended to be permanent and the market conditions are modified during a significant period, in which both the reaction of its current or future competitors, as well as the decisions of consumers, are insufficient to dissuade the operator from engaging in the conduct in question."*[9]

6.1.3 Abusive behavior

Article 50 of Decree 2,153 lists the following six (6) types of conduct as constituting abuse of a dominant position:

(i) Predatory pricing that seeks to eliminate one or more competitors or to prevent market entry or expansion of competitors.

(ii) The application of discriminatory conditions for equivalent operations, which place a consumer or supplier at a disadvantage compared to another consumer or supplier with similar conditions.

(iii) Any conduct the object or effect of which is to make the supply of a product subject to the acceptance of additional obligations, which by their nature did not constitute the object of the business (tied sales).

(iv) Sale to a buyer under different conditions than those offered to another buyer when this is done with the intention of diminishing or eliminating competition in the market.

(v) Selling or rendering services in a part of Colombian territory at a price different from that offered in another part of said territory, when the intention or effect of the practice is to reduce or eliminate competition in that part of the country and the price does not reflect the cost structure of the transaction.

(vi) Failure to comply with the agreed date for the payment of a monetary obligation when the supplier is an SME or MSME.

It is emphasized that the different types of abuse of a dominant position set forth in article 50 of Decree 2,153 of 1993 must strictly comply with the factual assumptions indicated in the provision

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[9] Colombia. Superintendency of Industry and Commerce. Reasoned report submitted in Case No. 13-54936 "Pursuant to which it is recommended to close the investigation". Case *Angelcom*.

in order for the abuse to exist and the competition rules to have been infringed. However, according to the provisions of article 1 of Law 155 of 1959, *"all kinds of practices, procedures or systems tending to limit free competition and to maintain or determine inequitable prices"* are prohibited. Given this, those abuses of a dominant position that do not come within the factual assumptions of article 50 of Decree 2,153 of 1993 may come within article 1 of Law 155 of 1959, independently of whether the conduct is exclusionary or exploitative.

6.1.4 Trends

Proceedings for abuse of a dominant position are usually initiated by complaints from a third party, usually by competitors who suffer the abusive conduct of a dominant operator.

6.2 Vertical restraints

6.2.1 Applicable law

As mentioned above, article 47 of Decree 2,153 of 1992 sets forth the conduct constituting anticompetitive agreements. This provision also cover vertical agreements.

The SIC has specified that vertical restraints can generate "*anticompetitive, neutral, or even procompetitive* effects*, so that the net effect on competition and efficiency is not obvious in principle*".[10] Moreover, as vertical agreements are not anticompetitive *per se*, their investigation is more complex.

6.2.2 Trends

As already mentioned, the SIC recognized that vertical agreements are not anti-competitive *per se*. However, a significant number of sanctions are imposed by the SIC, particularly with regard to price fixing in cases where the supplier has sufficient leverage to demand specific prices from the seller. In these scenarios, where the prices set by the seller do not respond to market dynamics but to the demands of the supplier, the SIC has imposed sanctions.

6.3 Other Infringements

6.3.1 Antitrust acts

Article 45(2) of Decree 2,153 defines “act” as "*any behavior of those who perform an economic activity"*. However, it is important to emphasize that this provision makes it clear that the only thing that must be shown is that the party engaging in the anticompetitive acts performs an economic activity. Thus, it is not relevant whether the person performing the economic activity has the form of a commercial enterprise as such; it could also be a business or professional association, a trade association, a natural person or even a public sector entity.

In this regard, according to article 46 of Decree 2,153 of 1992, introduced by article 2 of Law 1,340 of 2009, all "acts" that affect free competition in the market are prohibited. In particular, Article 48 lists some of the acts considered restrictive, such as: (i) infringement of the rules on advertising contained in the consumer protection statute; (ii) influencing a company to increase

[10] Colombia. Superintendency of Industry and Commerce. Decision 16562 (April 14, 2014). "Pursuant to which sanctions are imposed for violations of the competition rules and orders and instructions are issued".

or maintain its prices; and (iii) refusal to sell or discrimination against a company as "retaliation" for its pricing policy.

6.3.2 Unfair competition

(i) Applicable regulations

The rules relating to unfair competition are contained in Law 256 of 1996. The purpose of this law is to "guarantee free and fair economic competition, by prohibiting acts and conducts amounting to unfair competition, for the benefit of all those who participate in the market".

(ii) Classification (types of behavior)[11]

(a) General prohibition: prohibits all acts of unfair competition, i.e., all acts or facts carried out in the market for competitive purposes, when contrary to sound commercial practice and the principle of good commercial faith.

(b) Customer poaching: Any conduct that has the purpose or effect of poaching customers from the activity, commercial services or establishments of others is considered unfair, provided that it is contrary to sound commercial practice or honest practices in industrial or commercial matters.

(c) Disorganization: Any conduct that has the purpose or effect of causing the internal disorganization of a business, its services or the establishment of others is considered disloyal.

(d) Confusion: Any conduct whose purpose or effect is to create confusion with the activity, commercial services or establishment of others is considered unfair.

(e) Deception: It is considered unfair to deceive the public about the whole activity, commercial services or establishment of others.

(f) Discrediting another firm: The use or dissemination of incorrect or false information or statements, the omission of true ones and any other type of practice that has the purpose or effect of discrediting the activity, services, establishment or commercial relations of a third party, unless they are accurate, true and pertinent, is considered unfair.

(g) Comparison: It is considered unfair to publicly compare one's own or another's activity, commercial services or establishment with those of a third party, when such comparison uses incorrect or false information or statements or omits true ones. Any comparison that refers to matters that are neither analogous nor verifiable is considered unfair.

(h) Imitation: It is considered unfair to imitate exactly and meticulously the services of a third party when this generates confusion about the business origin of the service or takes undue advantage of the reputation of others.

[11] Conduct defined in articles 7-19 of Law 256 of 1996.

(i) Exploitation of the reputation of others: It is considered unfair to take advantage of the advantages of the industrial, commercial or professional reputation acquired by another in the market for one's own benefit or for the benefit of others.

(j) Breach of secrets: It is considered unfair to disclose or exploit, without the authorization of the owner, industrial secrets or any other type of business secrets to which access has been obtained legally, but which are subject to a duty of confidentiality, or illegally.

(k) Inducing breach of contract: It is considered unfair to induce employees, suppliers, customers and other parties to breach the basic contractual duties they have with competitors.

(l) Violation of rules: The effective realization in the market of a significant competitive advantage acquired over competitors through the violation of a legal rule is considered unfair.

(m) Unfair exclusivity agreements: Exclusivity agreements are considered unfair when such clauses have the purpose or effect of restricting competitors' access to the market or monopolizing the distribution of products or services.

Acts that do not come within the above list may be challenged through the general prohibition contained in article 7 of Law 256. This is the case as long as an act that is contrary to good faith and good customs in the commercial field is detected.

(iii) Limitation period

Article 23 of Law 256 of 1996 establishes that unfair competition actions are statute barred after two (2) years have elapsed from when the affected party became aware of the commission of the conduct in question and, in any case, three (3) years after the moment when the conduct took place.

6.3.3 Interlocking

(i) Applicable regulations

"Interlocking", also known as "Board Interlocking", occurs when the same person is a member of the board of directors of two or more firms trading in the same market. Law 155 of 1959, despite being the oldest Colombian antitrust statute in existence, refers to the prohibition of this conduct. However, whether this legislation is valid is in dispute since the article to which it referred was repealed.

There are other regulations that refer to interlocking, such as Article 75 of Law 663 of 1993, or in relation to commercial law, Article 23 of Law 222 of 1995. Even the general prohibition contemplated in Article 1 of Law 155 of 1959 can be used to sanction this conduct.

(ii) Administrative rulings/case law

No cases have been recorded in relation to such conduct under the Colombian competition rules.

(iii) Infringements by State entities

The competition rules apply with respect to "*anyone who engages in an economic activity or affects such development, regardless of its legal form or nature and in relation to conduct that has or may have total or partial effects on the national markets, whatever the activity or economic sector*", as provided in Article 2 of Law 1,340 of 2009. In this regard, the competition rules apply to any entity that carries on an economic activity, regardless of its nature and the sector in which it operates.

Thus, under Colombian law both the public and private sector must comply with the competition rules, and sanctions may also be imposed on State entities.

7. Concentrations

7.1 Applicable law

The first regulation in the Colombian legal system regarding concentration control was article 4 of Law 155 of 1959. This regulation established a series of conditions to determine which firms would be obliged to inform the SIC in the event of *"merging, consolidating, acquiring control or integrating, whatever the legal form of the proposed transaction"*. Today, the series of rules that regulate prior merger control includes Law 1,340 of 2009 and Decision 2,751 of 2021.

7.2 Authorities

The authority in charge of authorizing concentrations is the SIC, specifically the Antitrust Unit. However, Law 1,340 of 2009 provides two major exceptions to the above: (i) in the case of concentrations in the aeronautical sector, the competent authority to authorize such operations is the Special Administrative Unit for Civil Aeronautics,[12] and (ii) in concentrations which only involve entities supervised by the Colombian Superintendency of Finance, the latter is the authority that will decide whether to clear a merger.[13]

7.3 Notifiable transactions

The SIC has defined mergers as "*any mechanism used to acquire control of one or more firms, for one firm to acquire control in another existing firm, or to create a new firm in order to engage in certain activities jointly*".[14] Therefore, the way to determine whether there has been a merger is to establish whether control was acquired in a firm, which means "the possibility of directly or indirectly influencing its policy, the commencement or termination of its activity, the change in its activity or the disposal of assets or rights that are essential to the conduct of its business."[15]

In this regard, the vehicle chosen as a means of implementing the merger is irrelevant. Therefore, whenever control is acquired in a firm, the merger is deemed to have been completed. The merger can take any legal form that facilitates the change of control from one corporate group to another,

[12] Article 8 of Law 1,340 of 2009.

[13] Article 9 of Law 1,340 of 2009.

[14] Colombia. Superintendency of Industry and Commerce. Guidelines for the assessment of mergers.

[15] Article 45(4) of Decree 2,153 of 1992.

whether merger by absorption, acquisition of shares, spin-off, purchase of assets, a business alliance or even a franchise agreement.

7.4 Mandatory notification thresholds

A merger must be notified to the SIC in advance if the following two criteria are met.

(i) Subjective criterion: this criterion is met when: (i) the parties to the merger engage in the same economic activity; or (ii) they are in the same value chain.

(ii) Objective criterion: this criterion is met when: (i) the parties, jointly or individually, have obtained, in the fiscal year prior to the proposed concentration, operating income or assets in excess of 7,074,307.43 Basic Value Units (approximately US$19 million[16]).

Firms that meet the subjective and objective criteria must refrain from implementing the merger until: (i) they are authorized by the SIC in the event that they have more than a 20% share of the relevant market; or (ii) they have not received acknowledgement of receipt from the SIC of the notification of the operation where they have less than a 20% share of the relevant market.

7.5 Filing procedure and deadline

The prior control of mergers can be divided into two phases: notification and prior assessment. As mentioned above, prior assessment takes place when the firms involved jointly or individually have a market share of more than 20% in each of the markets involved. By contrast, the parties to a merger with less than a 20% share of the relevant market are only required to notify (i.e. no prior assessment of the merger takes place).

As regards the notification, a document will be sent to the SIC setting out the information required by Decision 2,751 of 2021. The information will either be confirmed as received by the SIC or the need to carry out a prior assessment procedure will be stated within ten days of receipt of the communication.

If the competition authority requires the prior assessment procedure to take place, this will be divided into two phases:[17]

(i) Phase I:

(a) Decision 2,751 of 2021 lists the information that must be included in the prior assessment request. Three days after receiving the application, the SIC will verify that it contains the relevant information. If it does not comply with the requirements of Decision 2,751, the parties to the merger will be required to provide the missing information and the time period will be suspended until the information is provided.

(b) Once the request has been verified, the SIC will publish the initiation of the procedure on its website, in case third parties wish to provide information to the authority, which they must do within ten business days of publication.

[16] Exchange rate conversion date: March 12, 2025.

[17] Law 1,340 of 2009, Decision 2,751 of 2021

(c) Within 30 days following the filing of the complete prior assessment request, the SIC must determine whether to clear the merger and end the procedure or whether the matter should continue to Phase II. This will occur when, according to the information available, the SIC cannot rule out the possibility of negative effects on competition being generated by the merger. In Phase I,I a background study is carried out that allows the SIC to have more information that makes it possible to understand the potential effects of the proposed merger.

(ii) Phase II:

(a) The decision to move to Phase II will be notified to the parties, which will have fifteen business days to provide the information laid down in Annex 2 of Decision 2,751 of 2021.

(b) After the information referred to in Annex 2 has been submitted, the SIC will have three months to adopt a final decision on whether to authorize the merger. The SIC may authorize the merger, authorize it subject to conditions or refuse to authorize it.

7.6 Appeals

An appeal to the same administrative authority may be filed against a decision adopted by the Superintendent of Industry and Commerce which refuses to authorize, authorizes subject to conditions or approves a merger.

7.7 Breach of the obligation to notify and *ex-officio* investigations

The merger control process must be carried out before the merger takes place. Article 13 of Law 1,340 provides that firms that are obliged to obtain prior clearance from the SIC for a merger but fail to do so will be subject to an investigation for anti-competitive practices. Additionally, the SIC may order the reversal of a merger if it was not notified or if it was implemented before the SIC could adopt a decision. Reversal will take place if the SIC determines that the transaction in question had anti-competitive effects.

7.8 Substantive test of each type of transaction

In order to establish the concentration and market power of the parties seeking to merge, the SIC uses the following economic indexes to verify the degrees of concentration of the participants in the market:

(i) Herfindahl and Hirschman concentration index ("**HHI**"): This index seeks to determine market concentration. If the HHI is less than 1500, the market is viewed as not concentrated, so that a more in-depth analysis of concentration would not be required. Between 1500 and 2500 the market is moderately concentrated, and if the HHI is above 2500, the level of concentration is deemed to be high.

(ii) KWOKA asymmetry index: "*This index varies between 0 and 1, where 1 is the value corresponding to a monopoly market structure."*[18] Consequently, when asymmetry increases, there is a greater risk of dominance.

(iii) STENBACKA dominance index: This test is performed to determine whether the company to be integrated has a dominant position in the market. Taking into account *"the market share of the largest and the second largest firms, the STENBACKA index gives a market share threshold to determine whether or not the largest firm has a dominant position.*[19]

When deciding whether to approve, approve subject to conditions or refuse to approve the merger, the SIC takes into account the above three indexes when assessing the degrees of concentration existing in the relevant markets analyzed.

8. Antitrust investigations

8.1 Applicable law

Article 52 of Decree 2,153 of 1992 contains the essential elements of the administrative procedure to determine the existence of a restrictive business practice. The article has been subject to a series of amendments, particularly by Law 1,340 of 2009. Additionally, the Code of Administrative Procedure and Judicial Review Matters (Law 1,437 of 2011) is also applicable in matters not regulated by the aforementioned rules.

8.2 Commencement of an investigation

The SIC may initiate the preliminary phase of a proceeding *ex officio* or at the request of a third party, in order to determine the need to open an administrative investigation. Regarding the admissibility of complaints from third parties (citizens), this stage has the purpose of determining whether or not the facts that form the subject matter of the complaint merit a preliminary investigation. Once the facts that are the subject matter of the investigation have been clarified, the preliminary investigation is formally initiated. At this stage, the authority will analyze whether the facts of which it is aware may infringe the competition rules.

It should be noted that the actions taken and the information gathered during the preliminary investigation period are confidential.

8.3 Deadlines

The procedure and the time periods of the investigation phases are regulated in Article 52 of Decree 2,153 of 1992, which has been amended and supplemented by Law 1,340 of 2009 and Decree 19 of 2012 (known as the anti-bureaucracy decree). Based on the provisions of this regulation, once the SIC orders the opening of an investigation, it must notify the investigated parties of its decision so that within a period of twenty (20) business days they may submit their arguments and request and adduce the evidence they consider relevant for their defense.

[18] Colombia. Superintendency of Industry and Commerce. Decision 23645 of April 27, 2022 "Pursuant to which a merger operation is approved subject to conditions."

[19] Ibid.

After the investigation has been carried out and the evidence requested and provided by the investigated parties analyzed, as well as the evidence that the SIC decides to gather *ex officio*, the Deputy Superintendent for the Protection of Competition will summon the parties so that they may give their concluding arguments orally. After this hearing, the Deputy Superintendent shall submit to the Superintendent a reasoned report stating whether an infringement exists. The investigated parties and interested third parties joined to the investigation then have twenty (20) days to submit their observations on the report's findings. The subsequent stage regarding the Superintendent's decision to declare or exonerate the investigated parties from liability does not have an express term, other than the assumption that if the decision is unfavorable to the investigated parties, they will have ten (10) days following the notification of the decision to file an appeal with the same administrative authority, which will be resolved by the Superintendent.

8.4 Evidence

The SIC can request information, take witness statements and carry out inspection visits. In the preliminary inquiry phase, the evidentiary material is obtained that will allow it to close the preliminary inquiry or open the investigation phase. In the investigation phase, once the resolution to open the investigation is notified, as indicated above, the investigated parties have twenty (20) business days to request and provide evidence. During the investigation phase, the evidentiary period takes place, in accordance with the rules of the Code of Administrative Procedure and Administrative Disputes and the General Code of Procedure for the investigation, the study of admissibility and the evaluation of the evidence.

8.5 Initial administrative act

Once the preliminary inquiry has been carried out, if the analysis of the evidence gathered makes it possible to infer that anticompetitive conduct may have been committed, the SIC must issue an administrative act by means of which the full investigation begins. The administrative act must be duly reasoned, otherwise it would lack validity.

This initial administrative act must state the violations alleged against the investigated parties by the Antitrust Unit.

The importance of the accusations that are actually made is that they define the sanctions that the SIC may impose at the appropriate procedural moment. In other words, the SIC cannot adopt any decision regarding conduct that is not expressly imputed to the defendant parties in the initial administrative act.

8.6 Notification of the initial administrative act

The investigated parties must be formally notified of the administrative proceedings brought against them. Once they have been notified, this initial decision must be published: (i) on the SIC's website; and (ii) in a newspaper with a regional or national circulation. Apart from informing the investigated parties about the charges filed against them, this gives interested third parties the opportunity to be formally included in the investigation procedure.

8.7 Defense statements

Once notified of the initial administrative act, the investigated party can exercise its defense rights by filing the written Defense. During this phase, the parties may submit their observations in relation to the facts and evidence contained in the initial act. In addition, the investigated parties may submit or request evidence. Thus, at this stage, the investigated parties may ask the Superintendent of Industry and Commerce to accept certain commitments in order to obtain the

early termination of the investigation. Alternatively, they may agree to join the leniency program, accept the accusations made against them or contest them.

8.8 Evidence phase

Once the period to request and provide evidence has expired, an administrative act is issued which formally commences the evidence phase of the investigation. This act (i) resolves the evidentiary requests of the investigated parties and interested third parties; (ii) orders *ex officio* evidence; and (iii) may resolve other procedural requests raised in the statements of defense filed.

8.9 Hearings and allegations

The evidence phase, depending on the type of evidence to be considered, requires hearings to be organized and held for the giving of testimonial evidence, interrogations and statements of the parties, among others, where an interaction between the authority and the parties under investigation is necessary.

At the end of the evidence phase, the Deputy Superintendent for the Protection of Competition issues a decision which orders the end of the phase and sets a date and time for the hearing of final arguments. In this hearing, the investigated parties (and interested third parties) orally present their case.

8.10 Reasoned report

Upon completion of the oral hearing, the Deputy Superintendent will submit to the Superintendent of Industry and Commerce a reasoned report as to whether there has been an infringement.[20] The report advises the Superintendent on whether a sanction for the infringement of the conduct in question should be imposed. This reasoned report will then be served on the investigated parties and third parties formally joined to the procedure, who will have twenty (20) business days to submit to the Superintendent their observations in relation to its contents prior to the decision being adopted.

8.11 Decision

The Superintendent of Industry and Commerce adopts the decision that ends the administrative action, determining whether the conduct in question violated the competition rules. The Superintendent may terminate an investigation in one of the following ways:

(i) order the closure of the investigation if he or she considers that the offender has provided sufficient guarantees that it will suspend or modify its unlawful conduct. This is a discretionary power; if used, grounds must be given.

(ii) order the closure of the investigation by the SIC, if the anti-competitive conduct is not proven.

(iii) issue an administrative sanctions act in which it may: (i) impose fines; and (ii) order infringers to modify or end their anti-competitive conduct.

[20] Decree 2(52)153 of 1992.

8.12 Appeal to the same administrative authority

With respect to the administrative acts issued by the SIC in the administrative sanctioning procedure, an appeal to the same administrative authority may be filed. Pursuant to this appeal, the same authority that issued the disputed act may clarify, modify, supplement or revoke the decision in dispute. This decision may be filed within ten (10) business days following its notification.

Likewise, the concept of direct revocation has been used as a remedy in administrative sanctioning procedures. Direct revocation is a mechanism through which the administration controls its own acts. This mechanism is used to revoke administrative acts which are shown to be unconstitutional, illegal or in breach of fundamental rights. It can be initiated *ex officio* at the request of any of the parties affected by the administrative act. It should be noted that its classification as an additional appeal is not clear, however; *"it is defined by some as an extraordinary appeal"*.[21]

9. Judicial Review

The SIC's decisions on antitrust matters may be challenged through actions for judicial review heard by judges or courts depending on the quantum of the case.

As the decisions issued by the SIC are administrative acts, they must be challenged through an action for annulment and reestablishment of rights. This action is governed by article 138 of Law 1,437 of 2011, which provides that *"any person who believes he or she has suffered harm as regards a right protected by a legal rule may request that the nullity of the particular administrative act, express or presumed, be declared and his or her rights be restored; he or she may also request that any loss or damage be remedied.*"

The action will be successful if it is proven that the act was issued in any of the following circumstances: in violation of the rules on which it should be based; in an irregular manner; applying false reasoning, or beyond the powers of the person who issued it.

As stated above, the action may be heard by either of the following:

(i) Administrative judges: Judges will hear first-instance actions for annulment and reestablishment of rights regarding administrative acts when the quantum in issue exceeds 500 SMLMV. As mentioned, these decisions may be appealed to the administrative courts.

(ii) Administrative courts: Courts will hear first-instance actions for annulment and reestablishment of rights in which administrative acts of any authority are disputed, when the quantum in issue exceeds 500 SMLMV. Additionally, they will hear at second instance appeals against the first-instance rulings issued by the administrative judges.

(iii) Council of State: This body hears appeals against judgments issued at first instance by the administrative courts. This is the highest body for judicial review cases, no appeal being possible against its rulings.

[21] Colombia. Council of State. Ruling 4983-05. Filed 11001-03-25-000-2005-00114-00- (February 23, 2011). C.P: Gerardo Arenas Monsalve.

10. Other procedures

10.1 The Promotion of Competition

In general terms, "the Promotion of Competition" refers to the promotion of the culture of free competition. In a narrower sense, it refers to Article 7 of Law 1340 of 2009, pursuant to which the SIC can give a prior opinion on competition matters covered by draft regulations that are proposed by the public bodies forming part of the executive branch in Colombia. Thus, under the applicable provision, the public bodies in question must inform the SIC about the administrative acts they intend to issue where these may have an impact on free competition.

The opinion issued by the SIC is not binding; however, if a public body intends to deviate from the opinion given by the Authority, they must expressly state their reasons for doing so.

One of the main features of this concept is that it obliges public authorities with regulatory powers to inform the SIC of their actions. Moreover, following the amendment to article 7 of Law 1,340 of 2009 introduced by Law 1,955 of 2019, the SIC can informally obtain information about the state regulatory proposals which have an impact on competition. Decree 2,897 of 2010, which regulated the concept, establishes that the SIC will give its opinion within a period of 10 to 30 business days, depending on the type of regulation that is to be issued.

Since the regulatory proposals subject to the Promotion of Competition must affect free competition, the SIC issued Decisions No. 44649 of 2010, which raises the questions to be answered by public authorities in order to assess whether their proposed regulation meets this requirement and should be reported to the SIC. If these questions are answered in the negative, the public authority will not have to inform the SIC of the draft regulation; on the contrary, if any of the answers is positive, the duty to inform exists.

Article 7 of Law 1340 of 2009 establishes that the SIC has the choice of whether to issue an opinion. Thus, the SIC may issue its opinion indicating that the regulation does not give rise to any restriction on competition or, on the contrary, indicating that it has negative consequences for competition, or finally, it may choose not to give any opinion regarding the project in question. In the latter case, if the SIC issues no opinion, this is deemed to amount to its acceptance that the project does not represent an obstacle to competition. Finally, it is important to emphasize that if the Promotion of Competition stage is omitted, this may be a ground for annulment of the administrative act that was issued without taking it into account. Therefore, it is more than a simple formality for those entities that must seek the SIC's opinion in terms of the Promotion of Competition; rather, it is a duty which must be complied with to avoid proposed state regulations that have an impact on competition from being rendered invalid.

10.2 Market Studies and Reports

The SIC has conducted multiple market and sectoral economic studies, in order to strengthen its institutional capacity and provide it with tools in order to make decisions related to aspects, not only for the protection of competition, but also consumer protection, industrial property, and others.

The SIC has prepared economic studies regarding different products such as cotton, balanced food, cocoa, the maize production chain, beef, rice. It has also covered the health sector, retail,

postal, oil pipelines, access to credit, among others. These reports seek to describe the characteristics of the products in different markets as well as the industries involved.[22]

In addition, sectoral economic studies prepared by the SIC's Economic Studies Group are also worthy of note. These are prepared by the SIC as input for the formulation of recommendations for the implementation of sectoral policies and for planning purposes as regards the different Units. These sectoral economic studies include the following:[23]

(i) Collective Management Companies: An initial analysis of the case of Colombia. October 2022.

(ii) Characterization of travel agencies in Colombia (2015-2021). August 2022.

(iii) The market for online gambling in Colombia: Evidence for the period 2017-2021. August 2022.

(iv) Economic analysis of the market for steel used in housing construction in Colombia (2015-2021) July 2022.

(v) Mobile telecommunications infrastructure in Colombia: Evidence for the period 2015-2020. April 2022.

(vi) Analysis of the dairy sector in Colombia: Evidence for the period 2010-2020 - March 2022.

(vii) The Business World in Colombian Municipalities. December 2020.

(viii) Chlorine-Soda Chain Markets: Operation and Costs of Cartelization in the Sector. December 2020.

(ix) Analysis of the money order and express courier market segments in Colombia in view of the role of the Superintendency of Industry and Commerce. November 2020.

(x) Sunscreens and Suncreams in Colombia (2015-2019). November 2020.

(xi) Definition of the liquor market in Colombia: Evidence for the period 2016-2019. November 2020.

(xii) Diagnosis of Competition in the Mortgage Market. December 2019.

(xiii) Definition of the liquor market in Colombia: Evidence for the period 2017-2018. December 2019.

(xiv) Review of the demographic and commercial dynamics of drugs to treat the diseases with the highest mortality rate in Colombia. December 2019.

(xv) Competition in the Orange Economy: The advertising industry in Colombia. July 2019.

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[22] Economic studies published by SIC: https://www.sic.gov.co/estudios-economicos

[23] Sectoral economic studies published by SIC: https://www.sic.gov.co/documentos-elaborados-por-el-grupo-de-estudios-economicos

(xvi) Special Project INC2019 - Challenges and Perspectives for Competition Policy in the Creative and Cultural Economy. May 2019.

(xvii) *Special Project INC2019* - Challenges and Perspectives for Competition Policy in the Creative and Cultural Economy. May 2019

(xviii) Review of the Colombian experience in drug price control. December 2018

(xix) An overview of the registration activity of the Chambers of Commerce in Colombia during 2017. July 2018.

(xx) Regulation and Competition in Collaborative Economies. April 2018.

(xxi) Report on Intellectual Property information in Colombia. September 2017.

(xxii) Study of Taximeters in Colombia. December 2016.

(xxiii) An Overview of the Ports Sector in Colombia. December 2016.

(xxiv) Study of Internet Services in Colombia. December 2015.

(xxv) Diagnostic study of Industrial Property in Colombia. December 2015.

(xxvi) An Overview of the Air Transport Sector in Colombia. December 2015.

(xxvii) Study of the operation of the Legal Measurement System in Colombia. August 2014.

(xxviii) Study of the Pesticides Sector in Colombia. December 2013.

(xxix) Study of the Fertilizer Sector in Colombia. October 2013.

(xxx) Study of the Coffee Sector in Colombia. December 2012.

(xxxi) Study of the housing sector in Colombia. November 2012.

(xxxii) Study of the Cocoa Sector. October 2012.

(xxxiii) Study of the Telecommunications Sector in Colombia. September 2012.

(xxxiv) Study of the Automotive Sector in Colombia. July 2012.

The sectorial studies conducted by the SIC seek to analyze the behavior of different sectors, their trends, national and international variables and to present, in some of them, an analysis of possible market dominance and concentration.

10.3 Guidelines

The SIC has issued booklets that aim to develop, on a non-binding basis, the application of the competition rules to: (i) collaboration agreements between competitors, (ii) associations of companies and associations or professional associations, (iii) guidelines for the analysis of mergers, and (iv) good practices in the contracting of goods and services, namely:

(i) Booklet on the application of the competition rules to agreements between competitors.[24]. This publication was prepared by the SIC for informative purposes in order to raise awareness of the competition rules and their application to collaboration agreements between competitors, offering guidelines, recommendations and directives to adapt such agreements to the current regulations. Given the implications of these agreements, the guidelines and recommendations contained in the document seek to differentiate them from those agreements that restrict competition.

(ii) Booklet on the application of the competition rules with respect to business associations and professional associations.[25]. Given the role of business associations and professional associations and their importance at the industrial and political level, the SIC has developed guidelines and recommendations to promote good practices and avoid the materialization of anticompetitive practices within these organizations. It describes the typical conduct engaged in by such associations, giving examples of practices that have been investigated and sanctioned in the past and issues recommendations to avoid their attainment.

(iii) Merger Analysis Guidelines[26] . In these guidelines the SIC lays down the criteria used when assessing proposed mergers to determine whether they have anti-competitive effects. The guidelines were developed by the SIC based on Law 1340 of 2009, Decision No. 10930 of 2015 and other applicable rules on mergers.

(iv) Good practices in the procurement of goods and services. In this document, which together with the previous ones and other guidelines issued by the SIC, are part of its approach, the objective is to provide technical knowledge for the hydrocarbon sector to ensure that it complies with the competition rules. The document provides recommendations for companies in the sector with respect to the different phases for the tendering of goods and services: the pre-tender phase, the phase of sharing with stakeholders and interest groups information regarding the goods and services required: at the beginning of the tender; in its monitoring and development; as well as in the feedback and strengthening phase based on the competition rules.

10.4 Opinions on draft legislation

As at the date of this document, there is no draft legislation related to the competition rules in Colombia.

11. Actions for damages (including class actions and other proceedings)

When a market operator engages in conduct that is contrary to the competition rules, it does not only violate the law in terms of the general interest, since its behavior also affects individuals, both legal and natural persons. This means that the competition rules can also be relied on by private individuals and entities to seek redress for the harm they have suffered as a result of anticompetitive conduct.

[24] https://sic.gov.co/sites/default/files/files/CARTILLA_ACUERDOS%2019-03-2015.pdf

[25] https://www.sic.gov.co/recursos_user/documentos/CARTILLA_GREMIOS.pdf

[26] https://sic.gov.co/sites/default/files/files/Guia%20Concentraciones%20Empresariales%2004-11-15.pdf

In order to protect free competition, the SIC has administrative powers to investigate and sanction anticompetitive conduct. However, as regards compensating loss caused to individuals, it does not have a particular regime for compensating damages. As a result, recourse must be had to the general civil liability regime as the appropriate means of seeking compensation for damage caused by anticompetitive conduct. This can be done either through civil liability actions, popular actions or class actions.

Article 2,341 of the Colombian Civil Code establishes that: "*Whoever has committed a crime or negligence which has caused damage to another, shall pay compensation, without prejudice to the main penalty imposed by law for the negligence or crime committed*". Thus, this article makes it clear that whoever infringes the competition rules is also liable for the harm that his or her actions cause to individuals. Actions seeking damages in these cases may be brought before the ordinary courts. The foregoing is without prejudice to the sanctioning powers of the SIC in the administrative regime.

Such proceedings follow the same rules as ordinary civil liability proceedings, where the plaintiff has different ways of seeking damages. For example, an individual or a class action may be filed, depending on the type of result sought. Both types of action must be brought in the ordinary courts.

However, private damages actions for breaches of the competition rules are not yet firmly established in Colombia. If the aim is to develop, alongside the administrative procedure, an effective system in this regard, the general civil liability procedure rules must be supplemented with provisions that make specific reference to the competition rules.

It should be noted that although such actions have been filed in the civil courts, no final judgment regarding anti-competitive behavior has yet been given by any court.

11.1 Individual actions

(i) Applicable law

The definition of civil liability is contained in articles 1,604 to 1,617 and 2,341 of the Colombian Civil Code and relates to the action for damages brought in the ordinary courts by a person who has suffered loss or damage.

This action gives rise to a civil liability proceeding in which the judge must determine whether one or more parties are liable for the damage caused to another person. For this purpose, the judge must study the different elements that must exist for liability to be found, such as: fault, the facts giving rise to the loss or damage, the existence of loss or damage and the causal relationship between these latter two elements. If liability is proven, the judge will order the defendant to pay damages for the loss or damage suffered by the victim.

(ii) Limitation period

The limitation period for civil actions is ten years from when the anticompetitive conduct took place.

11.2 Class actions

(i) Applicable regulations

When there are several victims of anticompetitive conduct and they satisfy uniform conditions with respect to the conduct carried out, they may jointly file a class action in order to obtain legal recognition of the harm caused to them and compensation to remedy their loss, pursuant to article 3 of Law 472 of 1998.

In class actions, the affected parties may jointly seek damages for the loss or damage caused to the group by the anticompetitive effects of the restrictive conduct. This action has the advantage of opening the doors to a special procedure to *"determine liability for the carrying out of certain facts that infringe the individual interests of a large number of persons*" and thus "*simplify the access to the administration of justice*" for a group of victims.

In short, a class action means that an individual who has suffered the effects of anti-competitive conduct (and who is part of the group affected) can avoid bringing an individual damages action, with the cost and the time that this entails, since they can form part of the relevant class action.

(ii) Limitation period

According to Law 472 of 1998, the limitation period for class actions is 2 years from when the anticompetitive conduct ended.

11.3 Action for a declaration of unfair competition

(i) Applicable legislation

Article 20(1) of Law 256 of 1996 establishes the action for a declaration of the existence of unfair competition. This means that those who have been affected by unfair competition acts can obtain a court order declaring the existence of such acts and ordering the infringing party to remove the harmful effects caused and to compensate the loss or damage suffered. The applicable procedure is governed by the General Code of Procedure.

(ii) Limitation period

According to article 23 of Law 256 of 1996, unfair competition actions are statute barred two years after the moment when the injured party became aware of the conduct in question and, in any event, three years after the time that the act in question was carried out.

11.4 Popular action

(iii) Applicable regulations

The popular action is established in Law 472 of 1998 of the Colombian legal system as a procedural tool for the protection of collective rights and interests. It is brought to avoid contingent damage, to put an end to the danger, threat, violation or injury to collective rights and interests, or to reestablish the *status quo ante* whenever possible. In this regard, it should be stressed that it is not an action through which the remedy of damages

may be sought. However, it is worth mentioning it because of its significance in relation to the defense of free competition.

Given the definition of popular actions, it can be stated that they serve to protect the rights of the community in two ways: (i) *ex ante*, to prevent loss or damage that may occur and with respect to which there is a threat or danger of it occurring; or (ii) *ex post,* to restore the conditions to the *status quo ante*, before the damage occurred. Regarding compensating the victims, the *ex post* effect of a popular action is important, since through this legal instrument any individual, in order to protect the community, may request that the infringing party restore matters to the *status quo* existing before the anticompetitive conduct took place.

(iv) Limitation period

The limitation period for class actions is 5 years from when the anticompetitive takes place.

Ecuador

Ecuador

Mario Navarrete Serrano (Pérez Bustamante & Ponce) [1]

Abbreviations

COA	Administrative Organic Code
Constitution	Constitution of the Republic of Ecuador
CRPI	First Instance Resolution Commission
Decision 608	Decision 608 of March 28, 2005
IGT	General Technical Office
Information processing instructions	Instructions for information processing within the Competition Supervisory Authority (SCE)
IGPA	Administrative procedural management instructions
INCCE	National Office for Control of Business Concentrations
INICAPMAPR	National Office for Investigation and Control of Abuse of Market Power, Restrictive Practices and Agreements
INICPD	National Office for Investigation and Control of Unfair Practices
INAC	National Competition Advocacy Office
INJ	National Legal Office
Board	Market Power Regulation Board
LORCPM	Organic Law for the Regulation and Control of Market Power
LOTAIP	Organic Law on Transparency and Access to Public Information
RLORCPM	Regulations for the application of the Organic Law for the Regulation and Control of Market Power
SCE	Competition Supervisory Authority
Supervisor	Competition Supervisor
RBU	Unified Basic Remuneration

1. General background

1.1 Legislative framework

The system of competition in Ecuador is governed by the following legislation:

(i) Constitution of the Republic of Ecuador: Article 304 provides for the prevention of monopolistic practices as part of the State's objectives for the development of national

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trade policy. Since the Constitution also stipulates that the State shall regulate and intervene, when necessary, in order to protect economic rights and collective and public interests, it is obliged to establish penalty mechanisms to avoid *"any private monopolistic and oligopolistic practices, or abuse of dominant position in the market and other unfair competition practices"*[2]. Under Article 336 the State must promote fair trade, and ensure the transparency and efficiency of markets, by favoring competition on equal terms and through equality of opportunity.

(ii) Organic Law for the Regulation and Control of Market Power: The LORCPM was published on October 13, 2011[3] and is the only piece of organic primary legislation specializing in matters of free competition and unfair competition. The substantive provisions of the LORCPM regulate the different categories of anticompetitive behavior, namely: abuses of market power (abuse of dominant position)[4], restrictive practices and agreements[5], business concentrations[6] and aggravated unfair practices[7]. The law also *incorporates* rules on state aid[8] and regulatory barriers[9]. However, the powers of the SCE in this respect are constrained and are limited to issuing nonbinding recommendations.

(iii) Regulations under the Organic Law for the Regulation and Control of Market Power: This legislation establishes the provisions necessary for the proper application of the LORCPM.

(iv) Other relevant legislation: The following pieces of primary legislation address the system of competition:

(a) Decision 608 of 2005 of the Andean Community of Nations. This legislation establishes the rules of free competition in the Andean Community, whose objective is to prevent, correct and penalize practices that restrict or distort competition in the market of the member states[10].

(b) Organic Telecommunications Law. This legislation regulates the telecommunications sector. Title IV provides that the controlling authority must promote competition in the markets that make up the industry.

(c) Production, Trade and Investment Organic Code. Article 19 of the code guarantees access to administrative procedures to impede and penalize monopolistic practices, abuse of market power (dominant position) and unfair competition, as

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[2] Article 335, Constitution of the Republic of Ecuador, Official Registry (R.O.) 449 of October 20, 2008.

[3] LORCPM, R.O. Supplement 555 of October 13, 2011.

[4] Article 9, LORCPM.

[5] Article 11, LORCPM.

[6] Article 14, LORCPM.

[7] Article 26, LORCPM.

[8] Article 29, LORCPM.

[9] Article 28, LORCPM.

[10] Ecuador has an obligation to abide by the decisions of the Court of Justice of the Andean Community (TJCA) under Article 2 of the Treating Creating the TJCA. Also, under Article 425 of the Constitution, international treaties form part of Ecuadorian law, which strengthens the binding force of such decisions within the national legislative framework.

part of the rights of investors.

(d) Organic Code of the Social Economy of Knowledge, Creativity and Innovation. This legislation establishes provisions to prevent and penalize unfair competition practices. It also provides for the imposition of mandatory licenses in cases of abuse of a dominant position, when anticompetitive practices are found which affect fair access to the knowledge economy[11].

(v) Board Regulations: The Board is the regulatory body of the system of competition [*section 1.2*], under article 35 of the LORCPM, the following are the main provisions issued by the Board:

(a) Resolution No. 003. Criteria for the application of the *de minimis* rule in restrictive practices and agreements.

(b) Resolution No. 004 and No. 005. Regulation for the issue of rules by the SCE.

(c) Resolution No. 009. Determination of mandatory notification thresholds in control of business concentrations.

(d) Resolution No. 011. Methodology for determining relevant markets.

(e) Resolution No. 012. Methodology for determining the amount of infringements of the LORCPM.

(vi) SCE Regulations: in the light of article 44.16 of the LORCPM, the Supervisor has the power to issue resolutions, guides and internal rules relating to competition legislation.

(a) Administrative procedural management instructions. These instructions establish the procedures for the handling of administrative processes within the SCE. They regulate the periods, time limits and stages of proceedings in each department of the SCE.

(b) Information processing instructions. These Instructions regulate the management of data in administrative procedures, defining the classification of information and establishing rules for the handling, disclosure, transmission and copying of information in accordance with the legislation in force.

(c) Instructions for the identification and review of regulatory barriers. They establish the criteria for detecting regulations that may unjustifiably restrict the participation of economic operators in markets. By means of a two-stage analysis—legality and proportionality—the jurisdiction of the issuing entity and the impact of the regulation on free competition are assessed. If illegal or disproportionate barriers are identified, the SCE can recommend that they are eliminated or amended to ensure a fair and efficient regulatory environment.

(d) Instructions for raids and maintenance of the chain of custody of evidence. These instructions regulate the procedures for conducting raids and managing evidence, including planning, collection and identification. They establish rules for the maintenance of the chain of custody, providing for the labeling, storage, transfer

[11] Article 503, Organic Code of the Social Economy of Knowledge. Official Registry Supplement No. 899 of December 9, 2016.

and documentation of evidence.

(e) Methodology for determining the amount of fines for commission of infringements of the LORCPM. They regulate the procedure for calculating penalties for infringements of the LORCPM, based on factors such as turnover, market share, duration of the infringement and effects on consumers. They also include aggravating and extenuating factors and specific formulas according to the type of infringement.

(f) Instructions on management and enforcement of cessation commitments. These instructions regulate the acceptance, monitoring and verification of commitments proposed by operators under investigation for anticompetitive practices. They establish assessment criteria, monitoring mechanisms and penalties in the event of noncompliance.

(g) Instructions for the grant of leniency benefits (exemption from or reduction of an SCE fine). The instructions regulate the procedures so that operators or individuals involved in restrictive agreements can obtain a reduction of or exemption from fines in exchange for their cooperation.

There is debate regarding the power of the SCE to issue general binding rules (i.e., *ex ante* regulation). In the Supervisory Authority's initial years some of these guides were issued but were subsequently held to be illegal or simply repealed[12].

(vii) Case law: There are no binding precedents[13] dealing with the substantive analysis of anticompetitive behavior. However, the SCE, when hearing its cases, adopts the case-law criteria regarding common procedural concepts (such as the standard of reasoning applicable to any ruling) issued by the Supreme Court (*Corte Nacional de Justicia*) and the Constitutional Court.

On the other hand, there are few Supreme Court cases which have engaged in a substantive analysis of competition rules. One of them is the RECAPT case[14], in which the Court concluded that there are no anticompetitive practices by object, an interpretation that has been questioned by the SCE in its subsequent decisions[15]. According to the Court, all practices are subject to a factual and contextual analysis, shifting the burden of proof to the authority.

Apart from this case, which is not currently adopted as a reference, there are others such

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[12] Regulation Board of the Organic Law for the Regulation and Control of Market Power. Resolution No. JRCPM-SA-2023-003 of September 29, 2023. Manual of Good Commercial Practices for the supermarket sector and/or similar sectors in relation to their suppliers that are micro and small enterprises, popular economy organizations, craftspersons and small producers.

[13] In Ecuador, for Supreme Court decisions to be binding, there must be three rulings on the same concept in the same way. Article 185 of the Constitution of the Republic provides that: *"Judgments issued by specialized chambers of the Supreme Court which repeat on three occasions the same opinion on the same point, shall require that the ruling is referred to the full Court so that it deliberate and decide within sixty days on its approval. If no ruling is issued within that period, or it ratifies the criterion, this opinion shall constitute binding case law."*

[14] Supreme Court. Judgment of January 27, 2023. Case No. 17811-2016-01852.

[15] SCE. Resolution of November 2, 2022. Case No. SCPM-CRPI-016-2022.

as the Kimberly Clark decisions[16], in which the Court did not make rulings involving a substantial change.

(viii) Soft law: The Supervisory Authority is authorized to issue guides for economic operators and other interested parties regarding the application of competition law rules and concepts in Ecuador. Although they are not binding, these guides are usually taken into consideration in competition proceedings. The SCE has prepared the following guides to date:

(a) Guide to the application of unfair practices contained in the LORCPM (2020)[17].

(b) Guide to the investigation of restrictive practices and agreements (2021)[18].

(c) Competition compliance guide (2021)[19].

(d) Guide to the investigation of abuses of market power (2021)[20].

(e) Good practice guide for the prevention of collusive agreements between bidders in public procurement processes (2022)[21].

(f) Analysis guide to determine the distortion of competition by engagement in unfair practices contained in the LORCPM (2023)[22].

1.2 Institutional framework

The system is organized by means of two institutions: the first, with regulatory powers; and the second, in charge of control, supervision and imposition of penalties.

The Market Power Regulation Board has governing power in the formulation and planning of public policies within the scope of the LORCPM, as well as the power to issue regulatory instruments in relation to the LORCPM[23]. The Board belongs to the executive power and is made up of delegates from various ministries.

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[16] Supreme Court. Judgment of September 10, 2021. Case No. 09802-2017-00767.

[17] Available at: https://www.sce.gob.ec/sitio/wp-content/uploads/2023/09/Gui%CC%81a-de-aplicacio%CC%81n-de-las-conductas-desleales-contenidas-en-la-LORCPM-2020.pdf

[18] Available at: https://www.sce.gob.ec/sitio/wp-content/uploads/2023/09/Gui%CC%81a-para-la-investigacio%CC%81n-de-acuerdos-y-pra%CC%81cticas-restrictivas-2021.pdf

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

[20] Available at: https://www.sce.gob.ec/sitio/wp-content/uploads/2023/09/Gui%CC%81a-para-la-investigacio%CC%81n-de-conductas-de-abuso-del-poder-de-mercado-2021.pdf

[21] Available at: https://www.sce.gob.ec/sitio/wp-content/uploads/2022/03/Guia-de-buenas-practicas-para-la-prevencion-de-acuerdos-colusorios-entre-oferentes-de-contratacion-publica-.pdf

[22] Available at: https://www.sce.gob.ec/sitio/wp-content/uploads/2023/09/Gui%CC%81a-de-ana%CC%81lisis-para-determinar-el-falseamiento-al-re%CC%81gimen-de-competencia-por-el-cometimiento-de-las-conductas-desleales-contenidas-en-la-LORCPM-2023.pdf

[23] Article 35, LORCPM and Article 14, RLORCPM.

On the other hand, the Competition Supervisory Authority (SCE) is the body in charge of control, supervision and imposition of penalties. The SCE operates under an institutional model in which it directs the investigations and decides on the punishment of anticompetitive practices[24]. The investigation stage is the responsibility of the various specialized offices according to the type of conduct analyzed. The offices conduct the investigative procedure and present a final report to the CRPI.

The CRPI is the collegiate body that hears and decides cases which, on the basis of the findings of the offices and the explanations of the economic operators, determines whether there is an infringement of the law. Its resolutions can be contested before the Supervisor or before the ordinary judicial review courts.

The SCE forms part of the Transparency and Social Control Function.

1.3 Evolution of the system

The 1979 Constitution contains the first rule on free competition in Ecuador, which provided that *"[a]ny form of abuse of economic power, including unions and groupings of enterprises which tend to dominate national markets, eliminate competition or arbitrarily increase profits is forbidden and punished by law*". Subsequently, the 1998 Constitution included an article which stipulated: "*[w]ithin the social market economy system the State shall be responsible for: [...] Promoting the development of competitive markets and activities. Enhancing free competition and penalizing, in accordance with law, monopolistic practices and others that impede and distort it*".

Despite the inclusion of these provisions, no laws were enacted to establish specific competition rules in Ecuador. For example, in 1999, 2005 and 2009, draft legislation was submitted to the Ecuadorian parliament but did not get sufficient votes to be passed.

The unsuccessful attempts to establish a system of its own were made up for by Decision 608 of the Andean Community, issued in March 2005. Article 51 of the Decision established a transitional regime which provided that it would come into force in Ecuadorian territory two years after it was published in the Official Gazette of the Cartagena Agreement. Pursuant to this transitional provision, the Competition Subsecretariat was created within the Ministry of Industry and Trade. In 2009 the Subsecretariat was entrusted with the investigation of anticompetitive practices[25].

In October 2011, a local competition regime was adopted for the first time. The LORCPM, based on the Spanish Competition Law[26], was the first piece of domestic primary legislation on the subject.

To date only a single substantive amendment has been made to the LORCPM, published in May 2023[27]. However, the draft Organic Unfair Competition Law, introducing far-reaching changes to

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[24] Article 36, LORCPM.

[25] Executive Decree No. 1614. Official Registry No. 89 of October 2, 2009. The Subsecretariat heard the first free competition cases in Ecuador, for example: ARCA Ecuador S.A. (2011), Pfizer (2009) and LAN-Tame (2009). Of these, the Pfizer case culminated in a penalty for abuse of an intellectual property right.

[26] Spanish Competition Law 15/2007 of July 3, 2007.

[27] LORCPM, amended on May 16, 2023, Official Registry Supplement 311. Organic Law Amending Various Pieces of Legislation, for the strengthening, protection, enhancement and promotion of popular and solidarity economy organizations, craftsperosns, small producers, micro enterprises and entrepreneurial ventures, published in May 2023. In relation to the law, *see*: Brown, Alberto, "El proyecto de reforma a la ley de competencia ecuatoriana: Aspectos negativos" (*Ecuadorian draft competition law: Negative aspects*), CentroCompetencia, January 25, 2023, available at: https://centrocompetencia.com/proyecto-de-reforma-a-

the current system, is currently being processed in the parliament. The May 2023 reform included certain important items:

(i) Abuses of market power in a situation of economic dependence were repealed.

(ii) It included the application of the administrative disciplinary procedure (in book three of the COA) to all infringements not arising from anticompetitive behavior. This is a fast-track process which leads to a ruling at first instance in less than a year.

(iii) It provided for the possibility of penalizing abuses of market power which potentially impede, restrict or distort competition or affect the efficiency of markets (the decisions of the SCE already pointed in this direction, but now the prospective dimension of abuses of market power was expressly included)[28].

(iv) An open definition was introduced for anticompetitive practices by object, replacing the exhaustive list that previously existed[29].

(v) The prohibition of consciously parallel conduct was eliminated.

(vi) The name of the Supervisory Authority for Control of Market Power was changed to the Competition Supervisory Authority.

(vii) The obligation of public institutions to notify the SCE regarding State aid granted was clarified.

(viii) The obligation to determine the relevant market for administrative disciplinary procedures that do not arise from engagement in anticompetitive behavior was eliminated.

(ix) The appeal for reconsideration (an appeal filed with the same body that took the decision so as revoke or alter its administrative decision) was repealed.

(x) The possibility of classifying information obtained in the course of an investigation as confidential was raised to the status of primary legislation. Up to then this power was established in the RLORCPM (lower ranking legal status).

(xi) The powers of the SCE to identify and penalize practices and behavior that affect popular and solidarity economy organizations were extended (allowing the SCE to investigate and penalize, as if antitrust infringements were involved, violations that bear no relation to the market and free competition, but rather relate purely to consumer rights).

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la-ley-de-competencia-ecuatoriana-aspectos-negativos/; Navarrete, Mario, "La reforma publicada de la ley de competencia no es la que la Asamblea Nacional aprobó" (*The published reform of the competition law is not what the National Assembly passed*), Centro Competencia, July 19, 2023, available at: https://centrocompetencia.com/reforma-publicada-ley-competencia-no-es-asamblea-nacional-aprobo/.

[28] SCE. Resolution of February 9, 2023. Case No. SCPM-INJ-22-2022.

[29] Article 8 of the former RLORCPM included the following specific list of anticompetitive practices by object: (i) *fix on a concerted basis or manipulate prices, interest rates, charges, discounts, or other commercial or transactional terms, or exchange information for the same object or with the same effect;* (ii) *allocate, restrict, limit, suspend, impose obligations or control on a concerted basis production, distribution or marketing of goods or services; (iii) allocate on a concerted basis customers, suppliers or geographical areas; (iv) acts or omissions, agreements or concerted practices are also subject to the presumption established in this article.*

1.4 Definition of prohibitions and scope of action

The LORCPM classifies as infringements abuses of market power, collusive agreements and restrictive practices, as well as regulating business concentrations and prohibiting unfair practices. The channels for protection under the law are market efficiency, fair trade and general consumer welfare.

Thus, the SCE is the authority responsible for interpreting and applying the LORCPM, resolving specific cases and defining criteria to be used as a reference for public policy in relation to competition.

The scope of action of the SCE in relation to the *ex-post* substantive aspects of the regulation are addressed in articles 9, 11 and 25 of the LORCPM.

(i) Abuse of market power. Article 9 forbids one or more economic operators with market power, individually or collectively, to limit, restrict or distort competition, or damage economic efficiency and general welfare, even potentially.

(ii) Restrictive practices and agreements. Article 11 forbids agreements, decisions of associations and concerted practices which limit or distort competition. Pacts to fix prices, share markets, restrict production or impose unfair terms are specifically penalized. Agreements can be prohibited due to their object, without the need to prove effects, or due to their actual negative impact on the market.

(iii) Unfair practices. Articles 25 and 26 forbid acts of unfair competition which distort competition, affect economic efficiency or harm consumers and users. Following the 2023 reform, the SCE can penalize such practices even if they do not alter the system of competition, provided that their impact is large scale or widespread.

As regards *ex-ante* control, article 14 regulates the system of control of concentrations. In addition,

(i) Control of business concentrations. Articles 14 to 24 of the LORCPM regulate business concentrations which involve changes in the control of enterprises. Prior notification to the SCE is required when certain turnover or market share thresholds are exceeded. The authority can approve, impose conditions or reject the transaction if it affects competition. In the event of failure to notify, penalties and corrective measures are applied.

In addition, Articles 29 and subsequent articles regulate the regime for the granting of public resources by the State.

(ii) State aid rules. The LORCPM regulates State aid, allowing the State to grant economic benefits to certain operators to promote the public interest. The SCE can only issue nonbinding reports when such aid is abusive or unlawful[30].

Finally, the Regulation Board can impose restrictions on competition by means of a reasoned resolution, provided that it pursues the development of a national industry (State monopoly, strategic sectors and public services) or to promote the popular and solidarity economy[31].

[30] Article 31, LORCPM.

[31] Article 28, LORCPM.

1.5 Defendants in antitrust actions

The LORCPM adopts a functional approach to determining who is subject to its rules, establishing that any operator that engages in economic activities, regardless of its legal nature or lucrative purpose, must comply with the competition rules.

According to article 2, the law applies to all individuals and legal entities, public or private, national or foreign, which currently or potentially engage in economic activities, both within and outside national territory, provided that such activities have effects in Ecuador. This includes exchanges of goods and services in the market, including by public procurement.

Thus, even public entities can infringe competition rules when their actions are considered economic activities and do not constitute an exercise of essential public powers. Furthermore, the law allows anticompetitive behavior to be attributed not only to the operator that engages in such behavior, but also to the entity that controls it, provided that it is shown that both act as a single economic unit.

1.6 Extraterritoriality

Article 2 of the LORCPM provides that the law is applies to economic activities within Ecuadorian territory, as well as to those engaged in outside the country, provided that they produce or may produce effects on the national market. This allows the SCE to investigate and penalize anticompetitive behavior of foreign operators when it affects competition in Ecuador.

2. General sanctions regime

Under article 78, infringements of the law can be classified as minor, serious and very serious. The LORCPM provides that fines will be calculated, as a general rule, on the basis of the infringing economic operator's total turnover[32]. However, that possibility is qualified by article 96 of the RLORCPM, which provides that penalties must take into account only the infringing economic operator's revenue in the relevant market.

In the reform of the instructions on fines[33], however, the SCE again envisaged the possibility of penalties being calculated on the basis of the infringing operator's total turnover, for certain infringements that do not have an anticompetitive element (such as impeding an inspection or supplying misleading information); specifically for those in which there are prior obligations of which the infringing party is in breach, as in the case of violation of SCE resolutions.

In any event, irrespective of the base amount for the calculation, minor infringements are penalized by a fine of up to 8%, serious infringements by a fine of up to 10% and very serious infringements by a penalty of up to 12% of total turnover. The specific calculation formula and the variables for each penalty are explained in detail in the penalties guide.

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[32] However, article 96 of the RLORCPM, together with resolution SCE-DS-2023-18, provides that the fine shall be calculated on the "*turnover achieved in the relevant market or markets affected by the infringement under investigation*". In practice, the SCE refers to the regulations and not to the law.

[33] SCE. Resolution No. SCE-DS-2023-18 of November 16, 2023, Official Registry Supplement 348. Methodology for determining the amount of fines for commission of infringements of the Organic Law for the Regulation and Control of Market Power.

Apart from this general regime there are two exceptions. The first one applies in case the turnover cannot be calculated: the fine is based on a certain number of RBUs, depending on the classification of the infringement. Since in 2025, the RBU is equal to USD 470, the approximate calculation is as follows:

- Minor infringements: 50 to 2,000 RBU: USD 23,500 to 940,000
- Serious infringements: 2001 to 40,000 RBU: USD 940,470 to 18,800,000
- Very serious infringements: More than 40,000 RBU: More than USD 18,800,000

The second one applies when the profits obtained by the infringement exceed the thresholds established in the Law, for which the penalty will be equal to the profits obtained. This exception has been used in cases of collusion in public procurement, where the persons investigated are individuals[34].

The SCE may order the divestment, division or splitting of economic operators when it finds that it is the only viable measure to restore competition in the market.

As regards the liability of individuals, the LORCPM allows penalties to be imposed on legal representatives and members of the management bodies of firms that have committed a very serious infringement, with a fine of up to 500 RBU[35], depending on the degree of involvement in the conduct.

In order to determine the degree of involvement, the methodology for the imposition of fines for infringements of the law provides that the following will be taken into account: (i) the type of company; (ii) the type of shareholder or member; (iii) the system of governance; (iv) the voting capacity of the person penalized in the decision; and (v) the voting or management intention[36].

Apart from the system of penalties, the LORCPM includes the possibility of an operator presenting cessation commitments at any time during the investigation, and even before one commences. The distinctive feature of cessation commitments in Ecuador is that they require express acceptance of an infringement, as well as an assurance of cessation of the conduct and a proposal to rectify its effects. The SCE can accept, alter or reject the proposal within forty-five days from when it is presented[37].

3. Draft legislation

There is currently a Bill in progress which introduces substantial reforms to antitrust rules in Ecuador:

[34] SCE. Case No. SCPM-CRPI-025-2021.

[35] Article 79, LORCPM.

[36] Article 8, Methodology for the imposition of fines for infringements of the LORCPM.

[37] Article 89, LORCPM.

3.1 Draft organic unfair competition law

The National Assembly is currently considering the Draft Organic Unfair Competition Law, which would separate this system from the free competition rules[38]. If passed, the LORCPM would focus exclusively on anticompetitive behavior, whereas unfair competition would be regulated by the new law. The draft has already undergone a first debate and is awaiting a second debate[39], but there is no defined time limit for passing it or for it to be reviewed by the Government. Among the most important changes the following should be noted:

- The amendment of article 1 of the LORCPM would exclude the prohibition and penalization of unfair practices within its scope.

- Difference between types of conduct depending on the channel for protection. The draft law defines aggravated unfair competition, distinguishing it from simple unfair competition. Simple unfair competition only affects the private interests of economic operators, competitors or consumers, whereas aggravated unfair competition, in addition to these effects, can distort competition and affect the public economic order. Both concepts are based on acts carried out for competitive purposes that are objectively contrary to good faith.

- The civil courts have jurisdiction to hear cases of unfair competition, unless aggravated unfair competition is involved. In the latter case, the civil courts can only intervene in claims for damages.

- The concept of the average consumer is defined as a representative consumer whose knowledge of a good or service is influenced by the information provided by advertisers.

- Pyramidal sales practices are expressly classified as acts of unfair competition.

- The SCE still bears the burden of proof, except in cases of advertising, in which advertisers must show the truthfulness of their claims in situations of misleading, discrediting or comparative advertising.

- The funds from fines or infringements of this law will be collected by the SCE and deposited in a single national treasury account. Such resources will be used to finance campaigns to promote fair practices in the market, organized by the Supervisory Authority.

4. Institutional structure

4.1 Competition Supervisory Authority[40] (LORCPM, articles 36 – 52)

(i) Composition: The Competition Supervisor is the highest authority in the SCE. The holder of the office must be an Ecuadorian national, have participation rights, a postgraduate academic qualification related to competition and at least 10 years' professional experience[41].

[38] Draft Organic Unfair Competition Law, presented on October 3, 2022.

[39] Report of the first debate on the Draft Organic Unfair Competition Law, April 17, 2023.

[40] On September 3, 2024 Hans Willi Ehmig Dillon took up the post of Competition Supervisor.

[41] Appointment of the First Competition Supervisory Authority. Resolution No. CPCCS-PLE-SG-021-E-2024-0111 of April 7, 2024.

(ii) Appointment: The Council for Citizen Participation and Social Control, as part of the Transparency and Social Control function, appoints the supervisor from a shortlist of candidates submitted by the Government.

(iii) Term: The term of office is five years with the possibility of reelection.

(iv) Grounds for removal:

(a) Expiration of his term of office

(b) Final conviction

(c) Subsequent incompatibility

(d) Mental or physical incapacity, verified by the National Assembly, when this prevents him from carrying out the duties of his office for more than 180 days

(e) No confidence motion and removal following a political trial in accordance with the Constitution

(f) Death, and finally

(g) Voluntary resignation

(v) Number of professionals: According to the information published by the SCE, up to September 2024, 162 officials made up the institution[42].

(vi) Internal units: The institutional structure of the SCE is divided based on its investigation and adjudicative functions. The following are the principal investigative bodies of the SCE:

(a) National Office for Control of Business Concentrations

(b) National Office for Investigation and Control of Abuse of Market Power, Restrictive Practices and Agreements

(c) National Office for Investigation and Control of Unfair Practices

(d) National Competition Advocacy Office [43]

On the other hand, the decision-making body of the SCE is the First Instance Resolution Commission, which is a collegiate body made up of five commissioners, appointed by the Supervisor[44].

(vii) Annual budget: USD 5,264,658.46[45].

[42] This information refers to September 2024, according to the staff distribution published by the SCE.

[43] The principal activity of this office is the preparation of market studies.

[44] Article 44.8, LORCPM.

[45] Amount allocated in January 2024.

5. Restrictive practices or agreements

(i) Applicable legislation: Article 11 of the LORCPM prohibits all concerted practices or agreements between two or more economic operators when they have as their object or effect the distortion of competition, even potentially. The prohibition covers both vertical restrictive agreements, which involve operators at different levels of the production chain, and horizontal agreements, which occur between direct competitors. The article also establishes, by way of example, five categories of anticompetitive agreements, although there may be other practices that are also contrary to competition legislation.

(a) Directly or indirectly fixing purchase or sale prices or other commercial terms;

(b) Sharing markets, customers or sources of supply;

(c) Limiting or controlling production, distribution, technical development or investments;

(d) Applying to third-party contractors dissimilar conditions for equivalent transactions, leading to a competitive disadvantage; and

(e) Making the conclusion of contracts subject to acceptance of additional transactions which, due to their nature or according to commercial practice, bear no relation to the subject matter of such contracts.

Like in the European system, in Ecuador agreements can be anticompetitive by their object or by their effect.

An anticompetitive agreement by object is that which, due to its very nature or purpose, impedes, restricts or distorts competition, there being no need to show its effects on the relevant market. Under article 8 of the RLORCPM, anticompetitive practices by their object are those of a horizontal nature which, directly or indirectly, involve price fixing, limitation of production, distribution or marketing, allocation of markets, and collusive practices in public procurement processes.

On the other hand, anticompetitive behavior by effect requires proof that it has given rise, or at least may give rise, to adverse effects on competition. In these cases, it is necessary to undertake an analysis of the real or potential impact of such practices on the relevant market. Behavior by effect can benefit from the de minimis rule.

According to the de *minimis* rule, restrictive practices and agreements by effect will not be penalized when, due to their small market share of the operators executing the conduct, are incapable of having an actual or potential effect on competition. In the case of horizontal agreements, the parties involved must have a joint market share of less than 14%. In the case of vertical agreements, the joint share must be below 15% for the practice to be considered not punishable.

However, when in a relevant market there are multiple similar agreements entered into by different suppliers or distributors – known as cumulative effects – the possibility of applying the de minimis rule is further restricted. In these cases, the market share threshold is reduced to 5% per participant. A cumulative effect is considered to exist when at least 30% of the market is covered by parallel networks of agreements, which increases the risk that such practices, although they may seem harmless in isolation, may together significantly affect competition.

Finally, restrictive practices and agreements which contribute to improving production, marketing or distribution of goods and services, or that promote technical or economic progress, may be exempt from the prohibition, provided that they fulfill the following conditions:

(a) Benefits for consumers: they must allow consumers or users to fairly share in the advantages derived from the agreement.

(b) Proportionality: they must not impose restrictions that go beyond what is strictly necessary to achieve the above-mentioned objectives.

(c) Preservation of competition: they must not give economic operators the possibility to eliminate competition in a substantial part of the market of the products or services affected.

(ii) Specific powers: In general, article 37 of the LORCPM establishes among the powers of the SCE, the prevention, investigation, hearing, correction, punishment and elimination of anticompetitive practices. For its part, article 38 of the LORCPM lists the specific powers of the SCE; the most relevant, in relation to restrictive practices and agreements, which include:

(a) Conducting investigations and market studies.

(b) Hearing administrative proceedings for the imposition of measures and penalties.

(c) Holding hearings with those allegedly responsible.

(d) Examining and conducting, where it considers necessary, expert studies of books, documents and all other items necessary for the investigation, monitoring stock, verifying sources and costs of raw materials or other goods.

(e) Sealing off places that it considers appropriate for the purpose of ensuring the preservation of evidence.

(f) Accessing locations under inspection with the consent of the occupiers or by court order when an individual's residence is involved.

In addition, article 48 of the LORCPM, in relation to the investigative powers of the SCE, points out that it may demand from any economic operator or public or private sector institution, the reports, information or documents that it considers necessary for the purpose of conducting its investigations, and summon those connected with the cases in question to testify.

The SCE also has powers to carry out raids, order other corrective measures, impose penalties, and in the case of collusive agreements, appoint a temporary auditor for the purpose of monitoring compliance with the corrective measures imposed by the authority[46].

(iii) Statute of limitations: The administrative action to challenge anticompetitive practices becomes time-barred in four years. This term is counted from the moment the SCE became aware of the fact that constitutes the infringement, or from the moment the

[46] Article 76, LORCPM

infringement ceased, in the case of continuous conducts. Once this term has elapsed without the corresponding procedure having been initiated, the authority loses the power to exercise the sanctioning action[47].

(iv) Leniency: The system of compensated self-reporting or "Leniency" is regulated in articles 83 and 84 of the LORCPM and is explained in the Instructions for the grant of benefits of exemption from or reduction of a fine of the Competition Supervisory Authority (SCE), published in October 2019. An economic operator that has infringed article 11 of the LORCPM may avail itself of the exemption from the fine, provided that it is the first to provide evidence which allows: (i) a new investigation to be commenced; or (ii) sufficient evidence to be provided so that the SCE can confirm the existence of the infringement.

To be eligible for the benefit, the economic operator must comply with the following specific requirements:

(a) Actively cooperate with the SCE in the investigation procedure.

(b) End its involvement in the restrictive agreement, unless the SCE considers that its continued participation is necessary to ensure the effectiveness of the investigation.

(c) Not have destroyed evidence related to the infringement under its leniency request.

(d) Not have coerced other enterprises or economic operators to participate in the infringement.

If an economic operator fails to comply with the requirements to obtain the full exemption, it may still benefit from a reduction of the fine if its cooperation contributes evidence with significant added value to the investigation. The percentage reduction is determined according to the order in which the economic operators present their information:

(a) The first operator to provide added-value information can receive a reduction of 30% to 50% of the amount of the fine.

(b) The second operator to cooperate can obtain a reduction of 20% to 30%.

(c) Operators that subsequently present evidence may not benefit from a reduction greater than 20%.

In addition to the penalties imposed on economic operators, article 79 of the LORCPM provides for the possibility of imposing penalties on legal representatives and members of management bodies of infringing companies, of up to 500 RBU (USD 235,000[48]), according to their degree of involvement in the unlawful conduct.

The procedure to avail oneself of the exemption or reduction of fines consists of the following stages[49]:

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[47] Article 70, LORCPM.

[48] Bearing in mind that the RBU for 2025 is equal to USD 470.

[49] Instructions for the grant of benefits of exemption from or reduction of an SCE fine. Resolution No. SCPM-DS-2019-38 of October 2, 2019.

(a) Filing of the application verbally or in writing. Once it is lodged, the SCE allocates a chronological marking which establishes the order of arrival of applications. Each application is reviewed by the INICAPMAPR within an leniency procedure.

(b) Cooperation agreement. Once the office finds that the application meets the requirements under article 84 of the LORCPM, it signs with the applicant a cooperation agreement containing the terms and commitments for the reduction of the fine. Failure to comply with the agreement will deprive the applicant of the leniency benefits.

(c) Benefits report. The INICAPMAPR will commence ex officio the procedure for the investigation of the collusive agreement and, when the evidentiary period ends, will issue the benefits report, which will be delivered, together with the investigation file, to the CRPI.

(d) Definitive grant of benefits. The CRPI will analyze the recommendations of the office and will decide on the grant of leniency benefits.

(v) Criminalization**:** Although cartels are not criminalized, the offense of misappropriation of public funds, established in article 278 of the Criminal Code[50], may be applied to collusion in public procurement processes.

Although misappropriation of public funds is classified as an offense, the SCE does not currently refer cases of collusion to the Public Prosecutor's Office. Ultimately the classification of offenses in the Criminal Code does not share the purpose pursued by competition rules, and therefore, does not pursue as its principal purpose the deterrence of anticompetitive behavior. Some years ago, the practice was different and the SCE usually sent information regarding collusion in public procurement to the Public Prosecutor's Office, even in cases of cooperation, thus limiting the effectiveness of its incentives.

(vi) Trends: The rate of detection and punishment of cartels in Ecuador is low[51]. During Danilo Sylva's term as supervisor an attempt was made to change this trend and, along the public procurement authority, resources were invested to detect and punish public procurement cartels. In an effort to strengthen the SCE's institutional framework for cartel investigations, in the last four years, eight cartels have been sanctioned[52], including a sanction of more than USD 50 million imposed by the SCE to a construction company in 2022. This invigorated interest in investigating cartels will also benefit from the reformed classification of conduct by object.

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[50] Organic Integral Criminal Code. Article 278: *[…] persons who act pursuant to State authority who, for their own benefit or for the benefit of others take advantage of, appropriate, divert or use arbitrarily movable or immovable property, public funds, bills representing them, items, instruments or documents that are in their possession by virtue of or due to their office, shall be penalized by a prison sentence of between ten and thirteen years. […]*

[51] OECD (2021) Peer reviews of competition law and policy of the OECD and the Inter-American Development Bank: Ecuador. https://web-archive.oecd.org/2021-03-31/583641-ecuador-examenes-inter-pares-sobre-el-derecho-y-politica-de-competencia-2021.pdf

[52] Some recent cartel sanction cases include the Prosostenible case (CRPI, Resolution of April 14, 2023, Docket No. SCPM-CRPI-031-2022), the Posamiconstru case (CRPI, Resolution of June 29, 2022, Docket No. SCPM-CRPI-004-2022), and the Biomedik case (CRPI, Resolution of October 30, 2023, Docket No. SCE-CRPI-4-2023).

On the other hand, the agency is creating a strict rule whereby families are not considered business groups, unless there are companies by which joint control is exercised. The Supervisory Authority's position seeks to combat the common practice where different members of a family participate as independent operators in public procurement processes. This strict position favors the imposition of fines but may be excessive when the rationale is applied to business concentrations or the calculation of fines.

Indeed, the most important case in which this theory was applied led to a penalty for five companies with a fine of USD 176,000, in which the argument that there was an agency relationship between them was not accepted[54].

In relation to the leniency program, unfortunately, following the the Kimberly Clark case, in which the SCE declassified information introduced as part of a self-report leniency process, a high degree of mistrust in the cooperation process arose[55]. The current administration has endeavored to change that perception, by issuing new rules on the handling of confidential information[56], but the number of leniency applications has not rebounded.

6. Abuse of a dominant position

(i) Applicable legislation: In Ecuador the abuse of dominance (market power) is regulated in article 9 of the LORCPM and article 7 of the RLORCPM. According to the regulation, abuse of market power means the restriction or distortion of competition, economic efficiency or general welfare, caused by one or more economic operators (the latter case being collective dominance) on the basis of their market power.

(ii) Dominant position: The LORCPM defines market power as "*the capacity of economic operators to significantly influence the market. Such capacity may be achieved individually or collectively. Market power or a dominant position is held by economic operators who, by any means, are capable of acting independently without regard to their competitors, purchasers, customers, suppliers, consumers, users, distributors or other parties that participate in the market*"[57].

Article 8 of the LORCPM establishes the criteria for determining an operator's dominance:

(a) Market share that allows the ability to unilaterally raise prices or restrict supply.

(b) Existence of entry and exit barriers of a legal, contractual, economic or strategic nature.

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[54] CRPI. SCE. Resolution of July 29, 2022. Case No. SCPM-CRPI-010-2022.

[55] Kimberly-Clark case. Decision No. SCPM-IG-DES-001-2016, Complaint of the SCPM to the CAN (Andean Community) (No. 2709), Decision No. 1883 of the SGCAN, Application No. SCPM-IDIAPMAPR-2013-277, Case No. SCPM-IIAPMAPR-EXP-2016-004, Case no. 09802-2017-00197, Case no. 09802-2017-00767, Case no. 09802-2017-00196 and Constitutional Court Case No. 2007-19-EP.

[56] SCE. Resolution of August 8, 2019. Instructions for the grant of benefits of exemption from or reduction of a fine of the Competition Supervisory Authority.

[57] Article 7, LORCPM.

(c) Existence of competitors, customers or suppliers and their respective capacity to exercise market power.

(d) The possibility of access of the economic operator and its competitors to sources of inputs, information, distribution networks, credit or technology.

(e) The economic operator's recent behavior.

(f) Contestability of the market.

(g) Characteristics of the supply and demand of the goods or services.

(h) Extent to which the good or service in question can be substituted by another of national or foreign origin, considering the technological possibilities.

The definition of market power reflects a legalistic idea with vague boundaries which arises in the United Brands case[58], measuring the capacity of an enterprise to act independently of its competitors, customers and consumers. The SCE does not define dominant position exclusively as the capacity to profitably raise prices to supracompetitive levels, but rather adopts a broader approach based on structural criteria and competition barriers, aligned to the European model.

(iii) Abusive conduct: Article 9 of the LORCPM is made up of a general prohibition clause and a list containing 23 forms of anticompetitive behavior linked to abuse of market power. However, the classification of infringements is deficient, and those deficiencies have been used to facilitate the imposition of penalties or to lead to particular interpretations of the prohibitions.

For example, point 8 forbids "unjustified tied sales". On the other hand, point 4 classifies as an infringement "predatory or exploitative price fixing". Since article 9.4 does not include the term "unjustified", the agency has suggested that there can be no justification for predatory price fixing.

Similarly, the heading of article 9 states that it is forbidden to impede, restrict or distort competition, adversely affect economic efficiency or general welfare. The SCE has held that these three (competition, efficiency and general welfare) are understood independently. On this basis it has concluded, for example, that to diminish a distributor's freedom constitutes a violation of the legal interest of competition[59]. Anticompetitive behavior can be classified, according to its effects, as a) exclusionary and b) exploitative:

(a) Exclusionary: Such conduct includes the refusal to sell, narrowing margins, predatory pricing (at least at the initial stage of implementation), tied sales, bundling, exclusivity and conditional discounts.

(b) Exploitative: Among the clearest examples are predatory pricing (at least at a subsequent stage, after managing to exclude a competitor), forbidden by point 4 of

[58] Court of Justice of the European Union. Judgment of February 14, 1978. United Brands Company v. Commission of the European Communities.

[59] SCE. Resolution of February 9, 2023. Case No. SCPM-INJ-22-2022.

article 9 of the LORCPM. Similarly, the prohibition of second-line discrimination has been applied to impose liability for conduct of a mainly exploitative nature.

(iv) Trends: The Supervisory Authority has adopted an expansive interpretation of its powers and has established a more flexible evidentiary standard to establish the existence of infringements. Among the most important and uncertain areas in the application of the abuse of market power, the following trends may be highlighted: (a) the reaffirmation that penalties can be imposed for conduct without the need to prove an actual anticompetitive effect, its potential effect being sufficient; (b) the possibility of proving effects without complex economic evidence being required; (c) the irrelevance of intention in creating an infringement, including in cases of misleading information, in which fault is defined as lack of care and not as willful misconduct; and (d) the elimination of a minimum threshold of coverage in unilateral abuses, which allows conduct to be penalized even if it affects only 1% of the market.

These interpretations have given rise to penalties in cases such as BANRED and Chaide & Chaide, both being controversial rulings.

In the BANRED case, the SCE imposed on the largest ATM interconnection platform in the country a fine of USD 80,312.45. The Supervisory Authority considered as illegal the proposal by BANRED of terms of interconnection with another platform which, in its opinion, were excessive. The resolution does not specify whether an economic analysis of costs was performed in the determination of an “excessive” price[60].

In addition, the proposal was never implemented and the operation was ultimately completed under very different terms. However, the SCE held that the mere existence of the proposal was sufficient to consider it as potentially exclusionary. At judicial level, the Judicial Review Court overturned the decision of the SCE, concluding that no abuse of market power could be found[61].

There are also peculiar features in the Chaide & Chaide case. The SCE imposed on the country’s largest mattress manufacturer a fine of USD 370,000, alleging that it had imposed a minimum resale price fixing scheme. The theory of harm challenged that some of the company's prices were unreasonably low, to the point that they could exclude a competitor from the market[62].

The problem with this analysis is that the SCE did not take evidence of costs to determine whether the low prices were actually predatory, which leaves open the question of how a price was classified as "excessively low " without such analysis.

7. Unfair competition

(i) Applicable legislation: Under the LORCPM any deed, act or practice contrary to honest practice or custom in the course of economic activities is unfair. Of course, this definition includes advertising.

Unfair practices are governed by the rules on quasi offenses, and it is not necessary to

[60] SCE. Resolution of July 28, 2022. Case No. SCPM-IGT-INICAPMAPR-2022-014.

[61] Judicial Review Court, Proceedings No. 09802-2022-01601, August 27, 2024.

[62] SCE. Resolution of February 9, 2023. Case No. SCPM-INJ-22-2022.

prove the intention of the person under investigation or a subjective element in undertaking them. To prove such practices only the damage caused to another operator, consumers and public interest is taken into consideration. Potentially anticompetitive acts are also penalized[63].

What is peculiar about the system in Ecuador is the fact that aggravated unfair conduct is included as if antitrust infringements were involved (subject to the same powers of investigation and penalties). The provision was initially conceived in a manner similar to that of article 3 of the Spanish Competition Law, in which acts of unfair competition which, because they distort free competition, affect the public interest, are considered antitrust infringements[64].

Ecuadorian legislation was based on that system, but established broader regulation. Not only does it consider as competition violations unfair acts that harm the public interest, but also those that 'impede, restrict or distort competition, undermine economic efficiency, general welfare or the rights of consumers and users'.

The legislation in Ecuador also broadened the scope of the infringements by including acts which, although they do not directly affect competition, may prejudice the rights of consumers or users. For such acts to be penalized, it must be shown that they were performed on a widespread basis or that they had a large-scale impact on consumers and users[65].

(ii) Classification: The general clause governing unfair conduct is contained in the heading of article 26 of the LORCPM, which penalizes all deeds, acts or practices contrary to honest practice or custom in the course of economic activities. Article 27 establishes a list of specific unfair practices:

(a) Acts causing confusion: Any conduct which has as its object or effect, actual or potential, to cause confusion in the market regarding another economic operator's activity is considered an unfair practice.

(b) Misleading practices: They consist of conduct that misleads or may mislead the public, even by omission, in relation to the nature, form of manufacturing or distribution, the characteristics, fitness for use, quality, quantity, price, terms of sale or geographical origin of goods and services.

(c) Also considered misleading is any assertion which leads the consumer to have a misperception of the advantages, characteristics or benefits of an economic operator's products or services. In the case of this type of infringements, when the misleading conduct is based on express claims in advertising, the burden of proof is reversed, the person under investigation being required to prove the truthfulness and accuracy of the messages conveyed.

(d) Imitation: Imitations that violate an intellectual property right are considered unfair practices, as are those that cause confusion among consumers regarding the enterprise from which products or services originate, and the systematic imitation

[63] Article 25, LORCPM.

[64] Article 3, Spanish Competition Law 15/2007 of July 3, 2007.

[65] Article 26, LORCPM.

of a competitor's supplies or initiatives with the intention of hindering the consolidation of its position in the market.

(e) Discrediting acts: The spreading of information regarding a third party is considered an unfair practice when such information may undermine its reputation in the market, unless it is accurate, true and relevant.

(f) Comparison: Any comparison of one's own activity, services, products or establishments with those of a third party is considered an unfair practice when such comparison refers to items that are not similar, relevant or verifiable. Although comparative advertising is permitted in certain circumstances, the legislation penalizes comparisons that are misleading or do not allow objective verification of the information compared.

(g) Exploiting another's reputation: It is considered an unfair practice to take advantage, for one's own benefit or for that of a third party, of the industrial, commercial or professional reputation acquired by another economic operator in the market.

(h) Violation of trade secrets: It is considered an unfair practice to obtain, use or disclose a trade secret by illegal or unfair means, for the purpose of exploiting it. Trade secret means any undisclosed information in the possession of an economic operator which is of commercial value due to its confidential nature, provided that reasonable protective measures have been adopted to ensure its confidentiality. This conduct exists when information is acquired through industrial espionage, breach of trust or breach of an obligation of secrecy.

(i) Inducing breach of contract: It is considered an unfair practice for a third party to interfere with a competitor's contractual relationship with its employees, suppliers, customers or other players, for the purpose of inducing them to breach their contractual obligations. For this practice to be punishable, the induction must concern essential obligations of the contract, and its objective must be to exploit a secret, use unfair means (such as deceit) or eliminate a competitor from the market.

(j) Infringement of legislation: Any infringement of legislation which provides an economic operator with a significant competitive advantage in the market is considered an unfair practice. This may include infringement of environmental, tax, employment, social security and consumer legislation or other binding regulations which, if breached, provide a disproportionate advantage over other competitors who comply with the applicable legislation.

(k) Aggressive practices against consumers: Penalties may be imposed for practices involving harassment, coercion or undue influence over consumers, including taking advantage of the consumer's weakness or lack of knowledge, the imposition of unduly complicated procedures for the termination of contracts, threats of unfounded legal action and the inclusion of unfair terms in standard form contracts.

8. Merger control (Concentrations)

(i) Applicable legislation: Control of concentrations is regulated in articles 14 to 24 of the LORCPM, and in articles 11 to 29 of the RLORCPM.

(ii) Authorities: Article 15 of the LORCPM provides that the SCE is the authority in charge of examining, regulating, controlling, and where necessary, intervening and penalizing business concentrations subject to prior notification. To be specific, the INCCE draws up a report on the concentration that has been notified, in which it recommends that it is or is not authorized, so that the CRPI may rule in this respect, authorizing, imposing conditions, or rejecting the transaction.

(iii) Transactions subject to mandatory notification: So that a transaction is considered a notifiable business concentration, it must involve a lasting change of control of an agent in the market. According to article 12 of the RLORCPM, a change of control exists when substantial or decisive influence over an economic operator is obtained by any means. Article 14 of the LORCPM also lists various transactions that may give rise to a change of control, including mergers, asset transfers, acquisitions of shareholdings with the capacity to influence business decisions, links by common management or any transaction under which there is a *de facto* or *de jure* transfer of assets or decision-making capacity.

However, not every acquisition of rights, shares or assets is considered a business concentration. Article 13 of the RLORCPM provides that transactions do not constitute a business concentration where ownership of shares or fiduciary rights is of a temporary nature and is carried out by entities whose principal activity includes dealing in securities for one's own account or for the account of third parties. For this exception to apply, two fundamental conditions must be fulfilled:

(a) Competition is not influenced: The voting rights inherent in those shares cannot be exercised for the purpose of determining the economic operator's competitive behavior, but rather only for the purpose of managing its sale or restructuring.

(b) Maximum period of ownership: Assets must be resold within one year from when they are acquired. On an exceptional basis, the SCE may authorize an extension if it is proven that the sale has not been possible within the stipulated time.

In addition, the RLORCPM excludes from the category of business concentrations situations in which control of an enterprise is acquired by order of an authority in liquidation, bankruptcy, insolvency, temporary receivership or composition with creditors proceedings. In these cases, the acquisition of control is a regulatory or judicial measure aimed at the reorganization or liquidation of the economic operator concerned, without involving a concentration strategy in the market.

Furthermore, acquisitions of control arising from confiscation procedures or other administrative measures ordered in accordance with law are not considered business concentrations either. These measures are due to government decisions linked to the public interest or legislative compliance and not due to business strategies aimed at altering the market structure.

(iv) Compulsory notification thresholds: A transaction which gives rise to a change of control will be subject to approval of the SCE if it reaches the economic or financial thresholds provided for in article 16 of the LORCPM.

(a) Turnover (financial threshold): This threshold is met if the total turnover in Ecuador of the parties to the transaction as a whole exceeds, in the financial year prior to the transaction, the amount established by the Regulation Board. The current limits set are as follows:

Concentrations involving institutions of the national financial system and of the securities market	3,200,000 RBU **USD 1,504,000,000**
Concentrations involving insurance and reinsurance companies	214,000 RBU **USD 100,580,000**
Concentrations involving economic operators not included in the previous categories	200,000 RBU **USD 94,000,000**

(b) Market share (economic threshold): This threshold is met when two operators participate in the same market, and as a result of the concentration, their share is acquired or increased to reach a market share equal to or greater than 30% in the relevant product or service market, either at national level or within a defined geographical area within the country.

(v) Voluntary notification for information purposes: Concentrations that do not meet the thresholds can be voluntarily notified, without involving a substantive analysis or the need for approval by the authority. Under article 23 of the RLORCPM, the notification must be issued using the official form of the SCE, and the authority may request additional information which must be provided.

In addition, in view of article 22 of the RLORCPM, the SCE can, ex officio, demand notification of a transaction for information purposes, in which case operators will be obliged to submit the information within 15 days. However, this notification does not involve an authorization procedure nor confer powers on the SCE to block the transaction. The SCE has not exercised this power to date.

(vi) Consultation prior to notification: There are two ways to obtain a consultation before the mandatory notification of a business concentration. Firstly, economic operators can request meetings with the SCE to review drafts and resolve doubts about the notification under preparation[66].

In addition, the legislation allows a formal consultation to be made to the SCE for two specific purposes: to determine whether a transaction qualifies as a business concentration under article 14 of the LORCPM, or to establish whether the transaction meets the minimum thresholds to render prior notification compulsory, in accordance with article 16 of the LORCPM.

The consultation must be submitted in writing to the Supervisor and must be accompanied by detailed information regarding the transaction and the operators involved. If the SCE considers the information to be insufficient, it can request additional information and, in the event of failure to comply, the consulting party will be deemed to have withdrawn its request.

If the consultation does not comply with the criteria provided in the legislation, the SCE can issue a resolution refusing to admit it. It is important to emphasize that this consultation does not replace the obligation to notify when the legal requirements to do

[66] Article 18, final subparagraph, RLORCPM.

so are met.

(vii) Procedure and times: A concentration must be notified within eight days from the conclusion of the agreement, in accordance with article 17 of the RLORCPM. The agreement is deemed to be concluded when there is a corporate statement of intention of at least one of the parties to carry out the transaction. This statement may emerge, for example, by holding a shareholders' meeting to approve the transaction or by signing a binding contract.

The eight-day period can be problematic due to the amount of information and documents required in the notification, in accordance with article 18 of the RLORCPM. The SCE may request compulsory additional information and, if the presentation is incomplete, it can grant 10 days to rectify it. If the information required is not completed, the application is deemed to be withdrawn.

Following notification of acknowledgement of the case, which occurs after the stage of preliminary review of the information presented, the INCCE checks compliance with the requirements and the supply of the mandatory documents. Afterwards, the INCCE must conclude the investigation within 55 days. That period may be suspended or extended under certain circumstances. This analysis period is divided into Stage 1 and Stage 2.

(a) Phase 1 is an abbreviated procedure applicable when the economic concentration operation meets certain criteria that allow to presume it does not pose risks to the market. These criteria are evaluated by the INCCE in accordance with the procedure established in the IGPA.

The evaluation in this phase proceeds when any of the following conditions are verified:

- The economic operator acquiring control does not carry out, directly or indirectly (through companies of its economic group), economic activities in Ecuador.

Likewise, Phase 1 applies for:

- Horizontal integration transactions, provided that the following requirements are cumulatively satisfied:

  a. The combined participation in the relevant market of the operators involved and their economic groups is less than 30%.

  b. The Herfindahl-Hirschman Index (HHI) prior to the transaction is less than 2,000 points.

  c. The variation of the HHI as a result of the transaction is less than 250 points.

- Vertical integration transactions, provided that the following requirements are jointly met:

  a. The combined share of participation of the operators involved and their economic groups is less than 30% in vertically integrated markets.

  b. The HHI in vertically integrated markets, prior to the transaction, is less than 2,000 points.

If the transaction meets these requirements and the information presented is sufficient to verify them, the INCCE can issue within 15 working days a report recommending the approval of the transaction to the Commission. From then onwards, the CRPI has an additional period of 10 days to issue its resolution. However, if the INCCE decides that the transaction requires a more thorough analysis or if it fails to rule within 15 days, the investigation will automatically move on to Phase 2.

In Ecuador, the transition to Phase 2 is not dependent on the existence of risks to competition nor on the identification of such risks in a list of requests. It is sufficient that the authority requests more time for the analysis. This aspect adds a degree of uncertainty to the procedure, since the notifying parties cannot always foresee the authority's concerns nor the reasons justifying an extension of the investigation.

(b) The procedure at Phase 2 is conducted within the same general period of 60 days, but can be extended by suspensions of up to 45 working days and extensions of up to an additional 25 working days. In practice, a transaction eligible for Phase 1 can be resolved in a period of between two and three months, whereas one at Phase 2 can be extended until approximately eight months, without taking into account the time necessary for the negotiation and implementation of possible remedies. At both stages the SCE retains the same investigative powers.

(c) Decision. Once the investigation has ended, the INCCE issues its report to the CRPI for the adoption of a final decision. The CRPI has the remaining time of the original 60-day period, as well as any suspension or extension that has been applied, to decide on the authorization or rejection of the concentration or imposition of conditions.

(d) Appeal. An appeal against the CRPI resolution may be filed before the Superintendent of Economic Competition and, subsequently, it may be contested in the judicial review courts. There is currently still debate in the courts about the standing to file these appeals. In particular, it is disputed whether only the notifying party is entitled to appeal or whether interested third parties can also do so. This matter forms part of a broader analysis to determine who are parties for procedural purposes in the procedure for control of concentrations and in the supervision of compliance with possible remedies imposed.

(viii) Breach of the obligation to notify: The LORCPM establishes a specific system of penalties for breach of the obligation to notify concentrations and for cases of gun jumping. These infringements are classified as minor, serious and very serious, depending on the nature and the impact of the conduct on the market.

(a) The extemporaneous notification of an economic concentration operation is considered a minor infringement, i.e., when the obligated economic operators do not submit the notification within eight calendar days from the conclusion of the agreement, as required by Article 16 of the LORCPM.

Likewise, failure to comply with a notification request made ex officio by the SCE, even when the transaction does not exceed the thresholds established for mandatory notification, constitutes a minor infringement. In these cases, and pursuant to Article 22 of the Regulation, the authority may require that the transaction be notified for information purposes, within a period of fifteen days, which may be extended. Once the requirement is issued, compliance becomes

mandatory, and failure to comply with this obligation constitutes a minor infraction pursuant to Article 78, paragraph b, of the LORCPM.

(b) On the other hand, cases in which a business concentration is executed before it has been notified to the SCE or before the relevant authorization is obtained are classified as serious infringements. This situation reflects a more serious violation, since it jeopardizes the authority's capacity to assess the effects of the concentration on competition before it is implemented.

(c) Finally, the execution of acts or contracts by the economic operator resulting from an economic concentration subject to control, when such operation has not been previously notified or authorized by the Superintendency of Economic Competition, constitutes a very serious infringement. Unlike the serious infringement, which relates to the anticipated execution of the concentration operation, this infringement is configured when, in addition, the merged or acquiring company acts in the market as if the concentration were valid, without having complied with the legal requirements. The law provides for penalties not only for the company, but also for its legal representatives and administrators, who may be personally fined according to their level of participation in the infringement. In particularly serious cases, the authority may order the dissolution of the operation, if this is necessary to reestablish competitive conditions.

Despite these provisions, in practice there is no record of the imposition of personal penalties on legal representatives or directors in cases of gun jumping. Moreover, the SCE has never resorted to splitting as a structural remedy in this context.

(ix) Substantive test in each type of transaction: The analysis of business concentrations conducted by the SCE is based on a substantive test which seeks to determine whether the operation notified causes a substantial restriction of competition. This analysis is undertaken in two different stages, in accordance with criteria combining structural and efficiency assessments.

First of all, there is an examination of whether the transaction can give rise to a substantial reduction of competition using the following elements:

(a) State of competition in the relevant market, taking into account the market structure, the intensity of existing competition and entry and exit barriers.

(b) Degree of market power of the acquiring economic operator and of its principal competitors, assessing their capacity to fix prices, supply restrictions and other conditions that may affect competitive dynamics.

(c) Need to preserve or promote free competition, ensuring that the transaction does not unjustifiably restrict the participation of new players or cause anticompetitive exclusions.

(d) Effects of the transaction, verifying whether the concentration creates or reinforces market power leading to a significant reduction, distortion or obstruction of competition, whether foreseeable or confirmed.

(e) The analysis of these factors follows a hybrid model, in which the SCE combines the traditional dominance approach with an examination of effects on actual

effective competition. This allows a broader and more flexible assessment of the competitive impact of concentrations.

Secondly, if a substantial risk to competition is identified, the analysis is supplemented by the assessment of the possible benefits generated by the transaction. This examination is not automatic and is only conducted if there are signs that the concentration could restrict competition. At this stage, the following factors are considered:

(a) Improvements in production or marketing systems, which may generate efficiencies in terms of costs and processes.

(b) Promotion of technological or economic progress, in terms of innovation, development of new productive capacities and improvements in the quality of products or services.

(c) Impact on competitiveness of domestic industry on the international market, determining whether the transaction strengthens the position of Ecuadorian operators in global contexts.

(d) Positive effects on domestic consumers, including possible improvements in prices, availability of goods and services, or a greater variety of choices.

(e) Proportionality of benefits in relation to the restrictive effects on competition, ensuring that the efficiencies resulting from the transaction are not theoretical or are unattainable without the concentration.

(f) Diversification of share capital and worker participation, analyzing whether the transaction contributes to a more balanced business structure or to the democratization of ownership and decision-making.

The burden of proof of the benefits of the transaction rests exclusively on the notifying parties. For these benefits to be taken into account in the analysis of the SCE, they must comply with the following criteria: (i) be verifiable; (ii) specific to the concentration; and (iii) sufficient to counteract any negative effect on competition. Furthermore, efficiencies that can be achieved using mechanisms that restrict competition to a lesser extent will not be taken into account.

(x) Remedies: The SCE can impose remedies for the purpose of mitigating the possible risks to competition that may arise from a transaction subject to authorization. In the light of article 21 of the RLORCPM, remedies can be classified as behavioral or structural, depending on the nature of the risk identified and on the capacity of the measure to restore effective competition conditions.

(a) Structural remedies: They focus on the modification of the market structure, generally by means of divestment of assets, business units or essential rights of the merged enterprise. The application of such remedies seeks to avoid the exclusive accumulation of market power and to preserve competitive rivalry between economic operators.

(b) Behavioral remedies: They impose restrictions on the future behavior of the entity resulting from the concentration. They can include restrictions on price fixing, commitments regarding access to inputs or essential infrastructure, prohibitions of tied sales or exclusivity clauses, among other conditions.

The SCE can impose these remedies unilaterally or accept them as voluntary commitments proposed by the notifying economic operators, provided that they are sufficient, verifiable and proportionate to the risks identified. The decision regarding the suitability of the remedy is adopted on the basis of a detailed analysis of the relevant market and of the expected effects of the concentration.

In addition, the application of remedies is subject to monitoring and compliance mechanisms, which can include appointing divestment or compliance supervisors, periodic audits or monitoring reports[67]. Breach of these conditions may give rise to administrative penalties.

(xi) Administrative silence: Under article 23 of the LORCPM, if the SCE fails to issue the relevant resolution on time, the business concentration is deemed to be authorized.

Such authorization due to administrative silence has the same legal effects as an express authorization, allowing economic operators to execute the transaction without the need to make additional requests or take additional steps at the competition authority.

The time limits for a resolution on a concentration notification is 60 calendar days, from the filing of the full application and the documentation required.

However, this period can be extended on a single occasion for another 60 calendar days, and suspended for 45 days if the SCE considers that the circumstances of the analysis so require. If no express resolution is issued within this period, the transaction is deemed to be approved.

Positive administrative silence has been applied in a recent case relating to the merger of Cinemark and Multicines, in which the transaction was automatically approved because no express resolution was issued within the statutory period[68].

9. Investigation of anticompetitive behavior

Investigative and disciplinary procedures are regulated in articles 53 to 69 of the LORCPM and 64 to 71 of the RLORCPM. The LORCPM also provides that infringements not arising from anticompetitive behavior are dealt with in accordance with the administrative disciplinary procedure established in the COA[69].

(i) Commencement of the investigation: Investigations may be commenced ex officio, upon a complaint of any individual or legal entity showing a legitimate interest or at the request of another public body.

(a) Ex officio commencement: The SCE can commence the procedure ex officio having become aware directly or indirectly of the conduct capable of constituting an infringement. Ex officio cases often use incidental findings in market studies[70].

[67] Article 36, IGPA.

[68] Artículo 64.1, LORCPM.

[69] Artículo 64.1, LORCPM.

[70] Artículo 55, RLORCPM.

(b) Commencement at the request of another body: Any administrative body that becomes aware directly or indirectly of conduct capable of constituting an infringement must request the SCE to commence an investigation, enclosing all information that it considers relevant to justify the commencement of the procedure[71].

(c) Commencement by complaint: The complaint may be lodged by the injured party, or by any individual or public or private legal entity showing a legitimate interest[72].

(ii) Admissibility: Article 54 of the LORCPM establishes the content of the complaint:

(a) The complainant's name and address;

(b) Identity of those allegedly responsible;

(c) A detailed description of the alleged conduct, indicating the approximate duration or imminent occurrence;

(d) A list of those involved in the alleged conduct;

(e) Data identifying those involved known by the complainant, including, inter alia, their addresses, telephone numbers and email addresses, if any, and, where applicable, the identification data of their legal representatives (the regulation clarifies that the absence of one or more of the requirements of this point does not invalidate the complaint);

(f) The characteristics of the goods or services the subject of the alleged conduct, and of the goods or services affected;

(g) The evidence reasonably available to the complainant;

Article 59 of the RLOCPM points out that the applicant's withdrawal does not prevent the SCE from continuing with the investigative stage.

(iii) Evidence: As a general rule, the burden of proof is borne by the SCE[73]. However, there is a reversal of the burden of proof: i) in the case of an agreement for an anticompetitive object, ii) if the operator refuses, hinders, impedes, conceals or omits information in the course of an investigation[74], and (iii) in investigations of misleading acts as unfair conduct[75].

The CRPI appraises the evidence in accordance with the rules of reasoned judgment; in other words, on the basis of experience, logic, firmly established knowledge and the state of the art.

(iv) Discretion and confidentiality: If the requirements for a complaint are met, the SCE is

[71] Artículo 56, RLORCPM.

[72] Artículo 57, RLORCPM.

[73] Article 48, fifth point, LORCPM.

[74] Article 48, fifth point, LORCPM.

[75] Article 27, LORCPM.

obliged to investigate; however, the general rules of administrative law do not require public institutions to investigate everything that is reported, but rather only that which they consider sufficiently important and in line with their objectives. There is therefore a tension between the LORCPM and the general rules in relation to the obligation to investigate everything that is reported; this debate is still open.

On the other hand, the investigative stage will be private, except for the parties directly involved[76]. As in the preliminary investigations there are no parties, that stage (and also any prior step) is private and confidential.

Once the investigation has commenced, the parties are entitled to access the file, except whatever has been declared confidential. The SCE has adopted various views in relation to the standard of confidentiality. Initially it applied a very wide standard in which nearly everything was declared confidential, but now it has adopted a stricter view and tends to declare a small amount of information as confidential.

The tension between confidentiality and the right of defense continues, as shown by recurrent changes in the internal instructions[77].

(v) Time limits: Once the complaint has been received, the SCE will review the requirements indicated in article 54 of the LORCPM and, if any is missing, will grant a deadline of three days to complete or clarify the complaint. If the complaint is not clarified or completed within the stipulated period, it will be immediately dismissed.

On the other hand, if the complaint is considered complete, within three days the SCE informs the operators the subject of the complaint of its content and allows them a period of 15 days to reply. When this period has expired, the SCE can rule within 10 days on the commencement of the investigation, issuing a resolution to commence the investigation or to dismiss the complaint[78].

The investigation may last up to 180 calendar days, which may be extended for an additional 180 days, and ends with the filing of charges. When the process is commenced ex officio, the agency can conduct a preliminary investigation of up to 180 working days.

(vi) Commencement: Upon expiration of the period of 15 days granted to those allegedly responsible, if the SCE considers that there are presumptions of existence of an infringement, within 10 days it will issue the resolution to commence the investigation stage. This resolution must be duly reasoned and must contain at least the identity of those allegedly responsible, a description of the conduct under investigation, the facts that gave rise to the resolution to commence, the identity of any interested third parties, and the duration of the investigative stage[79].

The Office in charge of the investigation may request from any economic operator, institution or public or private sector body information or documents to conduct its

[76] Article 56, LORCPM. Article 5, Instructions for information processing of the SCE.

[77] As a reference, the most recent reform of the Instructions for information processing within the SCE was made on September 5, 2024, by Resolution No. SCE-DS-2024-37

[78] Article 56, LORCPM,

[79] Article 56, LORCPM. Article 62, RLORCPM.

investigations[80].

When the term of the investigation has ended, the investigating body must issue a report on the results of the investigation; including any corrective measures and penalties that should be imposed, which will be notified to those allegedly responsible[81].

(vii) Presentation of defense of those investigated: The accused operators, once they have been served with the report of results, a copy of the complaint and the list of charges, have a period of 15 days to present defenses. If those allegedly responsible fail to filed defenses, the proceedings will continue in absentia[82].

(viii) Evidentiary stage: When defenses have been filed, the CRPI orders the opening of the evidentiary stage for a period of 60 days, which can be extended for an additional period of up to 30 days, at the authority's discretion. Once the evidentiary period has ended, the parties can file submissions within 10 days[83]. This stage ends with the issue of a final report by the investigating body, which must be sent to the CRPI for consideration and ruling[84].

(ix) Resolution stage: If the CRPI considers it appropriate, it will call a public hearing, at which the parties can present the submissions, documents and justifications that they consider appropriate. When the hearing has been held or the evidentiary period has ended, the decision-making body of the Competition Supervisory Authority will issue a duly reasoned resolution within a maximum period of 90 days[85].

10. Administrative appeals

(i) Appeal: A resolution issued by the CRPI, and any administrative act issued by a body of the SCE under the LORCPM, can be appealed to the Supervisor, by filing an appeal within 20 days from the day following that of notification of the administrative act appealed[86].

(ii) Extraordinary review appeal: This appeal may only be filed against final administrative acts and allows its exceptional review when specific circumstances provided by law are present. Pursuant to Article 68 of the LORCPM, it may be filed in case of material, factual or legal errors in the administrative act; when new evidence or elements arise that could not have been known in a timely manner; or when there are substantial defects affecting the legality of the act. The appeal may be filed by the Superintendent, by consumers or by economic operators who demonstrate a legitimate interest, within a period of three years after the act has become final[87].

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[80] Article 64, RLORCPM.

[81] Article 67, RLORCPM.

[82] Articles 67 and 68, RLORCPM.

[83] Article 59, LORCPM.

[84] Article 70, RLORCPM.

[85] Article 61, LORCPM.

[86] Article 67, LORCPM.

[87] Article 68, LORCPM.

11. Judicial review proceedings

All resolutions of the Supervisory Authority can be contested in the courts. This challenge is heard by non-specialist judges of the judicial review district courts. On an exceptional basis, when constitutional proceedings are brought against the SCE, the judges with jurisdiction to hear them are constitutional judges (which, except for the Constitutional Court, refers to all judges regardless of their subject of specialization or rank).

These are the two possible channels, depending on the nature of the action:

12. Judicial review

(i) Judicial review courts. All challenges to administrative acts issued by the SCE must be filed in the judicial review district courts, regardless of the amount. These judges review the legality of the acts of the SCE at first instance, there being no appeal from such review. The SCE has requested the creation of judges of administrative courts specialized in competition, but these chambers have not been created yet (and, for budgetary reasons, it is unlikely that they will be created in the medium term).

(ii) Supreme Court: Decisions of the judicial review courts can be the subject of a cassation appeal to the Supreme Court, by means of an action related to specific errors of law[88].

13. Constitutional review

Any challenge or claim of a purely constitutional nature which does not fit within any other channel in which the review of legality of an action is claimed, can be filed by means of constitutional actions. At first instance, all judges of all branches of jurisdiction and subject matter can hear constitutional actions. The Constitutional Court has final appellate jurisdiction.

14. Damages

Actions to remedy or indemnify damage caused in relation to anticompetitive behavior forbidden by the LORCPM can be filed in accordance with general rules, in summary proceedings before a judge of the civil courts[89]. The action will become statute-barred in five years from when the resolution that imposed the penalty in question becomes enforceable.

In addition, article 64 of the LORCPM acknowledges that if the dismissal of malicious or reckless complaints has been ordered, the accused, if there are good grounds to do so, will be entitled to claim compensation in the courts for any loss and damage caused to him.

[88] Article 266, Organic General Code of Procedure. Official Registry 506 of May 12, 2015.

[89] Article 71, LORCPM.

Mexico

Mexico

Gerardo Lemus

Abreviaturas

COFECE	Federal Economic Competition Commission
SE	Secretaría de Economía
PROFECO	Procuraduría Federal del Consumidor
IFT	Federal Telecommunications Institute
LFCE	Ley Federal de Competencia Económica Federal Economic Competition Law
Decree	Decree amending, supplementing and repealing various provisions of the Mexican Constitution, in relation to institutional simplification, published in the Official Gazette of the Federation on December 20, 2024
UMA	Unit of Measure and Update

1. General background

1.1 Legislative framework

The legislative framework for competition in Mexico consists mainly of the Federal Economic Competition Law ("**LFCE**"), which gave effect to Article 28 of the Constitution of the United Mexican States. This law, which came into effect in 2014, establishes the basis for free market participation and competition, and defines monopolistic practices, unlawful concentrations and barriers to competition. In addition, the Federal Economic Competition Commission ("**COFECE**") and the Federal Telecommunications Institute ("**IFT**") have published other administrative provisions which complement this framework, as we will see later.

The recent Decree amending, supplementing and repealing various provisions of the Mexican Constitution, in relation to institutional simplification, published in the Official Gazette of the Federation on December 20, 2024 (the "**Decree**"), introduces important changes to Article 28 of the Constitution, conferring greater powers on the Federal Government to intervene directly in markets with competitive restraints and establishes the need to enact secondary legislation to implement these provisions. In fact, the Decree orders the enactment of new secondary legislation by the Mexican Parliament and the creation of a new competition authority in Mexico.

1.2 Institutional framework

The Federal Economic Competition Commission ("**COFECE**") is, to date, the independent body in charge of applying the LFCE. The COFECE has legal personality and its own funds, and makes decisions and operates independently. It is made up of a Board of Commissioners (Board) with seven Commissioners, including a Chair Commissioner, and has an investigative authority which takes charge of conducting investigations and is a party in trial-like procedures (the **"Investigative Authority"**). In addition, the IFT is the competition authority in the broadcasting and telecommunications sectors.

The Decree provides that the COFECE and the IFT will be eliminated within 180 days from the entry into force of the secondary legislation enacted by the Mexican Parliament in relation to competition and free market participation; and in relation to telecommunications and broadcasting, respectively. Decisions of such bodies issued before their elimination will continue to have full legal effect.

1.3 Evolution of the system

The system of competition in Mexico has evolved significantly since the enactment of the first Federal Economic Competition Law in 1992. The 2014 law marked an important development by strengthening the autonomy and powers of the COFECE. The reforms in 2017 and 2021 continued this process, adjusting and improving the legal framework to deal more effectively with anticompetitive practices and to adapt to changes in the economic and technological environment.

In principle, and subject to the secondary legislation that must be proposed and eventually passed, the recent reforms in 2024 confer greater powers on the Federal Government to intervene directly in markets with competitive restraints.

1.4 Definition of prohibitions and scope of action

The LFCE forbids absolute and relative monopolistic practices, unlawful concentrations and barriers to competition. Absolute monopolistic practices include agreements between competitors to fix prices, limit production, divide up markets or coordinate positions in public tender processes. Relative monopolistic practices are those engaged in by operators with substantial power in the market which have as their object or effect the improper displacement of other competitors or the establishment of exclusive advantages. Unlawful concentrations are mergers or acquisitions that hinder, reduce or impede competition. Barriers to competition are structural characteristics of the market or acts of economic operators which impede access by competitors or distort competition.

The scope of action of the LFCE includes all sectors of the economy, with emphasis on essential inputs, and on strategic sectors such as telecommunications and energy.

1.5 Parties liable

The LFCE applies to all economic operators, which include individuals and legal entities, for-profit or nonprofit, branches and entities of the federal, state and municipal administration, associations, chambers of commerce, professional groupings, trusts and any other form of participation in economic activity. All these operators are subject to the provisions of the law and can be jointly and severally liable for prohibited decisions and conduct.

1.6 Extraterritoriality

Article 1 of the LFCE provides that this legislation gives effect to Article 28 of the Mexican Constitution in relation to free market participation, competition, monopolies, monopolistic practices and concentrations, is a matter of public and social interest, applicable to all areas of economic activity and is to be generally observed throughout the Republic.

The LFCE is a federal law subject to the Mexican Constitution and to the legal principles enshrined in it. The Mexican Constitution upholds the principle of territoriality. According to that principle, the LFCE only regulates situations or behavior referring to competition in Mexican territory and the effects in Mexico of situations or conduct created or occurring in another State.

2. General sanctions regime

Article 127 of the LFCE establishes various penalties which the Commission can impose in the event of infringements of the law. The following are the main types of penalties which that legislation makes available to the authority:

(i) Correction or Elimination of Monopolistic Practices or Unlawful Concentrations. The COFECE can order the correction or elimination of monopolistic practices;

(ii) Reversal of Unlawful Concentration. Order the total or partial reversal of an unlawful concentration, the termination of control or the elimination of acts, where applicable, apart from the fine that may be applicable.

(iii) Imposition of fines for various infringements such as: (i) making false declarations or supplying false information to the Commission, apart from the criminal liability that may be incurred; (ii) engaging in absolute monopolistic practices, apart from the civil and criminal liability that may be incurred; (iii) engaging in relative monopolistic practices, apart from the civil and criminal liability that may be incurred; (iv) carrying out an unlawful concentration, apart from the civil liability that may be incurred; (v) breaching the obligation to notify a concentration when this should have been done in accordance with the LFCE; (vi) failure to comply with the conditions established in the resolution approving a concentration, apart from a possible reversal order; (vii) participating directly or indirectly in carrying out monopolistic practices or unlawful concentrations as representative or on behalf of legal entities; (viii) aiding, facilitating or inducing engagement in monopolistic practices, unlawful concentrations or other restrictions on the efficient operation of markets within the meaning of the LFCE; (ix) failing to comply with resolutions issued by the COFECE; (x) intervening as a public authenticating official in acts relating to a concentration, when such concentration has not been authorized by the Commission; (xi) controlling as an economic operator an essential input, (xii) infringing the regulation established regarding this essential input, and failure to observe an order to eliminate a barrier to competition, and (xiii) breach of an interim order issued under the LFCE.

(iv) Regulation of Access to Essential Inputs. Order measures to regulate access to essential inputs under the control of one or more economic operators for having refused, restricted or established discriminatory terms and conditions for access to such essential inputs.

(v) Disqualification of Representatives of Legal Entities. In the case of persons who participate directly or indirectly in monopolistic practices or unlawful concentrations as representative or on behalf or by order of legal entities, disqualification from acting as board member, director, manager, executive, agent, representative or attorney-in-fact of a legal entity for a period of up to five years, in addition to the fines that may be applicable.

Some of the above-mentioned fines are imposed as a percentage of the penalized economic operator's revenue. Under article 127 of the LFCE, such revenue will be that of the economic operator involved in the unlawful conduct, excluding that obtained from a source of wealth located abroad, as well as taxable revenue if it is subject to a preferential tax regime for income tax purposes, of the last tax year in which the infringement in question has been committed. If it is not available, the base for the calculation for the previous tax year will be used.

The COFECE may request from economic operators or the competent authority the necessary tax information to determine the amount of the fines referred to in the previous paragraph, and in the case of economic operators, may use the enforcement mechanisms established by the LFCE.

In the event of recurrence, the COFECE can impose a fine of up to double that which would have been originally established. Any economic operator who, having committed an infringement that has been penalized, engages in other conduct forbidden by the LFCE, shall be considered a reoffender, regardless of whether it is of the same type or not, if not more than ten years have elapsed between the commencement of the new procedure and the final decision on the first infringement.

3. Draft legislation

As already mentioned, by the constitutional reform decree published on December 20, 2024, constitutional changes were made which will lead to amendments to the current regulatory framework for competition in Mexico.

By that reform, it was decided to eliminate the COFECE, to be replaced by a new regulatory body that: will report to the Federal Government; will have legal personality and its own funds; will enjoy technical and operational independence in its decision-making, organization and operation; and will be made for separation between the authority that investigates and that which rules on procedures. Unlike the COFECE, since the reform does not provide that the new regulatory body will be independent, nor that it will have the power to manage its budget independently, there is the risk that its resolutions in relation to the Federal Government may be affected, since it will not have the degree of independence provided under the current regulation.

Under the tenth transitional article of the Decree, before March 21, 2025, the Mexican Parliament must enact new secondary legislation in relation to competition and free market participation, so as to give effect to the amended provisions of Article 28 of the Constitution. The passing and implementation of those laws will be key to the application of the new constitutional framework in relation to competition. The constitutional amendments will come into force within 180 days from the entry into force of the above-mentioned secondary legislation, upon which date the COFECE will be shut down and its powers and operational staff will be transferred to the new regulatory body.

In this respect, a legislative initiative for the new Federal Antitrust and Competition Law was already presented in the Lower House of Parliament in February 2025. Although it is still too early to anticipate whether the draft legislation submitted will be passed in the same form as it was presented or whether it will be amended, since it must undergo the appropriate legislative process, by the date of this contribution (late-March 2025) the following are some of the changes to the current legislation that are proposed in that draft law:

(i) As was already mentioned, a new governing body, which would replace the COFECE and the IFT in this respect;

(ii) An increase in the amount of the fines for infringements of that law;

(iii) A reduction of the amounts established as economic thresholds to render it compulsory for economic operators to notify concentrations, and

(iv) As regards anticompetitive behavior, provision is made for the inclusion of the possible analysis of the effect of conduct and the damage that it causes, under the concept of abusive exploitation of market power.

4. Institutional structure

In order to comply with its constitutional mandate, the COFECE is currently organized as follows:

(i) The Board of Commissioners (Board), the highest collegiate body of the COFECE, made up of seven Commissioners, including a Chair Commissioner, who are appointed upon a proposal of the President of the Republic, ratified by the Senate, the Chair Commissioner being appointed directly by the Senate from among the Commissioners. The Commissioners, acting as a Board, are in charge, inter alia, of deciding on the cases that are pursued in the COFECE.

(ii) The Investigative Authority, which investigates possible anticompetitive behavior, as well as competition conditions in markets or the existence of possible barriers impeding competition.

(iii) The Technical Secretariat, the body in charge of, among other activities, undertaking analyses of business concentrations and conducting trial-like procedures in which individuals or legal entities accused of engaging in anticompetitive behavior defend themselves.

(iv) The Planning, Institutional Relations and International Affairs Unit, in charge of undertaking the activities of promotion of competition, strategic planning and measurement of institutional performance, as well as coordinating the relations of the COFECE with other national and international bodies and institutions.

(v) The Internal Comptroller, which checks that public servants of the COFECE carry out their responsibilities in strict compliance with the legislation and regulations in force.

5. Horizontal agreements

5.1 Applicable legislation

In Mexico, under the LFCE, in general, anticompetitive behavior is classified mainly as absolute monopolistic practices and relative monopolistic practices.

5.1.1 Absolute Monopolistic Practices (article 53 of the LFCE)

Absolute monopolistic practices can be identified as horizontal agreements. Absolute monopolistic practices are considered unlawful and consist of contracts, agreements, arrangements or combinations between competing economic operators, whose purpose or effect is any of the following:

(i) Price fixing: Fixing, raising, agreeing on or manipulating the sale or purchase price of goods or services at which they are supplied or demanded on markets.

(ii) Restriction of production: Imposing the obligation to refrain from producing, processing, distributing, marketing or acquiring except only a restricted or limited quantity of goods or the provision or contracting of a restricted or limited number, volume or frequency of services.

(iii) Division of markets: Dividing, distributing, allocating or imposing portions or segments of an existing or potential goods or services market, by means of determined or determinable customers, suppliers, times or spaces.

(iv) Coordination in public tender processes: Establishing, agreeing or coordinating positions or abstention in public procurement processes.

(v) Exchange of information: Exchanging information for or with any of the objects or effects referred to in the previous points.

These practices are null and void, have no legal effect and economic operators that engage in them are liable for the penalties established in the LFCE, apart from the civil and criminal liability that may arise.

5.2 Statute of limitations

The limitation period established in general in the LFCE for the COFECE to exercise its powers is ten years, from when the unlawful concentration was carried out or the conduct forbidden by the LFCE ended.

5.3 Specific powers

The Investigative Body of the COFECE (see section 4), in accordance with article 28 of the LFCE, has powers to investigate anticompetitive behavior. Among other powers, it can: conduct and develop investigations; request information from economic operators either due to their possible involvement in anticompetitive practices, or because they may have relevant information relating to such practices; in that same context, it may obtain statements from witnesses; request information from other authorities and file criminal complaints with the Public Prosecutor's Office.

It should also be noted that under article 75 of the LFCE, in conducting investigations, the Investigative Authority of the COFECE will have the power to perform dawn raids to companies' premises. In the course of those visits, the Investigative Authority may, inter alia: (i) access any office, equipment, computer or electronic or storage device; (ii) check books, documents, papers and files; (iii) make copies of such books, documents or files, whether physical or electronic; (iv) secure books, documents and all other storage media, and (v) request from any official, representative or staff member of the economic operator explanations, information or documents related to the purpose of the visit.

5.4 Benefits for Cooperation Program

In the context of an investigation or procedures for relative monopolistic practices or an unlawful concentration, before the statement of probable responsibility is issued, under article 100 of the LFCE, the economic operator can, on a single occasion, request the benefit of exemption from or reduction of the fines established in the law, provided that: (i) it undertakes to suspend or rectify the concentration or practice, and (ii) the means proposed for that purpose are legally and economically viable.

Furthermore, the COFECE has an Immunity and Penalty Reduction Program in force under article 103 of the LFCE, which it applies in the case of absolute monopolistic practices, both for economic operators and for individuals that have engaged in absolute monopolistic practices on behalf of legal entities, provided that such person: (i) is the first to provide sufficient facts so that the COFECE may conduct an investigation; (ii) fully cooperates with COFECE in the investigation and in the trial-like procedure, and (iii) carries out the necessary actions to end its participation in

the unlawful practice. For these purposes, in addition to the provisions of the LFCE, the COFECE has also published a Guide to the Immunity and Penalty Reduction Program.

5.5 Criminalization

Article 254 Bis of the Federal Criminal Code establishes the penalties for which economic operators who engage mainly in absolute monopolistic practices will be liable. That provision states that the offenses specified there will be prosecuted on the basis of a complaint filed by the COFECE or by the IFT. Thus, criminal proceedings may be dismissed at the request of those bodies in plenary session, when the accused persons comply with the administrative penalties and other requirements indicated by the COFECE or the IFT. The limitation period for these offenses is 90 months from the date the offence was incurred.

Accused persons can avoid criminal liability when they avail themselves of the benefits provided for in article 103 of the LFCE.

5.6 Cooperation agreements between competitors

Unlike other jurisdictions, in Mexico there is no legal provision allowing the grant of an exemption from the application of the LFCE to cooperation agreements between competitors. Therefore, when an agreement of this kind is notified, the authority must verify whether there is evidence to equate the act in question to a concentration in accordance with the provisions of article 61 of the LFCE.

5.6.1 Legislative framework and regulation

Cooperation agreements between competitors are analyzed mainly under articles 53, 61, 86 and 90 of the LFCE, which impose the conditions in which such agreements can be considered lawful or anticompetitive. In addition, the COFECE Guide to Notification of Concentrations provides the criteria to determine whether certain cooperation agreements can be considered concentrations and, as such, must be notified to that body.

5.6.2 Classification of agreements

Agreements between competitors can be divided into two large categories:

(i) Permitted agreements

These agreements are designed to promote economic efficiency without unduly restricting competition, either contractually or through some vehicle with legal personality. Examples include:

(a) Cooperation in research and development: Enterprises can jointly develop new products or technologies, sharing costs and risks, without adversely affecting the market.

(b) Joint ventures for specific projects: Agreements to develop infrastructure, such as roads or electricity networks, in which cooperation does not eliminate competition in other markets.

(c) Technical standardization: Competitors who agree on technical standards for products for the purpose of ensuring compatibility and improving the consumer experience.

(ii) Prohibited agreements

These agreements directly or indirectly restrict competition and are prohibited by the LFCE. The most common examples include:

(a) Price fixing: When two or more competitors agree on minimum, maximum or standardized prices for their products or services.

(b) Market sharing: Dividing up geographical markets, customer segments or product lines between competitors.

(c) Restriction of production: Agreements to limit production or distribution for the purpose of manipulating prices.

(d) Collusion in public tender processes: Enterprises which coordinate their bids in public or private sector procurement processes to ensure a predetermined successful bidder.

5.6.3 Notification of agreements

The interpretation of the rules of the LFCE which is explained in the Guide to Notification of Concentrations requires that certain agreements between competitors are notified to the COFECE or to the IFT before they are implemented, depending on the sector in which they operate. Such notification will be compulsory if the agreement has an impact similar to that of a business concentration.

In that respect, the economic thresholds applicable to concentrations and the relevant notification procedure must be considered.

In order to analyze whether an agreement between economic operators constitutes a concentration, the following must be taken into account:

(i) Duration: Agreements designed to be permanent or long term are usually concentrations. Even temporary agreements can be classified in this way if they have profound integrating effects.

(ii) Independence: When the new economic operator created has autonomy in strategies such as pricing, distribution or finance, the agreement may be a concentration. If the participants lose their independent decision-making capacity, this reinforces the characteristics of a concentration.

(iii) Scope: The agreement must not reduce competition in external markets. Coordination in pricing, assets or production may indicate a concentration or absolute monopolistic practices.

In addition, agreements can be investigated under article 53 of the LFCE if signs of anticompetitive practices emerge, even after prior authorization. This occurs if false information is detected or if the agreement unduly restricts competition. In this respect, notifying an agreement as a concentration does not prevent investigations regarding its legality.

6. Abuse of a dominant position

6.1 Relative Monopolistic Practices (article 54 of the LFCE)

Relative monopolistic practices are those consisting of any act, contract, agreement, procedure or combination that entails the following:

(i) It is carried out by one or more economic operators who individually or as a whole have substantial power in the same relevant market in which the practice is undertaken (**Substantial power in the market**:)[1].

(ii) It has or may have as its object or effect, in the relevant market or in some related market, the improper displacement of other economic operators, the substantial obstruction of their access or the establishment of exclusive advantages for one or more economic operators (**Effects on the market**).

The practices will be unlawful and will be penalized if the above-mentioned scenarios are proven, unless the economic operator shows that they generate efficiency gains and have a positive impact on competition and free market participation, exceeding their possible anticompetitive effects and leading to an improvement of consumer welfare. The efficiency gains may include: (i) introduction of new goods or services; (ii) use of surplus, defective or perishable products; (iii) cost reductions derived from the creation of new production techniques and methods; (iv) introduction of technological advances; (v) combination of productive assets or investments which improve quality or broaden the characteristics of goods or services, and (vi) improvements in quality, convenience and service which have a positive effect on the distribution chain.

6.2 Cases of Relative Monopolistic Practices (article 56 of the LFCE)

The cases referred to in article 54 of the LFCE consist of any of the following:

(i) **Exclusive distribution**: Fixing, imposition or establishment of exclusive marketing or distribution of goods or services.

(ii) **Imposition of prices:** Imposition of price or other terms that a distributor or supplier must observe.

(iii) **Tied sale**: Sale or transaction subject to purchase, acquisition, sale or supply of another good or service.

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[1] In accordance with the provisions of article 58 of the LFCE, in order to determine the relevant market, the following criteria must be considered: (i) The possibility of replacing the good or service in question with others, both of domestic and foreign origin, taking into account technological possibilities, the extent to which consumers have substitutes and the time required for such substitution; (ii) The costs of distribution of the good itself; of its most important inputs; of its accessories and of substitutes from other regions and from abroad, taking into account freight, insurance, customs duties and non-customs restrictions, restrictions imposed by economic operators or by their associations and the time required to supply the market from those regions; (iii) The costs and the probabilities for users and consumers to access other markets; (iv) Federal, local or international legislative restrictions which limit access by users or consumers to alternative sources of supply, or suppliers' access to alternative customers; (v) All others that are established in the Regulatory Provisions, as well as the technical criteria that may be issued for such purpose by the Commission. Article 59 of the LFCE establishes the criteria to determine whether there is substantial power.

(iv) **Refusal to sell**: Refusal to sell, market or supply available goods or services to certain persons.

(v) **Agreement to exert pressure**: Agreement between several economic operators to exert pressure against a particular economic operator.

(vi) **Below-cost selling**: Selling below total or average variable cost, if it can be presumed that it will be possible to recoup losses by means of future price increases.

(vii) **Conditional discounts**: Granting of discounts, incentives or benefits with the requirement to refrain from using, acquiring, selling, marketing or supplying goods or services of a third party.

(viii) **Use of profits to finance losses**: Using profits of one good or service to finance losses of another.

(ix) **Price discrimination**: Setting different prices or terms of sale for different purchasers or sellers in equivalent circumstances.

(x) **Hindering the production process**: Increasing costs or hindering the production process of other economic operators.

(xi) **Refusal of access to essential inputs**: Refusal or restriction of access to an essential input.

(xii) **Narrowing of margins**: Reducing the margin between the price of access to an essential input and the price of the good or service offered to the final consumer.

6.3 Barriers to Competition and Free Market Participation. Essential Inputs

One of the mandates of the COFECE, in accordance with article 57 of the LFCE, is to prevent and eliminate barriers to competition and free market participation.

6.3.1 Essential inputs under the LFCE

Article 56.XII of the LFCE considers as a relative monopolistic practice the refusal, restriction of access or grant of access under discriminatory terms and conditions to an essential input by one or more economic operators.

Article 60 of the LFCE establishes the criteria which the COFECE must take into account to determine the existence of an essential input:

(i) Control of the input: It is assessed whether the input is controlled by one or more economic operators with substantial market power or that have been found to be predominant by the IFT.

(ii) Viability of reproduction: An analysis is undertaken of whether it is viable from a technical, legal or economic perspective for another economic operator to reproduce the input.

(iii) Indispensability and substitutes: It is decided whether the input is indispensable for the provision of goods or services in one or more markets and whether there are no close substitutes.

(iv) Control circumstances: The circumstances in which the economic operator managed to control the input are considered.

(v) Efficiencies in markets: It will be assessed whether regulating access to the input or allowing its use by third parties will create efficiency in markets.

6.4 Regulation of Unfair Competition

Unfair competition legislation seeks to protect the trader's goodwill, as opposed to economic competition, which protects the legal interest of market efficiency. Unfair competition focuses on avoiding behavior which may cause confusion, discredit competitors or mislead the public.

Article 5 of the Mexican Constitution establishes freedom of trade, subject to the activities being lawful and not in violation of public policy or good practice. This constitutional basis is fundamental for the regulation of unfair competition.

Mexico is also a party to the Paris Convention for the Protection of Industrial Property, which prohibits unfair competition and defines specific acts that constitute such competition, such as causing confusion, making false assertions and misleading the public regarding the characteristics of products.

Although one of the objectives of the Industrial Property Law is to eradicate unfair competition, it does not provide a full set of rules in this respect. Infringements relating to unfair competition must show a violation of an industrial property right so as to bring proceedings, which in certain cases has limited their effectiveness.

However, on January 26, 2005, article 6.bis was added to the Commercial Code, so as to provide that traders must refrain from engaging in acts of unfair competition which cause confusion, discredit by means of false assertions, or mislead the public. This reform allows the possibility of commencing commercial actions for unfair competition without the need to prove a violation of an industrial property right, as shown by a single ruling I.3o.C.98 C (10a.) issued by the Third Civil Collegiate Court of the First Circuit (digital registration: 2003810), although there is still not sufficient clarity regarding its application in practice.

6.5 Interlocking regulation

Interlocking refers to the practice of sharing officers or directors between competing companies. This practice can have significant implications for competition, since it can facilitate coordination of commercial strategies, price fixing and other anticompetitive behavior.

Although the LFCE does not expressly mention interlocking, the Guide to Exchange of Information between Economic Operators does address the subject of interlocking, highlighting the risks to competition that this practice may pose.

When a person forms part of the board of directors of two or more economic operators which are not part of the same business group, common or cross directorships arise. These directorships are considered risky for competition, since common directors can provide a channel for exchanging information between competitors, facilitating collusion and the monitoring of deviations.

The independent decision-making of boards of directors can be endangered, and competition can be affected due to the risk of exchange of strategic information and conflicts of interest. The COFECE will assess the risks to competition arising from exchanges of information through common directorships, especially in markets with fewer participants.

The COFECE can assess the relationship of common board members or directors at economic operators, both parent companies, controlling companies, holding companies and subsidiaries, branches, as well as the exceptions that have been adopted in practice. This will allow findings of an information exchange which could have constituted an anticompetitive practice.

For the assessment of the information exchange through common directorships, it is suggested that economic operators consider the risk factors and the assessment criteria indicated in the Guide. In addition, safeguard measures can be observed to protect the use of strategic information available to common directors, guaranteeing the independent behavior of boards of directors.

Although the LFCE does not expressly mention interlocking, the provisions regarding absolute and relative monopolistic practices, as well as the regulations on unlawful concentrations, can be applied to regulate this practice.[2] Directors' participation in competing companies could be investigated and penalized if it is shown to facilitate anticompetitive behavior or to diminish competition in the market. Companies must be careful when sharing directors and ensure that they fulfill the notification and assessment obligations established by the COFECE.

7. Concentrations/business combinations

Competition regulation in Mexico is intended to promote efficiency in markets and prevent anticompetitive practices. For the purposes of that regulation, concentration means a merger, acquisition of control or any act for the union of companies, associations, shares, SRL shares, trusts or assets in general that is carried out between competitors, suppliers, customers or any other economic operators (article 61 of the LFCE)[3].

In this context, business concentrations and cooperation agreements between competitors are subject to notification obligations and supervision by the competent authorities.

7.1 Applicable legislation

The LFCE contains the rules applicable to business concentrations in Mexico, as well as the regulatory provisions mentioned later. In addition, the Guide to Notification of Concentrations, published by the COFECE, provides practical guidance regarding how to comply with the statutory provisions applicable in this respect.

The LFCE is based on the principle of effective competition, whose principal objective is to encourage economic efficiency, promote a competitive environment and protect consumers. This

[2] As per the preliminary decision on casefile IEBC-003-2022, from May 2nd, 2024, pp. 15-19, *Órdenes a Grupo Toluca, Grupo La Piedad, Grupo IAMSA, Grupo Estrella Blanca, Grupo Transpaís Único, Grupo ADO, Grupo Pullman, Grupo Estrella Roja and Grupo Senda who are Concessionaires of Motor Transport and of Terminal, as well as the CANAPAT, linked by Cross-Directorates and Contact Spaces*.

[3] The Guide to Notification of Concentrations explains how some of these concepts should be interpreted, for example, acquisition of control.

principle seeks to ensure that enterprises compete on equal terms, avoiding anticompetitive practices that distort markets.

The specific objectives of the regulation of business concentrations include:

(i) The avoidance of excessive concentration of economic power: This prevents a single enterprise or a group of enterprises from dominating a market to the detriment of consumers and competitors.

(ii) The preservation of fair access to markets: By limiting entry barriers, the participation of new economic operators is fostered.

(iii) The promotion of innovation and diversity of products and services: A competitive environment encourages enterprises to innovate and offer better alternatives to consumers.

In addition, the current legislative framework includes criteria and key elements for the assessment of concentrations. In this respect, to determine whether a business concentration should be approved or penalized, the following is taken into consideration:

(i) Definition of the relevant market: According to the terms established by the LFCE.

(ii) Analysis of economic operators: Identification of the most important players in the market, their market power and the existing level of concentration.

(iii) Impact on the market: Assessment of the effects of the concentration on competitors, those demanding the good or service, and other related markets or operators.

(iv) Relationship between participants: Consideration of the participation of those involved in other economic operators and vice versa, provided that this relationship affects the relevant market or related markets.

(v) Market efficiencies: Evidence provided by economic operators to show that the concentration will generate efficiencies which promote competition and free market participation.

(vi) Other technical criteria: Additional instruments and analyses in accordance with the Regulatory Provisions.

Likewise, the LFCE identifies situations in which a concentration can be considered unlawful:

(i) Substantial power: The concentration confers on some of the participants substantial power in the relevant market or increases of such power, limiting competition.

(ii) Entry barriers: The transaction establishes barriers to the entry of new competitors, hinders access to the relevant market or displaces other economic operators.

(iii) Facilitating prohibited conduct: An environment is created which facilitates monopolistic practices or infringements of competition legislation.

In this respect, the assessment of business concentrations requires an integral analysis which takes into consideration both the characteristics of the market, and the possible effects of the proposed transactions on competition.

The legislative framework serves as a preventive and corrective mechanism. The supervision of concentrations allows the authorities to identify possible risks before they materialize and to mitigate adverse effects on competition. In addition, by analyzing notified transactions, the authorities in charge ensure that business decisions do not limit the competitive dynamics of markets.

7.2 Authorities

In Mexico, the supervision of competition lies mainly in the hands of two regulatory entities:

(i) **Federal Economic Competition Commission**

COFECE, among other functions, must approve concentrations among companies.

(ii) **Federal Telecommunications Institute**

The IFT is the authority in charge of competition in the broadcasting and telecommunications sectors. It is also an independent body, but with exclusive powers in this area. In addition to supervising anticompetitive practices, the IFT also has the function of review concentrations in telecommunications and broadcasting, ensuring that they do not affect competition.

(iii) **Synthesis**

Thus, the COFECE and the IFT are currently the authorities in charge of supervising concentrations, depending on the sector to which the transaction belongs:

(a) COFECE: Competition in all sectors not related to telecommunications and broadcasting.

(b) IFT: Competition in telecommunications and broadcasting.

Although both entities are independent, they act on a coordinated basis to resolve competition disputes that involve interrelated markets.

7.3 Notifiable Transactions

The transactions that must be notified to the authority in charge are concentrations (as defined earlier) which reach the economic thresholds established in article 86 of the LFCE.

7.3.1 Mandatory notification thresholds

The economic thresholds contained in article 86 of the LFCE determine whether a concentration must be notified and seek to ensure that transactions with a significant impact on markets are supervised. The following are the quantitative criteria to determine whether a concentration must be notified:

(i) Value of the transaction: When the total amount of a transaction exceeds 18 million times the Unit of Measure and Update ("UMA"), equal to approximately MXN 2,036 million in 2025 (US $101'878,956.19)[4].

(ii) Accumulation of assets: When a transaction involves the accumulation of 35% or more of the assets or shares of an economic operator whose assets or annual sales originating in Mexico amount to more than 18 million UMAs, approximately MXN 2,036 million in 2025 (US $101'878,956.19)[5].

(iii) Significant shareholdings: (a) When the transaction involves the accumulation of assets or share capital in Mexico exceeding 8.4 million UMAs (around MXN 950 million in 2025 or US $47'536,841.05[6]); and (b) the annual sales in Mexico of the parties involved, as a whole or separately, exceed 48 million UMAs, equal to approximately MXN 5,430 million in 2025 (US $271'710,575.70)[7].

These thresholds not only determine notification obligations but also are an indicator of the importance of the transaction in terms of its potential impact on the market. Once a concentration is notified in view of such criteria, the authorities will also consider the qualitative aspects mentioned in section 9.1 above, the potential impact on the market, for the purpose of determining mainly whether the concentration in question takes place between an operator or operators that have substantial power in the relevant market and whether the transaction damages competition and free market participation.

Enterprises must carefully calculate the total value of the transaction, which includes contingent payments, debts assumed and other factors. Any error in the estimation could lead to infringements involving fines or even the reversal of the transaction. It should be remembered that the LFCE and the Guide to Notification of Concentrations, when assessing notification obligations, impose the obligation to notify transactions which are carried out by successive acts (for example, purchases of assets carried out in packages, but which form part of the same transaction). Finally, it is also necessary to take taxes into account when calculating the amounts of a transaction in economic terms, in order to ascertain whether or not it must be notified.

Economic operators must notify a concentration before any of the following scenarios occur:

(i) The legal act is completed in accordance with the applicable legislation or, where relevant, the condition precedent to which such act is subject is fulfilled;

(ii) *De facto* or *de jure* control of an economic operator is acquired or exercised directly or indirectly, or there is a *de facto* or *de jure* acquisition of assets, stake in trusts, shares or SRL shares of another economic operator;

(iii) A merger agreement is signed between the economic operators involved, or

(iv) In the case of successive acts, the last of them is completed, whereby the amounts established in the previous article are exceeded.

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[4] Exchange rate from Banco de México of March 18th, 2025.

[5] Exchange rate from Banco de México of March 18th, 2025.

[6] Exchange rate from Banco de México of March 18th, 2025.

[7] Exchange rate from Banco de México of March 18th, 2025.

Concentrations arising from legal acts performed abroad must be notified before they take effect legally or physically in national territory.

7.4 Exceptions

It should be mentioned that article 93 of the LFCE indicates the following cases in which prior authorization is not required for concentrations (even when exceeding the thresholds referred to above):

(i) Internal restructuring between enterprises of the same group.

(ii) Increase in shareholding without changing initial control.

(iii) Trusts without a transfer of control.

(iv) Acts abroad without an impact on control or Mexican assets.

(v) Investment firms without significant influence.

(vi) Acquisitions on the stock market without controlling powers.

(vii) Investment funds with speculative purposes and no impact on relevant markets.

7.5 Notification procedure and time limits

The procedure for notification of concentrations to the competent authorities follows various key stages which ensure an adequate analysis of the transaction and its impact on markets. Each of these stages is described below:

7.5.1 Filing of notification

Economic operators must file a notification together with the documents required. The latter include:

(i) A detailed description of the transaction (nature, objective, parties involved).

(ii) Financial information, such as income statements and general balance sheets of the parties.

(iii) Definition of the relevant market, including products, services and geographical area.

If the authority requires it, the parties can be requested to provide additional information. This may include market studies, price data or any other necessary documentation for the analysis.

7.5.2 Assessment by the authority

The LFCE establishes a procedure with specific time limits so that the authorities can analyze and rule on concentration notifications. However, it also provides for exceptional situations in which such time limits can be extended due to the complexity or particular nature of the transaction notified.

(i) Initial review of the notification: Once the notification has been filed, the authority has 10 working days to decide whether it contains the essential information required by the LFCE. If documentation is missing, the parties will be required to rectify the omissions within 10 working days, the time limit being suspended until all the information required is received.

(ii) The COFECE can also request additional information from the parties within 15 working days from the filing of the notification, and the parties will have the same period to submit the information requested. The time limit will also be suspended until all the information requested is presented.

(iii) Substantive analysis: When the notification is accepted, the authority has 60 working days to issue its resolution, either authorizing the transaction, imposing conditions or prohibiting it. This period can be extended if additional information is required or complexities arise in the analysis.

(iv) Formal extension of the period: In justified cases, the authority can formally extend the period for analysis by an additional 40 working days. This is particularly common in very important or complex transactions.

7.5.3 Resolution

At the end of the procedure, the authority can:

(i) Unconditionally authorize the concentration: When it is concluded that the transaction does not pose risks to competition.

(ii) Authorize the concentration subject to conditions: If risks are identified, corrective measures are imposed, such as divestment of assets.

(iii) Prohibit the concentration: If the risks are significant and cannot be mitigated.

If the authority does not issue a resolution within the stipulated periods, the concentration is considered to be tacitly approved. This is known as the positive administrative silence principle and is designed to guarantee legal certainty for businesses. However, this principle is rarely applied, as the COFECE and the IFT usually issue resolutions within the stipulated periods or request extensions.

The time limits and exceptions in the notification procedure reflect the balance between the need to protect competition and to guarantee legal certainty. Enterprises must be proactive in providing full information and considering possible extensions in complex cases. Experience shows that interaction with the authorities and transparency in the transaction are key to facilitating an efficient and favorable analysis.

7.6 Voluntary notification and *ex officio* investigation

The voluntary notification of concentrations is a mechanism established in the LFCE which allows economic operators to present transactions to the authority even though they do not exceed the stipulated thresholds. This is done mainly to avoid subsequent questioning and to obtain an advance resolution that provides legal certainty.

7.6.1 Benefits of voluntary notification

- Reduction of regulatory risks: Although the transaction is not subject to mandatory notification, the parties can ensure that they will not be the subject of a future investigation.
- Greater transparency: Enterprises show their commitment to compliance and fair competition.
- Speedy authorization: The authority can issue a preliminary resolution to speed up the execution of the transaction.

7.6.2 Voluntary notification procedure

The procedure follows the same stages as mandatory notifications, but the authority usually undertakes a less intensive analysis since the economic thresholds have not been exceeded. However, if possible risks to competition are identified, the authority in charge could extend the assessment and, in extreme cases, impose conditions or reject the transaction.

7.6.3 *Ex officio* investigation

The ex officio investigation is a key mechanism in the system of supervision of unnotified concentrations which could give rise to adverse effects on the market. In this respect, the authority has the power to investigate transactions carried out without prior notification when it detects signs of harm to competition. [8]

Reference is made below to the most relevant aspects of the provisions regarding the authority's power to conduct investigations in cases of possible unlawful concentrations:

(i) Commencement of the investigation: Investigations can be commenced ex officio, upon a complaint by private parties, or at the request of the Federal Government. Its objective is to identify monopolistic practices and unlawful concentrations.

(ii) Investigation stage: During this stage, data, information and evidence is collected in relation to the acts under investigation. The investigation period will commence from the issue of the relevant decision to commence and may not be less than 30 nor exceed 120 working days; this period may be extended on up to four occasions, for periods of up to 120 working days, when there are duly justified reasons for doing so.

(iii) The authority's powers: The authority can request information, make verification visits (*in-situ* investigations) and request statements. Verification visits require a written order and are confined to obtaining documents and statements regarding the facts under investigation.

(iv) Conclusion of the investigation: When the investigation ends, within a period not exceeding 60 working days, the authority will submit an opinion to its governing body in which a proposal is made to dismiss the case for lack of evidence or to proceed with a trial-like procedure against the economic operator responsible.

[8] As per the LFCE, Article 65, transactions that are not subject to mandatory notification, cannot be investigated after a year from their closing.

The combination of voluntary notification and ex officio investigations enables the authority to maintain effective control over concentrations, even in cases in which operators try to avoid supervision. It also promotes an environment of trust and compliance among market participants.

7.7 Pre-notification

It is worth mentioning that the COFECE follows a policy of replying to all consultations made to it and of clarifying doubts that private parties may have when dealing with their affairs. This allows prior consultations to be made to the authority regarding the obligation to make notifications. This is done with the understanding that, although replies to such consultations are not binding, they can provide clarity for economic operators in this respect.

8. Antitrust investigations and trial-like proceedings

8.1 Applicable legislation

The regulation of antitrust activity, meaning monopolies, monopolistic practices, unlawful concentrations and barriers that reduce, harm, impede or affect in any way free market participation or competition in production, processing, distribution or marketing of goods or services, is based on the following rules, in addition to the Mexican Constitution, articles 26 to 36 and 66 to 85 of the LFCE and the Regulatory Provisions of the LFCE:

(i) Articles 13, 15 to 17 Bis of the Organic Statute of the COFECE.[9]

(ii) Regulatory Provisions of the Federal Economic Competition Law for the telecommunications and broadcasting sectors.[10]

(iii) Guidelines for conducting, by electronic means, investigations, procedures and steps under the responsibility of the Investigative Authority of the Federal Telecommunications Institute.[11]

(iv) Guide for filing complaints of monopolistic practices and unlawful concentrations in the telecommunications and broadcasting sectors, at the Investigative Authority of the Federal Telecommunications Institute.[12]

(v) Guide for filing requests for investigation of market conditions provided for in article 96 of the Federal Economic Competition Law, in the telecommunications and broadcasting sectors.[13]

[9] https://www.cofece.mx/wp-content/uploads/2024/06/ComEstatutoOrganicoReforma04062024-1.pdf

[10] https://www.ift.org.mx/sites/default/files/c-cemt-02-drlfcestr.doc

[11] https://www.ift.org.mx/node/25540

[12] https://www.ift.org.mx/node/20770

[13] https://www.ift.org.mx/sites/default/files/d-dmca-04-gpsicmpa96lfce.doc

(vi) Guide to the procedure for exemption from or reduction of fines in investigations of monopolistic practices or unlawful concentrations for the telecommunications and broadcasting sectors.[14]

(vii) Guide to the procedure for reduction of penalties for absolute monopolistic practices, for the telecommunications and broadcasting sectors.[15]

(viii) Guide for determining relevant markets in the telecommunications and broadcasting sectors.[16]

(ix) Guidelines for the use of electronic means during the investigation, the outcome of the procedure, the verification and the incidents dealt with at the COFECE.[17]

(x) Regulatory Provisions of the Immunity and Penalty Reduction Program provided for in article 103 of the Federal Economic Competition Law.[18]

(xi) Regulatory Provisions of the Federal Economic Competition Commission for the classification of information derived from the legal advice provided for economic operators.[19]

(xii) Technical Criteria of the Federal Economic Competition Commission for the Application for and Issue of Interim Measures, and for Setting Security.[20]

(xiii) Technical Criterion for the Application for Dismissal of Criminal Proceedings in the Cases referred to in the Federal Criminal Code.[21]

(xiv) Technical Criteria for the Calculation and Application of a Quantitative Index to measure Market Concentration.[22]

(xv) Guide to Notification of Concentrations.[23]

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[14] https://www.ift.org.mx/node/20773

[15] https://www.ift.org.mx/sites/default/files/1_acuerdo_pleno_guia_version_accesible_guia_del_procedimiento_de_reduccion_de_sanciones_de_pma_tyr_301121.pdf

[16] https://www.ift.org.mx/sites/default/files/contenidogeneral/competencia-economica/guiamercadosrelevantes.pdf

[17] https://www.cofece.mx/acuerdo-dof-02marzo2023-01/

[18] https://www.dof.gob.mx/nota_detalle.php?codigo=5588359&fecha=04/03/2020#gsc.tab=0

[19] https://www.cofece.mx/wp-content/uploads/2021/08/240817DRsPrivilegiocompendio.pdf

[20] https://www.cofece.mx/wp-content/uploads/2020/11/CompendioCriteriosTecnicosFijaci%C3%B3ndeCauciones.pdf

[21] https://www.cofece.mx/wp-content/uploads/2017/11/crit_tec_sol_sobreseimientoprocesopenal_codigo_penal_federal.pdf

[22] https://www.cofece.mx/wp-content/uploads/2017/11/criterios_tecnicos_para_medir_concentracin_del_mercado.pdf

[23] https://www.cofece.mx/wp-content/uploads/2021/06/GUIACON_2021.pdf

(xvi) Guide to the Control of Concentrations in the Telecommunications and Broadcasting Sectors.[24]

8.2 Commencement of investigation

In order to commence an investigation for monopolistic practices or unlawful concentrations an objective reason is required. Any sign of the existence of monopolistic practices or unlawful concentrations is an objective reason.

The investigation of anticompetitive behavior will be commenced ex officio by the COFECE, or at the request of the President of the Republic, directly or through the Ministry of Economy ("**SE**"), at the request of the Federal Consumer Protection Agency ("**PROFECO**") or of a party and shall be the responsibility of the Investigative Authority of the COFECE.

As part of its activities, the Investigative Authority monitors on a regular and permanent basis the media, specialized press, websites, and any other kind of information regarding industries and markets, including discussion forums, chat rooms, blogs, etc., since sometimes signs of anticompetitive practices can be found there.

Requests for investigation presented by the President of the Republic, directly or through the SE, or by the PROFECO will be given priority.

Anyone can report to the Investigative Authority violations relating to absolute monopolistic practices, relative monopolistic practices or unlawful concentrations.

Within 15 working days from the receipt of a complaint, the Investigative Authority must analyze it and issue a decision (a) ordering the commencement of the investigation, (b) rejecting the complaint, in whole or in part, on the grounds that it is clearly unfounded, or (c) warning the complainant of the need to clarify or complete his complaint within 15 working days, which may be extended by the same period in justified cases. If the complainant fails to duly comply with that warning, the complaint will be deemed not to have been filed.

The decision deeming a complaint not to have been filed must be notified to the complainant within 15 working days from the date of expiration of the period for compliance with the warning.

If the decision is not issued within the above-mentioned periods, the investigation will be deemed to be commenced. In this case, the Investigative Authority, at the request of the complainant or ex officio, must issue the decision to admit.

8.3 Time limits

The investigation period will commence from the issue of the relevant decision to commence and may not be less than 30 or more than 120 working days. This period may be extended on up to four occasions, for periods of up to 120 working days, when there are duly justified reasons to do so in the Investigative Authority's opinion.

Once the investigation has ended, the Investigative Authority will have a period of 60 working days to present to the Board an opinion proposing:

[24] https://www.ift.org.mx/node/21075

(i) The commencement of the trial-like procedure, since there is an objective basis making it likely that the economic operator or operators under investigation will be held liable, or

(ii) The closure of the case if there is no basis to commence the trial-like procedure.

The likely perpetrators must be summoned if the Investigative Authority orders the commencement of the procedure, or even if it does not propose it, the Board decides that it should be commenced on the grounds that there is an objective basis making it likely that the economic operators involved will be held liable.

Once the likely perpetrators have been summoned, they will have access to the file of the investigation and will have an unextendible period of 45 working days to respond in their best interest, attach documentary evidence in their possession and put forward the evidence that should be taken.

The person summoned must refer to each of the facts indicated in the statement of probable responsibility. Any facts to which he does not respond will be deemed to be correct, unless proven otherwise. The same will occur if he fails to file a reply within the period indicated in the previous paragraph.

The likely perpetrator's response will be considered by the Investigating Authority so that, within a maximum period of 15 working days, it may rule on the arguments and evidence offered. When that period expires, a decision will be taken to reject or admit the evidence and the place, date and time for taking such evidence will be set. The evidence will be taken within a period not exceeding 20 days from when it is admitted.

When all the evidence has been presented, including, where necessary, evidence ordered to clarify obscure or contradictory facts, the COFECE will set a period of up to 10 working days so that the Investigative Authority and the likely perpetrators may file their written submissions.

When submissions have been filed or the period granted to do so has expired, the file will be deemed to be completed and will be sent to a Commissioner to prepare the draft resolution to be submitted to the Board.

The Board of the COFECE must issue its resolution within 40 working days from the date on which the file of the investigation has been completed.

8.4 Evidence

Within the trial-like procedure due to a statement of probable responsibility for anticompetitive practices, all evidence is admissible, except testimony of the parties and that to be given by the authorities.

The COFECE will reject evidence that has not been lawfully offered, that bearing no relation to the facts the subject of the procedure, as well as unnecessary or unlawful evidence.

Once the evidence has been taken, within the next 10 days, the COFECE may approve and order the taking of additional evidence to clarify obscure or contradictory facts.

The COFECE has complete freedom to analyze the evidence, to determine the value of each piece of evidence in relation to each other, and to set the final result of that appraisal. The appraisal of the evidence by the COFECE must be based on an assessment as a whole of direct, indirect and circumstantial evidence that emerges in the process.

8.5 Opening administrative decision

As previously mentioned, when the trial-like process has been initiated by order of the Investigative Authority or by decision of the Board, the COFECE will summon the alleged perpetrators.

As soon as the alleged perpetrators have been summoned, they will have access to the file of the investigation for 45 working days, during which period they may respond in their best interest, attach documentary evidence in their possession and put forward the evidence that should be taken.

All acts and documents in the trial-like process before the COFECE can be presented by electronic means.

8.6 Defense of persons investigated

As part of the trial-like procedure, the likely perpetrators can put forward all lawful evidence that they consider appropriate.

In the written response that they must present after reviewing the file of the investigation, the economic operators under investigation may attach documentary evidence in their possession and put forward such evidence as should be taken.

The proposed evidence will be taken within 20 days from when it is admitted.

Within 10 working days from the conclusion of the taking of evidence offered by those under investigation, the COFECE may approve and order the taking of additional evidence not offered by the parties for the purpose of clarifying any fact.

8.7 Hearings

Within 10 working days from the date on which the file is completed, the likely perpetrator or the complainant will be entitled to request an oral hearing from the Board for the purpose of making the submissions that they consider appropriate.

8.8 Reasoned report

The opinion submitted by the Investigative Authority to commence the trial-like procedure must contain at least the following:

(i) The identity of the economic operator or operators under investigation and, where applicable, of the likely perpetrator or perpetrators;

(ii) The facts investigated and their probable object or effect on the market;

(iii) The evidence appearing in the file of the investigation and its analysis; and

(iv) The basis for the opinion and, where applicable, the statutory provisions considered to be infringed, as well as the consequences that may arise from such infringement.

8.9 Decision

The COFECE can currently issue its resolutions with full independence, in compliance with the principles of transparency and access to information.

In order to issue its resolution, the Board will deliberate collectively and decide the matters by majority of the votes cast. All Commissioners must vote and may not refrain from doing so.

Commissioners who are absent from the Board must cast their vote in writing before the meeting or within five working days after the meeting in question. If Commissioners cannot vote for duly justified reasons or because they are prevented from doing so, and there is a tie in the vote of the Board, the Chair Commissioner will have a casting vote.

Board meetings will be public, except the parts dealing with matters containing confidential information declared as such in accordance with the legislation.

Any definitive resolution issued by the Board of the COFECE must contain the following:

(i) The appraisal of the evidence leading to the monopolistic practice or unlawful concentration being deemed to have or not to have been proven;

(ii) In the case of a relative monopolistic practice, the decision on whether the economic operator or operators responsible have sufficient power within the meaning of the Federal Economic Competition Law;

(iii) The decision on whether to order the definitive elimination of the monopolistic practice or unlawful concentration or of its effects or the decision to carry out acts or measures the omission of which has caused the monopolistic practice or unlawful concentration, as well as the means and time limits for proving compliance with that decision to the COFECE, and

(iv) The decision on the imposition of penalties.

Decisions and resolutions of the Board will be public and only the parts containing confidential or restricted information, within the meaning of the Federal Economic Competition Law and other applicable provisions, will be kept secret.

8.10 Appeals

Only the final resolution in the trial-like procedure issued by the Board of the COFECE due to an investigation of anticompetitive practices can be contested. That decision of the COFECE can only be contested by means of the indirect action for protection of fundamental rights (i.e. "*amparo indirecto*"[25]) and will not be suspended.

[25] The indirect amparo writ is a legal procedure in Mexico that protects individuals against acts of authority that violate their fundamental rights. It is called "indirect" because it is filed before a district judge and is generally used when the challenged act does not stem from a final judgment or resolution of a trial, but from laws, regulations, omissions, or administrative acts that affect a person's rights.

Only in cases in which the COFECE imposes fines or the divestiture of assets, rights, shares or SRL shares, will such measures be executed until the resolution of any action for protection of fundamental rights that is instituted.

The final resolution of the trial-like procedure may only be contested due to violations committed in the resolution or during the procedure; the general rules applied during the procedure can only be claimed in the action for protection of fundamental rights filed against the aforementioned resolution.

Proceedings for protection of fundamental rights will be heard by federal courts specialized in competition. Ordinary or constitutional appeals against acts in the course of procedures shall not in any event be admitted.

9. Immunity and Sanctions Reduction Program

The COFECE also has an Immunity and Sanctions Reduction Program, which is used as a mechanism for detecting, investigating and penalizing absolute monopolistic practices.

Any person or enterprise that has participated or is carrying out unlawful agreements with their competitors can join the Immunity and Sanctions Reduction Program to receive a reduction of the fines for which they would be liable and be exempt from criminal liability. In exchange, the economic operator must supply information and evidence to the Investigative Authority regarding such agreements and provide full ongoing cooperation throughout the procedure so as to determine whether there are absolute monopolistic practices.

Any person that has aided, facilitated, induced or participated in such practice can also join the program. The identity of the informant economic operator will be kept confidential.

The benefit of reduction of penalties is granted provided that:

(i) A request is made to avail oneself of the Immunity Program and sufficient evidence is provided to facilitate the commencement of an investigation or for the existence of the practice to be presumed;

(ii) Full ongoing cooperation with the COFECE is provided in the investigation which is conducted and, where applicable, in the trial-like procedure; and

(iii) The necessary actions are undertaken to end his participation in the absolute monopolistic practice.

The following are the benefits of the Immunity Program:

(i) The first applicant that meets the requirements will be liable for a minimal fine amounting to one UMA (i.e. MNX 113.14, approximately USD 6).

(ii) Other economic operators that subsequently request this benefit may receive reductions in the fine of up to 50%, 30% or 20%.

(iii) All economic operators admitted to the Immunity Program will not be criminally liable for engaging in absolute monopolistic practices.

10. Other procedures

Title IV of the LFCE describes the special procedures that may be undertaken by the COFECE. Each of these procedures seeks to ensure effective competition and to eliminate practices that restrict it.

This title includes chapters on:

(i) Investigations to determine essential inputs and barriers to competition,

(ii) Resolutions regarding market conditions,

(iii) The issue of opinions on the grant of licenses and concessions.

(iv) Procedures for waiving and reducing fines.

The first chapter focuses on the investigation of essential inputs and barriers to competition, allowing the COFECE to commence investigations ex officio or at the request of other competent authorities. These investigations can lead to recommendations, orders to eliminate barriers, or the divestiture of assets.

The second chapter deals with resolutions regarding market conditions, which are commenced at the request of authorities or parties affected and may culminate in opinions or resolutions (published in the Official Gazette of the Federation), where COFECE can, among others, order measures to eliminate barriers to competition, determine the existence of and regulate access to essential inputs, and order the suspension of acts constituting anticompetitive behavior.

The third chapter of Title IV establishes the power of the COFECE to issue opinions or authorizations regarding licenses, concessions and permits at the request of the contracting authority. This ensures that measures are included to protect competition in invitations to tender and tender conditions. Finally, the fourth chapter addresses the procedures for exemption from and reduction of fines, allowing economic operators to request these benefits before a statement of probable responsibility is issued, with the commitment to correct unlawful practices.

These special procedures are designed to enable the COFECE to investigate and resolve complex issues relating to competition in an effective manner, ensuring free market participation and market efficiency. The publication of its resolutions and opinions promotes transparency and trust in the country's competition system.

11. Actions for damages. Class actions

11.1 Actions for damages

Article 53 of the LFCE, in its final paragraph, provides that economic operators that engage in monopolistic practices will be liable for the penalties established in the law, apart from the civil and criminal liability that may apply. In other words, in addition to the fines which the COFECE or the IFT may impose on the economic operator that engages in those practices, those affected may claim damages in the civil courts. Furthermore, the Federal Civil Code provides that anyone

who engages in unlawful conduct and causes harm to another is obliged to remedy it, by paying damages.[26]

Article 134 of the LFCE itself provides that persons who have suffered loss or damage due to a monopolistic practice or an unlawful concentration can file proceedings to protect their rights in the courts specialized in economic, broadcasting and telecommunications competition, when the resolution of the COFECE or of the IFT has become final. Upon the final resolution issued in the trial-like process, the unlawfulness of the economic operator's conduct will be deemed to be proven for the purposes of the action for indemnity.

Like the legislation in other jurisdictions, the concepts of loss and damage are found in civil legislation, specifically in the Federal Civil Code. As well as defining those concepts, article 2110 of the Federal Civil Code provides that the loss and damage must be an immediate and direct consequence of the breach of the obligation, either that it has been caused or must necessarily be caused. On that basis, in actions for indemnity in Mexico it is essential to establish and prove that causal relationship.

11.2 Class actions

In 2012 a legal reform came into force in Mexico which introduced amendments to various laws, including the LFCE, the Federal Civil Code, the Federal Civil Procedure Code and the Federal Consumer Protection Law, so as to expressly provide for and regulate class actions.

In this regard, article 585 of the Federal Civil Procedure Code provides that, among other bodies, the COFECE has standing to bring class actions. For such purpose, the action must contest acts which harm consumers or users of goods or services, public or private, or the environment, or the acts involved have harmed the consumer due to the existence of unlawful concentrations or monopolistic practices, declared to exist by a final resolution issued by the COFECE. This is consistent with the provisions of articles 53 and 134 of the LFCE, already mentioned.

In this respect, the use of this mechanism has been very limited. Few class actions have been filed by private parties against other economic operators, among the most notable being a claim against Coca Cola for the harm caused to Big Cola[27] and a claim filed by the Mexican Social Security Institute against pharmaceutical companies due to the cartel that they operated from 2005 to 2009 in relation to the sharing of public tender processes for insulin and serums[28]. More recently, in October 2024, the COFECE filed its first class action against certain pharmaceutical companies for manipulation in supplies and prices of medicines. That action is still pending decision.[29]

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[26] Article 1910 of the Federal Civil Code: Anyone who unlawfully or against good customs causes harm to another is obligated to repair it, unless they can demonstrate that the damage was a result of the inexcusable fault or negligence of the victim.

[27] Casefile DE-21-2003 COFECO, Propimex, S.A. de C.V. v Coca Cola.

[28] COFECO v Baxter, Fresenius, Eli Lilly and Pisa. Jesús Eduardo Aguilar Cortés, "El papel de la reclamación de daños y perjuicio en el derecho de competencia económica en México" (*The role of the claim for damages in competition law in Mexico*), *Tirant lo Blanch*, Mexico, 2019.

[29] Collective action COFECE v Casa Marzam, Casa Saba, Fármacos Nacionales and Asociación de Distribuidores de Productos Farmacéuticos de la República Mexicana.

11.3 Situation in practice

One wonders whether the fact that the law provides the possibility of filing an action in the courts for loss and/or damage caused by anticompetitive behavior is sufficient to effectively protect the rights of the public in general and whether it provides sufficient tools to enforce these rights. To offer an initial response, if we look at the number of individual actions before the COFECE or the IFT which ultimately seek to determine damages, according to the public information available, it is very limited.

The lack of action by market players that are affected by anticompetitive practices is due to various factors, such as: unawareness of the existence of these legal mechanisms; the absence of a clear procedure for claiming damages; the difficulty in proving in legal proceedings the causal connection between the conduct and the loss and damage the subject of the claim. Due to all these factors, the conditions do not exist yet for the proliferation of actions for damages by persons affected. In this regard, it is deemed necessary that Parliament needs to regulate the procedures for filing actions for damages in relation to competition, so that those affected by anticompetitive practices who resort to legal action obtain, if it is well founded, the appropriate remedy.

However, in January 2025 the competition courts affirmed a judgment previously issued against the Mexico City International Airport (**"AICM"**) confirming the finding initially issued by the COFECE under article 134 of the LFCE against the AICM and in favor of a taxi company, due to discriminatory practices by the AICM in favor of other taxi companies[30]. In the same way, in December 2024 the competition courts had already initiated a sub-proceeding to determine the damages to be paid by the AICM.

[30] Decision DE-009-2014 COFECE, Servicio de Excelencia v Santaló Estudios y Proyectos (SEPSA), Sitio 300, Alfonso Méndez; Yellow Cab, Enrique Ruvalcaba; Porto Taxi, Jorge Espinosa; Nueva Imagen, Carlos Tepale, and Confort.

Peru

Peru

Ivo Gagliuffi

Abbreviations

INDECOPI	National Institute for the Protection of Competition and Intellectual Property
Directorate	National Directorate for Investigation and Promotion of Free Competition of INDECOPI
Commission	Competition Commission of INDECOPI
Chamber	Competition Chamber of the INDECOPI Competition and Intellectual Property Tribunal

1. General background

1.1 Legislative framework and other sources

The Peruvian competition system is regulated by:

(i) The Constitution of Peru 1993[1]: Article 61 of the Constitution provides that the State facilitates and monitors free competition, combats all practices that restrict it and combats the abuse of dominant or monopolistic positions. It adds that no law or agreement may authorize or establish monopolies.

(ii) The Consolidated Amended Text of Legislative Decree 1034[2]: the Consolidated Amended Text of Legislative Decree 1034, the Law for the Elimination of Anticompetitive Behavior ("DL 1034"), is the legislation in charge of prohibiting and penalizing anticompetitive behavior for the purpose of promoting economic efficiency in markets for consumer welfare (*control of behavior*). In addition, it undertakes the tasks of promoting competition in markets (market studies, competition advocacy).

(iii) Law 31112[3]: the Law governing prior control of business concentrations, and its Regulations (Supreme Decree 039-2021-PCM), establishes a system of *control of structures* for the purpose of promoting effective competition and economic efficiency in markets for consumer welfare. It is the first piece of legislation on transversal prior control of all business sectors, in force since June 2021, since Peru previously only applied this system to the electricity sector.

(iv) The Criminal Code[4]: in June 2023, Law 31775 amended the offense of abuse of market power, by establishing criminal penalties for horizontal collusive practices which are absolutely prohibited (hard core cartels).

[1] Available at: https://www.congreso.gob.pe/constitucionyreglamento/.

[2] Available at: https://www.gob.pe/institucion/indecopi/normas-legales/6088289-111-2024-pcm.

[3] Available at: https://www.gob.pe/institucion/indecopi/normas-legales/1736208-31112.

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

(v) Other relevant legislation: the following pieces of legislation are also applicable:

- Law 27584[5], regulating judicial review proceedings, which applies when a free competition procedure is contested in the courts.
- The Consolidated Amended Text of Law 27444, the General Administrative Procedure Law, which applies on a supplementary basis in procedural matters to free competition procedures.
- The Integrated Text of the Regulations on the Organization and Functions of the National Institute for the Protection of Competition and Intellectual Property ("INDECOPI")[6], approved by Resolution 063-2021-PRE/INDECOPI.

(vi) INDECOPI Guidelines: in addition, the Commission is authorized to issue Guidelines and Guides for market operators on the proper interpretation of the rules and, for that purpose, has, up to March 2024, issued the following guidelines, in the following order of publication: (a) Confidentiality Guidelines[7], (b) Market Studies Guide[8], (c) Guidelines for the interpretation of specific aspects of the Law for the Elimination of Anticompetitive Behavior[9], (d) Leniency Program Guide[10], (e) Guide for combatting collusion in public procurement processes[11], (f) Trade Associations and Free Competition Guide[12], (g) Guidelines on the Reward Program[13], (h) Guide to the Program for Compliance with Free Competition Rules[14], (i) Guidelines on Inspection Visits[15], (j) Information guide to anticompetitive agreements between enterprises in relation to employment[16], (k) Guide for identifying unusual consortiums in public procurement processes under the Law for

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[5] Available at: https://spij.minjus.gob.pe/spij-ext-web/#/detallenorma/H817703.

[6] Available at: https://cdn.www.gob.pe/uploads/document/file/3288494/3.2.Texto%20integrado%20ROF%20Indecopi%20%28vigente%29.pdf.pdf.

[7] Available at: https://www.gob.pe/institucion/indecopi/normas-legales/2066201-027-2013-clc-indecopi.

[8] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2067535-guia-de-estudios-de-mercado.

[9] Available at: https://www.indecopi.gob.pe/documents/1902049/3898344/CLC%20-%20Lineamientos%20para%20la%20interpretaci%C3%B3n%20de%20aspectos%20espec%C3%ADficos%20de%20la%20Ley%20de%20Represi%C3%B3n%20de%20Conductas%20anticompetitivas.pdf.

[10] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2067481-guia-del-programa-de-clemencia.

[11] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2067475-guia-de-compras-publicas.

[12] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2067464-guia-de-asociaciones-gremiales-y-libre-competencia.

[13] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115567-lineamientos-del-programa-de-recompensas.

[14] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115530-guia-de-programas-de-cumplimiento-de-las-normas-de-libre-competencia.

[15] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115561-lineamientos-de-visitas-de-inspeccion.

[16] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115541-guia-informativa-sobre-acuerdos-anticompetitivos-entre-empresas-en-el-ambito-laboral.

the Elimination of Anticompetitive Behavior[17], (l) Guidelines on compensation for damage caused to consumers due to anticompetitive behavior[18], (m) Guidelines for the Calculation of Notification Thresholds[19], (n) Guidelines for the classification and analysis of business concentrations[20], and (o) Factsheet on the role of the Banking, Insurance and Pension Fund Managers Supervisory Authority in the prior control of business concentrations[21].

(vii) Administrative precedents[22]: The Chamber and the Commission have had the opportunity to set binding precedents for the analysis of certain cases. Such criteria are mandatory, although the relevant bodies can deviate, but must give reasons for their decision.

1.2 Institutional framework

The current system of promotion and protection of competition is the responsibility of the National Institute for the Protection of Competition and Intellectual Property. It provides for an administrative and judicial model in which an investigating body, the National Directorate for Investigation and Promotion of Free Competition of INDECOPI (the "Directorate"), investigates and presents cases to an administrative decision-making body, the Competition Commission (the "Commission"). The latter body rules at first instance on whether: (i) the conduct constitutes an anticompetitive practice, imposing the relevant penalties and corrective measures, if this is so; or (ii) whether a business concentration is approved, with or without conditions, or rejected. Afterwards, the Competition Chamber of the Competition and Intellectual Property Tribunal (the "Chamber") is the decision-making body that rules at second instance on appeals filed against the Commission's rulings.

The Chamber's decisions can be the subject of judicial review, specifically, at first instance, by the Judicial Review Chamber of the High Court. The latter body's decision can in turn be appealed to the Civil Chamber of the Supreme Court and may be the subject of a cassation appeal to the Constitutional and Labor Chamber of the Supreme Court.

1.3 Evolution of the system

The origin of the system of Competition Law dates back to 1991, with the enactment of Legislative Decree 701. This legislation established for the first time the protection of free competition in the Peruvian legislative framework on an institutional and structured basis (there were some previous pieces of legislation of an isolated nature or lacking sufficient legislative technique[23]).

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[17] Available at: https://cdn.www.gob.pe/uploads/document/file/6861713/5935812-guia-para-identificar-consorcios-inusuales-en-las-contrataciones-publicas.pdf?v=1732829317.

[18] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115578-lineamientos-sobre-resarcimiento-a-consumidores-por-conductas-anticompetitivas.

[19] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/1945863-lineamientos-para-el-calculo-de-los-umbrales-de-notificacion.

[20] Available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/3862900-lineamientos-para-la-calificacion-y-analisis-de-las-operaciones-de-concentracion-empresarial.

[21] Available at: https://cdn.www.gob.pe/uploads/document/file/7426125/6327253-cartilla-informativa-sbs-indecopi.pdf?v=1735319052.

[22] To access INDECOPI rulings see: https://servicio.indecopi.gob.pe/buscadorResoluciones/.

[23] For a detailed review of the origins of competition legislation in Peru, see: Gagliuffi, Ivo. (2006). "Viaje a la semilla: ¿cómo era regulada la libre competencia en el Perú hasta antes del Decreto Legislativo 701?" (*Back to the Source: how free competition was regulated in Peru before Legislative Decree 701?*) (2006).

Subsequently, it was partly supplemented by legislation on free competition with the inclusion in 1997 of Law 26876, the Law Combatting Monopolies and Oligopolies in the Electricity Sector, which included prior control of business concentrations, but only in the electricity sector.

In 1992, INDECOPI was created by Law 25868, the Law on the Organization and Functions of INDECOPI, in charge of the observance and application of Legislative Decree 701.

Years later, 2008 saw the enactment of Legislative Decree 1034, the Law for the Elimination of Anticompetitive Behavior, the legislation currently in force, whereby Legislative Decree 701 was repealed, a series of new features being established, including the following:

(i) The definition of the objective of the legislation, pointing out that this consists of penalizing anticompetitive behavior, promoting economic efficiency.

(ii) The clarification that the application of free competition legislation in the event of abuses of a dominant position was restricted only to abuses having exclusionary effects on the market. Abuses of a dominant position with exploitative effects (i.e. predatory pricing) are not punishable.

(iii) The establishment of the prohibition rule applicable to behavior (absolute or *per se* and relative or based on reason).

(iv) The inclusion of various ways in which each of the punishable anticompetitive practices can be carried out.

(v) The classification as infringements of vertical collusive practices as a specific case of anticompetitive behavior.

(vi) The elimination, at that time, of the system of criminal penalties for anticompetitive behavior.

(vii) The strengthening and incorporation of the Leniency Program and Cessation Commitments, respectively.

(viii) Greater detail regarding indemnity for loss and damage caused by anticompetitive behavior.

(ix) Details of the investigative powers of the investigating body and the Commission.

(x) Details regarding applicable corrective measures.

As can be seen, the legislation made important changes to competition regulation in Peru. In addition, certain additional amendments to that law were made on two occasions. First of all, Legislative Decree 1205, of September 2015, which introduced the following changes:

(i) Clarifications regarding horizontal collusive practices which are subject to absolute prohibition.

In: Universidad de Lima (Ed.), Libro Homenaje Facultad de Derecho (pp. 133-162). Fondo Editorial Universidad de Lima.

(ii) Powers of the investigating body and the Commission in relation to competition advocacy.

(iii) Details regarding the procedure to be followed to seek a court order in cases in which it is required by law.

(iv) Detailed aspects regarding the Leniency Program and Cessation Commitments.

(v) Establishment of different scenarios of implementation of corrective measures.

(vi) Inclusion of the case of acknowledgement of commission of infringements with the application of reductions of the applicable penalty.

(vii) Inclusion of the concept of the facilitator within the scope of the legislation, this agent being liable for a penalty (potential defendant).

(viii) Improvement of the competition authority's tools for international cooperation.

(ix) Increase of fines applicable for failure to comply with requests, submission of false documentation, concealment of information or hindering performance of the competition authority's functions.

(x) Greater detail regarding aspects for compensation of loss and damage caused by anticompetitive behavior.

Subsequently, the amendments provided for by Legislative Decree 1396 of September 2018 were included, which incorporated, inter alia:

(i) The modification and extension of certain time limits in the framework of an administrative procedure relating to free competition.

(ii) The modification of aspects relating to confidential information in the framework of such procedures.

(iii) Details regarding the procedure for cases to compensate loss and damage caused by anticompetitive behavior.

(iv) The implementation of the Reward Program.

(v) Greater detail regarding cases of suspension of the time limit for issuing a decision in the framework of an administrative procedure relating to free competition.

On the other hand, in relation to control of concentrations, Law 31112, establishing prior control of business concentrations, came into force in June 2021. This legislation incorporated control of concentrations in general, i.e. for all sectors, repealing Law 26876, the former legislation on control of concentrations applicable only to the electricity sector[24], and included some amendments to Legislative Decree 1034.

[24] It should be pointed out that beforehand the Government, during the parliamentary interregnum, enacted Urgent Decree 013-2019, establishing for the first time on a transversal basis the Prior Control of Business Concentrations; however, it was repealed by Law 31112, before it came into force.

1.4 Definition of anticompetitive conduct

Competition legislation penalizes anticompetitive conduct, dividing it into two broad types: (i) Abuse of a Dominant Position, and (ii) Collusive Practices (which in turn, are subdivided into Horizontal and Vertical Collusive Practices).

The legislation provides lists of examples or open lists, regarding the forms of behavior that could constitute an Abuse of a Dominant Position or a Collusive Practice.

It should be noted that behavior is analyzed under two different rules, in accordance with articles 8 and 9 of DL 1034: (i) the *Per Se* Rule, whereby certain behavior is considered to be absolutely prohibited, because it is based on the premise that it cannot confer any benefit on consumers (i.e. price fixing between competitors) and, therefore, in these cases, in order to confirm the existence of an administrative infringement, it is sufficient for the authority to prove the conduct (not its effects on the market); and (ii) the Rule of Reason, according to which certain behavior is considered to be prohibited in relative terms, because it could be justified and capable of creating a pro-competitive balance in the market (i.e. exclusive distribution agreements) and, therefore, in these cases, to confirm the existence of the administrative infringement, the competition authority must prove the existence of the behavior and also that it has -actual or potential- net negative effects for competition and consumer welfare.

1.5 Defendants in competition proceedings

DL 1034 applies to individuals and legal entities, irregular companies, independent funds or other public or private-law entities, national or otherwise, for-profit or nonprofit, which offer or demand goods or services on the market or whose associates or members engage in such activity. It also applies to those who manage, administer or represent the above-mentioned entities that have legal obligations, since those persons have participated in planning, carrying out or executing the administrative infringement. The law also applies to individuals and legal entities which, without competing in the market in which the behavior under investigation occurs, act as planners, intermediaries or facilitators of an infringement subject to absolute prohibition (i.e. hub & spoke). This provision includes officials, executives and public servants, in relation to matters not pertaining to the regular performance of their functions.

1.6 Extraterritoriality

DL 1034 is governed by the Effects Theory and, in that sense, applies to behavior that causes or may cause anticompetitive effects in all or part of the national territory, even though that act has originated abroad.

1.7 Acts of the authorities and exemptions

Article 2 of DL 1034 does not draw a distinction regarding the agents that can be considered perpetrators of competition law infringements. In that regard, its scope[25] expressly includes individuals and legal entities, irregular companies, independent funds or other public or private-law entities, national or otherwise, for-profit or nonprofit.

The scope also includes those who manage, administer or represent the above-mentioned entities that have legal obligations. It is also expressly pointed out that individuals and legal

[25] By "scope" we refer to those as a whole to whom competition legislation may be applied.

entities that act as planners can be penalized, also taking into account officials, executives and public servants, in relation to matters not pertaining to the regular performance of their functions.

Subject to what is stated above, article 3 of DL 1034 establishes an exemption, by pointing out that behavior that is a consequence of legislative provisions falls outside the scope of the legislation. Such legislation will be contested in the appropriate channels (i.e. a constitutional challenge in the Constitutional Court), not before the competition authority.

In this respect, the Chamber issued a binding precedent in its Resolution 479-2014/SC1-INDECOPI of April 16, 2014[26], referring to the application of the exemption described. In the Chamber's opinion, any exemption from the application of DL 1034 must be based on a restrictive or literal interpretation of other legislation. The Chamber specifically held as follows:

(i) The reference to acts that are "a consequence of legislation", included in article 3 of the Law for the Elimination of Anticompetitive Behavior, must be understood as the need to have legal authorization or even an obligation to engage in the conduct analyzed.

(ii) In addition, for the purposes of the application of the above-mentioned article 3, the interpretation of the "legislation" on which the exemption is based must be considered as restrictive or literal, i.e., the legislation must clearly authorize the conduct analyzed and must not be applied extensively to other behavior.

(iii) In the analysis of behavior that may be considered anticompetitive practices, but which could in turn be authorized by a piece of legislation, the following steps must be followed:

- Analyze, adopting a strict or literal interpretation, whether or not the "legislation", i.e., legislation other than the Law for the Elimination of Anticompetitive Behavior, authorizes certain behavior.

- If the "legislation" in fact authorizes the behavior, the competition authority cannot penalize it, regardless of whether or not this anticompetitive behavior harms third parties. If the "legislation" authorizes certain behavior, but it is considered that there are signs that it is being undertaken in an "unreasonable" manner, the competition authority should notify such facts to the entity empowered to apply the "legislation".

- If the behavior analyzed is not expressly authorized by the legislation, the competition authority must analyze it according to the criteria of the Law for the Elimination of Anticompetitive Behavior and all other applicable precedents.

However, by Cassation appeal 2035-2022 (Lima), the national Supreme Court overturned this Resolution 479-2014/SC1-INDECOPI, setting aside the penalty imposed by the Chamber on two labor unions that used boycott strategies to restrict competition in the labor market in the Port of Salaverry in Peru. Although the Supreme Court did not expressly overturn the above-mentioned binding precedent, it would be understood to have ceased to be valid, as the resolution that approved it was formally annulled. Furthermore, the Supreme Court did not follow the Chamber's reasoning which, as we have pointed out, proposed a restrictive or literal interpretation of legislation that can exclude DL 1034. On the contrary, the Supreme Court adopted a kind of

[26] Available at: https://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/220fb8aa-055c-47b3-b046-f3972b402e83.

teleological or purpose-based interpretation of the employment legislation in the face of competition legislation, pointing out as follows:

> "*[T]he correct interpretation of article 2 of Legislative Decree No. 1034, the Law for the Elimination of Anticompetitive Behavior, is that labor unions are not within the scope of that Law, since they are not created with the intention of competing in the market, their intrinsic purpose being the protection of the employment rights of their members in a relationship of subordination to an employer, all of which is guaranteed by the Constitution itself (article 28) and the International Conventions on the subject (Number 87 of the ILO).*"

2. General sanctions regime

Article 46 of DL 1034 divides penalties into fines for "minor", "serious" or "very serious" infringements. Fines for minor infractions can reach up to five hundred (500) UIT[27] (approximately USD 723,000[28]), for serious infractions up to one thousand (1,000) UIT (approximately USD 1,446,000), while fines for very serious infractions can even exceed that last amount.

All of this is so, provided that the fine does not exceed a certain percentage of sales or gross revenue received by the perpetrator of the infringement, or its business group, in relation to its entire business activities in the year prior to that of the Commission's resolution (8% for "minor" infringements, 10% for "serious" infringements, and 12% for "very serious" infringements).

In the case of professional bodies or business associations, or economic operators that have commenced their activities after January 1 of the year prior to the decision that imposes the fine, such fine may not in any event exceed one thousand (1,000) UIT. (approximately USD 1,446,000).

A fine can also be imposed of up to one hundred (100) UIT (approximately USD 145,000) on individuals, whether legal representatives or members of management bodies, depending on the finding of their degree of responsibility for the infringements committed.

Furthermore, fines can be imposed in the event of submission of false information, concealment, destruction or alteration of information requested by competition bodies, unjustified failure to comply with requests for information, refusal to appear, or the hindering of performance of the functions of competition bodies. These fines can amount to one thousand (1,000) UIT (approximately USD 1,446,000). provided that they do not exceed 10% of the sales or gross revenue of the perpetrator of the infringement or its business group for the year immediately prior to that of the Commission's decision.

3. Draft legislation

At the time of drawing up this document, there is no draft legislation on competition before parliament in Peru. However, there are drafts that may modify the economic regime under the Constitution or grant constitutional status to INDECOPI, the provisions of which could affect the application of competition rules. However, no significant support for these initiatives has been

[27] The UIT is the Tax Unit, which is used in Peru to calculate the amount of administrative fees or fines. The UIT is updated annually. For 2025, it has been set at PEN 5350 (approximately USD 1450).

[28] Calculated as of 16/03/2025, an exchange rate of 3.70 soles per dollar was applied, considering this value as an average due to exchange rate variability.

noticed. The most recent amendments to the regulation of the subject that are in force were the passing of Law 31112 (2021), establishing merger control; and Law 31775 (2023), specifying the offense of abuse of economic power.

4. Institutional structure

4.1 National Directorate for Investigation and Promotion of Free Competition[29]

(i) Composition: the Directorate is the body with technical autonomy in charge of the commencement and examination in the procedure for the investigation and imposition of penalties for anticompetitive behavior regulated by DL 1034. It is also in charge of organization, examination and investigation in relation to business concentrations subject to the procedures provided for in Law 31112. It is headed by a National Director.

(ii) Appointment: the National Director is appointed by the General Management of INDECOPI (article 13 of the Regulations on the Organization and Functions of INDECOPI).

(iii) Term: unlimited, serving on a full-time and exclusive basis.

(iv) Removal:

- By decision of the General Management.
- Voluntary resignation accepted by the General Management of INDECOPI.

(v) Number of professionals: the Directorate currently has approximately forty-five (45) officials.

(vi) Internal units: although the Directorate does not formally have subareas, there are three (3) large teams (Divisions) according to their area of specialization: control of practices, control of structures, and promotion of competition.

(vii) Powers: the Directorate has broad powers to carry out its functions. Among them the following should be noted: (i) the conduct of preliminary investigations, (ii) the ex officio commencement of procedures for investigation and penalization of anticompetitive behavior, and the examination of the procedure, (iii) requests to the Commission to issue interim measures, (iv) undertaking studies and publishing reports, (v) drawing up proposals for Guidelines, and (vi) conducting training and awareness-building activities in relation to competition legislation.

In addition, for the conduct of its investigative activities, the Directorate has powers to: (i) carry out inspection visits with or without prior notification (dawn raids), at premises of individuals or economic operators; (ii) demand that any kind of document be handed over,

[29] Although DL 1034 refers to the "Technical Secretariat", article 96 of the "Integrated Text of the Regulations on the Organization and Functions of the National Institute for the Protection of Competition and Intellectual Property" creates the "National Directorate for Investigation and Promotion of Free Competition", and article 97 assigns to this body the task of "*Carrying out the functions of Technical Secretariat of the Competition Commission*".

such as internal and external correspondence, and magnetic or electronic records; (iii) summon and question persons under investigation or their officials; (iv) demand, with prior judicial authorization, a copy of private correspondence contained in physical or electronic files; and (v) seek judicial authorization to remove the secrecy of communications (including the confiscation of cellphones and other devices, monitoring of calls and copying of personal messages sent or received using any application).

In this respect, these investigative powers allow the Directorate to use various tools for the purpose of obtaining evidence to prove the existence of cartels in Peru. In addition, the possibility of demanding private correspondence and removing the secrecy of communications facilitates the authority's work with the adoption of new technologies used by economic operators so as to plan, implement and monitor these unlawful agreements.

4.2 Competition Commission

(i) Composition: it is made up of four (4) members, one of whom chairs it. The Deputy Chair replaces the Chair in the event of absence or a temporary impediment. Commissioners must be of recognized standing and professional competence and have five (5) years' experience in matters related to the Commission's powers. Like the Chamber and the Directorate, commissioners enjoy technical autonomy.

(ii) Appointment: Commissioners are appointed by the Governing Council of INDECOPI, following an opinion of the Advisory Body.

(iii) Term: the term of office is five (5) years, with the possibility of being appointed for an additional term.

(iv) Vacancy:

- Death.
- Permanent disability.
- Accepted resignation.
- A legal impediment arising after the appointment.
- Removal due to a serious infringement or for a reason approved by the Advisory Body.
- Unjustified failure to attend three (3) consecutive meetings or five (5) nonconsecutive meetings in a one (1) year period.

(v) Number of professionals: it is made up of four commissioners.

4.3 Competition Chamber of the Competition and Intellectual Property Tribunal

(vi) Composition: the Chamber is a body with technical and functional autonomy specializing in competition, which is made up of five (5) members; efforts must be made to ensure that the composition of the Chamber reflects a multidisciplinary group.

(vii) Appointment: they are appointed by Supreme Resolution, endorsed by the President of the Council of Ministers, upon a proposal of the Governing Council of INDECOPI, following an opinion of the Advisory Body. The requirements to be appointed as a member are to be of recognized standing and professional competence and have five (5) years' experience in matters related to the Chamber's powers.

(viii) Term: the members' term of office is five (5) years, with the possibility of being appointed for an additional term. If at the end of the term the new member is not appointed, the outgoing member will remain as acting member for a maximum period of three (3) months from the date of expiration.

(ix) Vacancy:

- Death.
- Permanent disability.
- Accepted resignation.
- A legal impediment arising after the appointment.
- Removal due to a serious infringement or for a reason approved by the Advisory Body.
- Unjustified failure to attend three (3) consecutive meetings or five (5) nonconsecutive meetings in a one (1) year period.

5. Abuse of a dominant position

5.1 Applicable legislation

Abuses of a dominant position are analyzed in accordance with article 10 of DL 1034. In particular, article 10.1 of that legislation provides that an abuse of a dominant position exists when a dominant operator in the relevant market uses its position to unduly restrict competition, with the intention of making a profit, to the detriment of actual or potential competitors, whether direct or indirect. This is so insofar as the abusive behavior would not have been possible if there was no dominant position.

Since, according to article 10.4 of DL 1034, abuses of a dominant position are subject to a relative prohibition, in accordance with article 9 of the same legislation, in order to prove the existence of an infringement, the authority must confirm the conduct and that it has or could have negative effects on competition and consumer welfare.

Potentially abusive behavior is therefore analyzed applying the standard of the so-called Rule of Reason.

5.2 Dominant position

Under article 7.2 of DL 1034, the mere possession of a dominant position does not constitute unlawful conduct. In addition, according to article 7.1 of the same legislation, an economic operator is deemed to enjoy a dominant position in a relevant market when it is capable of substantially restricting, affecting or distorting the supply or demand conditions in that market, its

competitors, suppliers or customers being unable, at that time or in the immediate future, to counteract that possibility, due to factors such as:

(i) A significant share in the relevant market.

(ii) The characteristics of the supply and demand of the goods or services.

(iii) Technological development or services involved.

(iv) Access by competitors to sources of financing and supply, and to distribution networks.

(v) The existence of legal, economic or strategic barriers to entry.

(vi) The existence of suppliers, customers or competitors and their negotiating power.

5.3 Abuse of a dominant position

DL 1034 only considers to be abusive behavior conduct that can have an exclusionary effect (in contrast, abuses that have only exploitative effects are not sanctioned, as is the case in certain jurisdictions.). In particular, article 10.2 provides a list of examples of that kind of behavior, such as: unjustified refusal to deal, application of dissimilar conditions to equivalent transactions (discrimination), imposing as a condition for the conclusion of contracts the acceptance of additional transactions that bear no relation to the subject matter of such contracts (tied sales), imposing exclusive distribution or sale agreements or non-compete clauses which are not justified, repeated abuse of judicial or administrative proceedings aimed at restricting free competition (predatory litigation).

In general, behavior that impedes or hinders the entry or continued presence of current or potential competitors, for reasons other than greater economic efficiency, will be considered abusive practices.

5.4 Standard for assessment of behavior

In various resolutions the Chamber has defined the sequence of analysis in cases of abuse of a dominant position[30]. This has been included in the Guidelines for the interpretation of specific aspects of the Law for the Elimination of Anticompetitive Behavior[31] which provide the concurrent conditions as indicated below:

(i) Define the relevant market in which the potentially abusive practice is pursued.

(ii) Determine whether any of the accused parties has a dominant position.

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[30] For example, see Resolutions No. 0589-2015/SDC-INDECOPI and No. 0460-2016/SDC-INDECOPI, both available at: https://servicio.indecopi.gob.pe/buscadorResoluciones/tribunal.seam.

[31] Competition Commission (2016) "Lineamientos para la Interpretación de Aspectos Específicos de la Ley de Represión de las Conductas Anticompetitivas" (*Guidelines for the interpretation of specific aspects of the Law for the Elimination of Anticompetitive Behavior*), Section 2.1, published by Resolution No. 129-2016-INDECOPI/COD. Available at: https://www.indecopi.gob.pe/documents/1902049/3898344/CLC%20-%20Lineamientos%20para%20la%20interpretaci%C3%B3n%20de%20aspectos%20espec%C3%ADficos%20de%20la%20Ley%20de%20Represi%C3%B3n%20de%20Conductas%20anticompetitivas.pdf

(iii) Establish whether the reported misconduct is proven.

(iv) Weigh up the objectives restricting competition against the justifications based on pro-competitive efficiencies, and if the balance is positive, an infringement cannot occur.

According to various rulings of the Commission and the Chamber, it is not necessary to verify the existence of actual exclusionary effects, it being sufficient to prove that the conduct can potentially have such effects.

5.5 Trends

Most of the proceedings for abuse of a dominant position have been commenced by complaints made by a party, i.e. by private economic operators, not by ex officio actions of the Directorate.

6. Horizontal collusive practices

6.1 Applicable legislation

The applicable legal regime described in article 11 of DL 1034 provides that the following will constitute a "horizontal" collusive practice: any agreement, decision, recommendation or concerted practice engaged in by competing economic operators if they have as their object or effect the restriction, obstruction or distortion of free competition. Examples of these, listed in the same law, are agreement on or for:

(i) Direct or indirect fixing of prices or of other commercial terms or terms of service.

(ii) Limitation or control of production, sales, technical development or investments.

(iii) Allocation of customers, suppliers or geographical areas.

(iv) The quality of products, when it does not relate to national or international technical regulations and adversely affects the consumer.

(v) The application, in commercial or service relations, of dissimilar terms for equivalent transactions, which unjustifiably place certain competitors in unfavorable situations compared with others.

(vi) The unjustified imposition as a condition for the conclusion of contracts of the acceptance of additional transactions which, due to their nature or in accordance with commercial practice, bear no relation to the subject matter of such contracts.

(vii) The unjustified refusal to meet requests for purchase or acquisition of goods or services, or to accept offers of sale or supply of goods or services.

(viii) Unjustifiably hinder the entry or continued presence of a competitor in a market, an association or intermediary organization.

(ix) Unjustified exclusive distribution or sale.

(x) Submission of offers, bids or proposals or refraining from doing so in public or private tender processes or competitions or other forms of public procurement provided for in the relevant legislation, and at public auctions.

(xi) Other practices of equivalent effect which seek to obtain profits for reasons other than greater economic efficiency.

The legislation also provides that some of these practices are always particularly damaging to competition and the market, which are known as "hardcore cartels". In that case, article 11.2 of DL 1034 provides that the following are subject to absolute prohibitions: *inter-brand* horizontal collusive practices (i.e. between economic operators that do not belong to the same business group) which do not complement or are not ancillary to other lawful agreements and which have as their object:

(i) To fix prices or other commercial terms or terms of service;

(ii) To limit production or sales, in particular by means of quotas;

(iii) To allocate customers, suppliers or geographical areas; or

(iv) To establish bids or refrain from participating in tender processes or competitions or other forms of public procurement provided for in the relevant legislation, and at public auctions.

All other collusive practices would therefore be subject to relative prohibitions (article 11.3 of DL 1034).

6.2 Statute of limitations

The limitation period for this type of behavior is five (5) years from the final act of execution of the infringing behavior. It should be pointed out that the limitation period is interrupted by any act of the Directorate relating to the investigation of the infringement which is notified to the person allegedly responsible.

6.3 Compensated reporting

This concept is provided for in Peruvian legislation by means of the so-called Leniency Program. This consists of the possibility, before the commencement of an administrative procedure for the imposition of penalties, for any person to request an exemption from penalties in exchange for providing evidence that helps to detect and prove the existence of a collusive practice, and to penalize those responsible (article 26.1 DL 1034).

If several economic operators seek exemption from penalties, only the first that has provided evidence in relation to the existence of anticompetitive behavior and the identity of the perpetrators of the infringement, will benefit from the full exemption (Type A Leniency)[32]. This is so unless the Directorate already has circumstantial evidence of the existence of the collusive practice, in which case the Directorate will reasonably assess the amount of the reduction,

[32] See: Technical Secretariat of the Competition Commission (2017), "Guía del Programa de Clemencia" (*Leniency Program Guide*). Section 3.1.: "Exoneración de la sanción" (*Exemption from penalties*).

between 50% and 100% of the applicable fine, depending on the usefulness and effectiveness of the information provided (Type B Leniency)[33].

Other economic operators that provide relevant information may benefit from a reduction of the fine (Type C Leniency)[34], if such information contributes significant added value to the investigative and disciplinary activities of the Directorate and the Commission (article 26.3 DL 1034).

For the reduction of the fine, DL 1034 provides for the following ranking:

(i) The second applicant can receive a reduction of between 30% and 50% of the fine that would have been applicable.

(ii) The third applicant can receive a reduction of between 20% and 30%.

(iii) Subsequent applicants can receive a maximum reduction of 20%.

The following are some of the requirements to participate in the leniency program: (i) that the individual or legal entity has participated in the cartel; and (ii) that he offers his full cooperation with the authority's investigative activities. In this regard he will be required to provide relevant information to prove the conduct and will continue to have a duty to cooperate throughout the entire procedure. The Commission published, in August 2017, the Leniency Program Guide, describing various additional aspects relating to the program[35].

6.4 Specific penalties

In accordance with the Twenty-third Final Additional Provision of the Consolidated Amended Text of Law No. 30225, the Public Procurement Law, approved by Supreme Decree No. 082-2019-EF[36], if the INDECOPI classifies an anticompetitive practice pursued in the course of contracting with the State as a very serious infringement and that aspect of the final resolution becomes final, then the Public Procurement Supervisory Body (OSCE) enters the perpetrators of the infringement in the register of persons disqualified from contracting with the State and they will remain on record there for a period of one (1) year.

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[33] Idem.

[34] See: Technical Secretariat of the Competition Commission (2017), "Guía del Programa de Clemencia" (*Leniency Program Guide*). Section 3.2.: "Reducción de la sanción" (*Reduction of penalties*).

[35] In this respect, see the "Guía del Programa de Clemencia" (*Leniency Program Guide*), available at: https://www.INDECOPI.gob.pe/documents/1902049/3761587/Gu%C3%ADa+del+Programa+de+Clemencia.pdf

[36] Public Procurement Law. *"Twenty-third Final Additional Provision.- Anticompetitive practices in Public Procurement.- In the framework of the provisions of the Second Final Additional Provision of Legislative Decree No. 1034, the Legislative Decree approving the Law for the Elimination of Anticompetitive Behavior, when the National Institute for the Protection of Competition and Intellectual Property (INDECOPI) finds an infringement of that Law classified as very serious and the penalty is final, the Public Procurement Supervisory Body (OSCE), or whoever acts as such, shall proceed to enter, for a period of one year, the perpetrators of the infringement in the register of persons disqualified from contracting with the State".*

6.5 Criminalization

On June 7, 2023, Law 31775 was published, amending article 232 of the Criminal Code, in relation to the offense of abuse of economic power, within the *offenses against the economic order*[37]. With this amendment, horizontal collusive practices subject to absolute prohibition (hardcore cartels) could be penalized not only in administrative proceedings, but also in the criminal courts, and individuals involved in the alleged offense could be individually prosecuted. However, Law No. 31775 has provided that the beneficiaries of total exemption under the Leniency Program may also benefit from immunity in criminal proceedings.

6.6 Trends

The Commission has engaged in extensive work in detecting horizontal collusive practices, specifically, the detection of hardcore cartels, whose penalties have been generally confirmed by the Chamber at second instance at administrative level. In addition, the leniency program has been playing an important role in the detection of this type of conduct. Nevertheless, in the medium term it will be necessary to analyze the impact of the criminalization of cartels and the grant of immunity from prosecution to the beneficiaries of the total exemption in a leniency program, in accordance with Law 31775 of 2023.

7. Vertical collusive practices

7.1 Applicable legislation

The regulation applicable to such conduct is described in article 12 of DL 1034, which provides that the following constitute vertical collusive practices: agreements, decisions, recommendations or concerted practices engaged in by economic operators operating at different levels in the same production, distribution or marketing chain, which have as their object or effect the restriction, obstruction or distortion of free competition.

In this respect, the legislation points out that these vertical unlawful practices may consist of scenarios classified as infringements for cases of abuse of a dominant position and for cases of horizontal collusive practices.

It also provides that this anticompetitive practice requires that at least one of the parties involved has, before engaging in the conduct, a dominant position in the relevant market.

Like abuses of a dominant position, vertical collusive practices are subject to a relative prohibition and, therefore, are analyzed in accordance with the Rule of Reason.

7.2 Statute of limitations

Like horizontal collusive practices, the limitation period for this type of behavior is five (5) years from the final act of execution of the infringing behavior. It should be remembered once again that

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[37] Criminal Code *"Article 232.- Abuse of economic power. Any person who participates in an anticompetitive agreement or practice subject to an absolute prohibition established in Legislative Decree 1034, the Legislative Decree approving the Law for the Elimination of Anticompetitive Behavior, or legislation that may replace it, with the object of impeding, restricting or distorting free competition, shall be punished by a prison sentence of not less than two nor greater than six years, with a fine of between one hundred and eighty and three hundred and sixty-five days and disqualified in accordance with article 36, subparagraphs 2 and 4."*

the limitation period is interrupted by any act of the Directorate relating to the investigation of the infringement which is notified to the person allegedly responsible.

7.3 Specific powers

These powers are the same as those that apply to the investigation and detection of abuses of a dominant position and horizontal collusive practices.

7.4 Compensated reporting

In accordance with the Leniency Program Guide (2017), compensated reporting does not apply to this type of conduct.

7.5 Trends

Most investigations of vertical collusive practices have not been launched by the Commission. This was pointed out in the Peer Review of Competition Law and Policy in Peru, drawn up by the OECD and the Inter-American Development Bank in 2018[38].

8. Unfair competition

8.1 Applicable legislation

Legislative Decree 1044, the Law for the Elimination of Unfair Competition ("DL 1044"), of July 26, 2008, regulates the system of unfair competition and punishes acts of unfair competition whose actual or potential effect is that the proper functioning of the competitive process is affected or impeded. Its provisions apply to any individual or legal entity that offers or demands goods or services in the market, and engages in conduct that causes or may cause effects in Peruvian territory, even if the act has originated abroad.

As regards conduct, for an act to be considered an unfair practice, it is sufficient that it contravenes the General Clause provided in article 6 of DL 1044, i.e., that it is objectively contrary to good faith in business, this premise essentially being the basis for classifying acts as unfair practices.

In that sense, the unfairness of conduct under competition rules will be determined in view of the fact that such conduct is not motivated by efficiency, but rather by a violation of the requirements of objective good faith. Thus, the following are considered acts contrary to the requirements of good faith in business (unfair): those which lead to a competitor acquiring a better competitive position -attracting customers or suppliers-. This is done by actions that are not based on its own entrepreneurial effort, but rather they are essentially actions obstructing third-party competitors.

8.2 Classification (types of conduct)

In addition to the definition of unfair acts contained in the General Clause, the legislature saw fit to provide a list of examples of such acts, for the purpose of guiding citizens with greater certainty regarding conduct that is deemed to infringe that General Clause, for which it adopts the following classification:

[38] Available at: https://www.oecd.org/daf/competition/PERU-Peer-Reviews-of-Competition-Law-and-Policy-2018.pdf

(i) *Acts affecting market transparency*: Misleading practices; acts causing Confusion.

(ii) *Acts relating to another economic operator's reputation*: acts of Improper Exploitation of Another's Reputation; Discrediting acts; Improper Comparison;

(iii) *Acts which improperly alter the competitive position*: acts of Violation of Trade Secrets; acts of Violation of Regulations (which include violation of the constitutional principle of subsidiarity of the State in the conduct of business activities in the market); acts of Commercial Sabotage;

(iv) *Acts performed through advertising*: acts contrary to the Principle of Authenticity; acts contrary to the Principle of Legality; acts contrary to the Principle of Social Appropriateness.

It should be emphasized that, in terms of case law, the fact is that INDECOPI admits or pursues complaints of unfair competition using some of the above-mentioned practices contained in the list of examples, establishing a series of scenarios contained in DL 1044 that must be met so as to be considered an unfair practice. On the other hand, the concept of the General Clause is used when the conduct reported has atypical characteristics of its own which do not resemble any of the infringements already listed in the legislation, i.e., it is applied as a last resort[39].

8.3 Competent Authority

The competent authority to hear cases in this respect is the Unfair Competition Supervisory Commission of INDECOPI, at first instance at administrative level, and the Chamber as the second instance at administrative level.

8.4 Procedure

The procedure may be commenced ex officio or in response to a party's complaint, then the accused must present its case so that the evidence that is considered appropriate is taken and a final resolution is issued. A resolution at first instance is issued within a maximum period of approximately two hundred and five (205) working days and, if there is an appeal against that resolution, at second instance the resolution is issued within a maximum period of one hundred and twenty (120) working days, in accordance with DL 1044.

8.5 Penalties

If the perpetrator of the infringement is found liable, the authority may impose a fine of up to seven hundred (700) UIT per infringement, provided that this does not exceed 10% of the gross revenue received by the perpetrator in relation to its entire business activities, for the year immediately prior to that of the issue of the Commission's resolution.

[39] See Resolutions No. 25-2022/SDC-INDECOPI, No. 86-2021/SDC-INDECOPI, No. 98-2018/SDC-INDECOPI, No. 235-2017/SDC-INDECOPI and No. 3156-2012/SDC-INDECOPI.

9. Concentrations

9.1 Applicable legislation

Law 31112, which establishes Prior Control of Business Concentrations, was published on January 7, 2021 and came into force on June 14, 2021. This legislation replaced the Urgent Decree 013-2019 of the Government, published on November 19, 2019, which introduced, for the first time, a general regime for control of business concentrations in Peru. Law 31112 also repealed Law 26876, the Law Combatting Monopolies and Oligopolies in the Electricity Sector, which established control of concentrations only for the Peruvian electricity sector, since 1993.

Regulations under Law 31112 were enacted by Supreme Decree 039-2021-PCM, in March 2021. Those regulations, inter alia: (i) established an ordinary procedure and another simplified procedure for the notification of concentrations; (ii) defined the scope of the calculation of the economic thresholds to determine the obligation to notify; (iii) regulated the procedure for reviewing conditions; and (iv) established the special circumstances which may justify an ex officio investigation of transactions where there is no obligation to notify.

On an additional basis, the Commission has approved and published Guidelines for the Calculation of Notification Thresholds ("Guidelines for the Calculation of Thresholds")[40], which establish the details of the calculation of economic thresholds that determine whether or not a transaction must be notified on a mandatory basis. The Commission also recently approved Guidelines for the Classification and Analysis of Concentrations ("Guidelines for the Classification of Concentrations")[41].

9.2 Authorities

The Commission is the competition authority with powers to apply Law 31112. However, in the case of transactions of entities that obtain deposits from the public, such as banks and financial institutions, the joint approval of the Commission in relation to competition, and of the Banking, Insurance and Pension Fund Managers Supervisory Authority (SBS) is required, according to its responsibilities. In addition, since a concentration between entities that obtain deposits from the public poses a systemic risk for the stability of the banking and financial system, only the approval of the SBS will be required[42]. On the other hand, in cases in which a transaction involves economic operators whose activities have been authorized by the Securities Market Supervisory Authority (SMV), the joint approval of the Commission will be required, in relation to competition, and of the SMV according to its responsibilities.

9.3 Notifiable concentrations

Under article 5 of Law 31112, concentrations within the scope of that legislation are any act or transaction that involves a transfer or change of control over an enterprise or part of such enterprise. Such concentrations can occur as a consequence of the following transactions (see Table No. 1):

[40] Resolution 022-2021/CLC-INDECOPI, of May 19, 2021.

[41] Resolution 103-2022/CLC-INDECOPI, of December 27, 2022.

[42] This procedure has been explained in greater detail by the "Factsheet on the role of the Banking, Insurance and Pension Fund Managers Supervisory Authority in the prior control of business concentrations".

Table No. 1
Cases of business concentrations covered by Law 31112

	Type of transaction	Comment
(a)	A merger of two or more economic operators, which were independent before the transaction, irrespective of the form of corporate organization of the entities that are merged or of the entity resulting from the merger.	Independence refers to operators that do not form part of the same business group. Law 31112 also defines economic operator as an individual or legal entity, national or foreign, subject to private law or public law, which offers or demands good or services and is the holder of rights or beneficiary of contracts or which, without being the holder of such rights or beneficiary of such contracts, may exercise the rights inherent in them. This includes national or foreign investment funds (article 3).
(b)	The acquisition by one or more economic operators, directly or indirectly, of rights which enable it, individually or jointly, to exercise control over all or part of one or more economic operators.	The concept of control has been defined in article 3 of Law 31112, as the possibility to exercise decisive and continuous influence over an economic operator by (i) rights of ownership or of use of all or part of the assets of an enterprise, or (ii) rights or contracts which allow influence to be decisively and continuously exercised over the composition, deliberations or decisions of the bodies of an enterprise, determining competitive strategy directly or indirectly. Various Commission rulings have held that control can be positive or negative, which has been included in the Guidelines for the Classification of Concentrations.
(c)	The establishment by two or more economic operators, which are independent of each other, of a joint venture or any other similar contractual form that involves the acquisition of joint control over one or more economic operators, so that such economic operator performs the functions of an autonomous business entity.	The Guidelines for the Classification and Analysis of Concentrations issued by the Commission have included in this case the signature of association agreements, such as joint ventures and consortiums[43]. Also included are shared-risk contracts and other forms of association that involve joint control of two or more operators, which may involve associations, irregular companies and any organizational structure that is different from that of its members.
(d)	The acquisition by an economic operator of direct or indirect control, by any means, of operating productive	The Regulations pointed out that an operating productive asset is an asset that generated a flow of business, sales or revenue for the

[43] See: National Directorate for Investigation and Promotion of Free Competition (2023) "Lineamientos para la calificación y análisis de las operaciones de concentración empresarial" (*Guidelines for the classification and analysis of concentrations*). Section 1.2.3.: "Constitución de una empresa en común, joint venture y modalidades análogas" (*Establishment of a joint venture and similar forms*).

	assets of another or other economic operators.	economic operator in the year prior to the transaction.

In addition, under article 2 of Law 31112, concentrations within the scope of the legislation are those that have effects in all or part of the national territory. This also includes concentrations that are carried out abroad and are binding directly or indirectly on economic operators that engage in business activities in the country, i.e. there must be a geographical connection with national markets.

9.4 Mandatory notification thresholds

A transaction that is classified as a business concentration and has a geographical connection in Peru, must be notified on a mandatory basis to the Directorate before it is carried out, provided that the following economic thresholds are met simultaneously[44]:

(i) Overall threshold: the sum of the annual sales or gross revenue generated in Peru (first scenario), or the book value of assets in Peru (second scenario), of the (i) acquiring economic operator and its business group, together with (ii) that of the economic operator being acquired and its business group (in the case of mergers, or association agreements), or of the economic operator being acquired and of the operators over which it exercises control (in the case of acquisitions of shares or rights), in the tax year prior to that of the transaction, must be equal to or greater than one hundred and eighteen thousand (118,000) Tax Units (UIT), approximately USD 161.8 million; and

(ii) Individual threshold: the value of annual sales or gross revenue generated in Peru (first scenario), or the book value of assets in Peru (second scenario), of at least two of the enterprises involved in the transaction (each considered individually), in the tax year prior to that of the transaction, must be equal to or greater than eighteen thousand (18,000) UIT, approximately USD 24.6 million[45].

The Regulations and the Guidelines for the Calculation of Thresholds establish the scope of information and the details for calculating it.

For example, in the case of transactions consisting of the purchase of rights that involve the acquisition of control of an economic operator by another previously independent operator, the thresholds must take into account sales, gross revenue, or assets at book value of the acquiring operator and its business group in Peru, and of the operator being acquired and only the operators over which the latter exercises control[46].

In addition, in the case of the calculation of thresholds by assets, an exception is applied to determine whether the assets are located in Peru. In particular, the Guidelines for the Calculation of Thresholds provide that if more than 50% of the sales attributable to a particular asset are exports, such asset will not be considered to be located in Peru and, therefore, its book value will

[44] It should be pointed out that the thresholds are not based on the value of the transaction, but rather on the sum of the factors of sales or gross revenue, or on the book value of assets in Peru.

[45] Article 6.1 of Law 31112.

[46] Competition Commission (2021) "Lineamientos para el Cálculo de los Umbrales de Notificación" (*Guidelines for the Calculation of Notification Thresholds*). Section 2: "identificación de las empresas involucradas" (*identification of enterprises involved*).

not be taken into account for the purposes of the calculation of thresholds[47]. This exception is intended to be consistent with the treatment of the calculation of thresholds by sales or services, which take into account the place of delivery or performance of the service, irrespective of the provider's residence.

9.5 Voluntary notification and ex officio investigation

Article 6.4 of Law 31112 provides that the Directorate may act ex officio in cases in which there are reasonable signs to consider that the concentration may give rise to a dominant position or affect effective competition in the relevant market.

Thus, Law 31112 stipulates that the notification of the transaction is voluntary for the parties when the enterprises involved do not reach the thresholds established in article 6.1 of the legislation.

When read together, these provisions imply that the Directorate has powers to conduct an ex officio investigation of the effects of a transaction which fulfills the conditions of a change of control between economic operators and a geographical connection, but which do not reach the economic thresholds provided for in the legislation. The legal framework also offers an individual the possibility to issue a voluntary notification, if he considers that there are reasonable signs that the transaction may give rise to a dominant position or affect effective competition in the relevant market.

However, the ex officio review cannot be arbitrarily activated, but rather it is included within a series of parameters aimed at identifying reasonable signs regarding the creation of a dominant position or a significant restriction of competition in the relevant markets involved. Thus, the Directorate can only commence the ex officio review of a business concentration up to one (1) year after its formal closing[48].

Finally, this ex officio review involves the authority proving the existence of special circumstances in which reasonable signs are identified that the Transaction may give rise to a dominant position or affect effective competition in the relevant market.

In this respect, the Regulations provide an open list of special circumstances, pointing out certain examples which are indicated below:

> ***"Article 23. Criteria and parameters for ex officio action of the Technical Secretariat in the event of business concentrations***
>
> *23.2 The scenarios indicated below, inter alia, are considered special circumstances:*
>
> *(a) Horizontal business concentrations undertaken in concentrated markets.*
>
> *(b) Horizontal business concentrations which involve the acquisition of an economic operator with a small market share, but with growth potential; or of an innovative economic operator that has recently entered the market.*

[47] Idem. Section 3.2.3. "Valor de los activos: Nexo geográfico" (*Value of assets: Geographical connection*).

[48] Article 23.4 of the Regulations.

(c) *Horizontal business concentrations, in which the acquiring economic operator or its business group has previously undertaken business concentrations which involved the acquisition of a competitor.*

(d) *Other business concentrations that have the potential to create possible significant restrictive effects on competition."*

It must be borne in mind that scenario d) above covers any concentration that has the potential to create possible significant restrictive effects on competition. This must be read in a broad sense, so that even if a transaction does not give rise to significant effects which are effective when the transaction is executed, it could be investigated if it is considered that such effects have not materialized, but could do so in the future.

9.6 Prior consultations

Under article 17 of Law 31112, before the prior control procedure is commenced, economic operators participating in the business concentration can individually or jointly consult the Directorate for guidance. This is so as to be able to clarify, among other aspects, whether the transaction falls within the scope of this Law or what information is required for the prior control. The Directorate's opinions are not binding on the Commission when making its decisions.

9.7 Pre-notification

There is the possibility of pre-notification to the Directorate; however, this procedure is informal, is not binding and there are no legal time limits. The following are the main advantages of pre-notification:

(i) To enable the authority to become familiar with the transaction and the markets involved.

(ii) To identify information that could be demanded in the admission procedure, so that the information is gathered and provided beforehand for the purpose of avoiding an extension of time limits.

(iii) To identify possible competition concerns in advance, so as to prepare the necessary information that may address such concerns.

9.8 Procedure and time limits

(i) Stage 1: when the parties have notified the application for authorization for the concentration, the Directorate has ten (10) working days to assess the information and decide if additional information is necessary. If so, the Directorate grants a period of ten (10) working days to the parties to rectify any missing documentation, and has five (5) working days to assess the rectified application and decide whether to admit it for consideration.

When the application has been admitted for consideration, the Commission has thirty (30) working days to issue a decision at Stage 1, or refer the transaction to Stage 2. The application and the file are kept strictly confidential, which means that no third party has access to it.

At any time in the procedure, the parties can request hearings or oral submissions to the Commission. In these cases, the time limit for the procedure can be extended for up to fifteen (15) working days. The Commission can also request information from other public

institutions, and may suspend the administrative time limits for up to ten (10) working days, which may be extended by an additional five (5) working days, so as to obtain the response of the institution in question.

Within the legal time limit, the Commission can unconditionally authorize the transaction at Stage 1, or order the commencement of Stage 2, when it considers that there are potential significant restrictions on competition which must be analyzed in greater detail.

According to information from public resolutions to date, which authorize concentrations at Stage 1, the Commission has been issuing resolutions in approximately two months from when the application is filed. To date no transaction has been the subject of a resolution issued outside the legal time limit.

(ii) Stage 2: if the Commission decides to take the application to the Stage 2 assessment, it issues a summary with the reasons which led it to take that public decision (brief memorandum). This is for the purpose of giving third parties with a legitimate interest the opportunity to submit relevant information to the authority, without being thereby considered as parties involved in the procedure.

During Stage 2, although the case is made public, and third parties with a legitimate interest duly appearing can access the file, the parties can request that the information that they consider appropriate is kept confidential.

The Commission has ninety (90) working days to issue a ruling; this period can be extended by an additional thirty (30) working days.

At any time at Stage 2, the parties can request hearings or oral submissions to the Commission. In these cases, the time limit for the procedure can be extended for up to fifteen (15) working days. The Commission can also request information from other public institutions, and may suspend the administrative time limits for up to ten (10) working days, which may be extended by an additional five (5) working days, so as to obtain the response of the institution in question.

According to public information, as of December 2024, four (4) transactions that completed the prior authorization procedure, were authorized at Stage 2. These applications were resolved in periods of between nine (9) months and one (1) year, approaching the maximum time limits stipulated[49]. As of December 2024, one (1) further transaction is under assessment at Stage 2.

[49] See in this respect: INDECOPI, News "El Indecopi autorizó con condiciones la adquisición de Hersil S.A. por parte de Pharmaceutica Euroandina S.A.C." (*INDECOPI authorized subject to conditions the acquisition of Hersil S.A. by Pharmaceutica Euroandina S.A.C.*), Press release (October 2022), available at: https://www.gob.pe/institucion/indecopi/noticias/663850-el-indecopi-autorizo-con-condiciones-la-adquisicion-de-hersil-s-a-por-parte-de-pharmaceutica-euroandina-s-a-c; INDECOPI, News, "El Indecopi autoriza con condiciones la operación de adquisición de Enel Distribución por parte de China Southern Power Grid International" (*INDECOPI authorizes subject to conditions the acquisition of Enel Distribución by China Southern Power Grid International*), Press release (February 2024), available at: https://www.gob.pe/institucion/indecopi/noticias/902252-el-indecopi-autoriza-con-condiciones-la-operacion-de-adquisicion-de-enel-distribucion-por-parte-de-china-southern-power-grid-international; INDECOPI News, "El Indecopi autoriza con condiciones una operación de concentración empresarial en el mercado mayorista de redes de acceso de fibra óptica" (*INDECOPI authorizes subject to conditions a business concentration in the wholesale market for fiber optic networks*), Press release (September 2024), available at: https://www.gob.pe/institucion/indecopi/noticias/1026842-el-indecopi-autoriza-con-condiciones-una-operacion-de-concentracion-empresarial-en-el-mercado-mayorista-de-redes-de-acceso-

Finally, in 2024 the Commission refused authorization of one (1) concentration in the sugar industry. In the Commission's opinion, the transaction would give rise to a significant restriction of competition in two markets related to the sugar industry in Peru, whereas the measures proposed by the applicant would not mitigate these possible restrictive effects[50].

9.9 Positive administrative silence

If the competent body fails to issue an express ruling within the stipulated legal time limit, positive administrative silence applies, the transaction being deemed to be unconditionally approved, and the prior control procedure is concluded. To date no application for prior authorization has been approved by resorting to positive administrative silence.

9.10 Appeals

If the application for authorization is refused or is authorized subject to conditions, the applicant economic operators can file an appeal. The time limit for filing such appeal is fifteen (15) working days from the day following notification of the resolution ending the first instance procedure conducted by the Commission.

If the Commission has ordered an interim measure, enforcement of the contested resolution is not suspended, unless the Chamber orders otherwise by means of a duly reasoned resolution. The Chamber rules within a maximum period of ninety (90) working days and ends the administrative proceedings.

9.11 Breach of the obligation to notify

Executing a business concentration which should have been notified on a mandatory basis, without having filed the relevant application for authorization or without having waited for the competent administrative authority to issue a ruling or definitively conclude the prior control procedure (gun jumping), renders null and void any acts arising from such execution. These acts have no legal effect, without prejudice to the applicable penalties.

In particular the following are considered serious infringements:

(i) Executing a concentration before it has undergone the prior control procedure.

(ii) Executing a concentration before the ruling is issued by the competent authority or possible positive administrative silence has become applicable.

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de-fibra-optica; and, INDECOPI News, "El Indecopi autoriza con condiciones una operación de concentración empresarial en el mercado de materiales de construcción" (*INDECOPI authorizes subject to conditions a business concentration in the wholesale market for construction materials*), Press release (October 2024), available at: https://www.gob.pe/institucion/indecopi/noticias/1041735-el-indecopi-autoriza-con-condiciones-una-operacion-de-concentracion-empresarial-en-el-mercado-de-materiales-de-construccion.

[50] See in this respect: INDECOPI, News "El Indecopi no autorizó que el Grupo Gloria adquiera la empresa fabricante de azúcar doméstica Agrícola del Chira S.A." (*INDECOPI did not authorize the Gloria Group to acquire the company manufacturing domestic sugar Agrícola del Chira S.A.*), Press release (July 2024), available at: https://www.gob.pe/institucion/indecopi/noticias/984250-el-indecopi-no-autorizo-que-el-grupo-gloria-adquiera-la-empresa-fabricante-de-azucar-domestica-agricola-del-chira-s-a.

These infringements result in fines of up to one thousand (1,000) UIT (approximately USD 1,446,000.), subject to a limit of 10% of the sales or gross revenue of the perpetrator of the infringement or its business group.

The following are also infringements, although of a minor nature:

(i) Failure to submit the application for authorization by means of the prior control procedure, in accordance with the statutory provisions.

(ii) Failure to supply to the competent body within the stipulated period the information that it requested.

These infringements involve fines of up to five hundred (500) UIT (approximately USD 723,000), subject to a limit of 8% of the sales or gross revenue of the perpetrator of the infringement or its business group.

In addition, the following are considered very serious infringements:

(i) Breaching or contravening a condition, agreement or commitment established in a resolution issued pursuant this law.

(ii) Executing a business concentration having been refused authorization for such transaction.

(iii) Obstructing by any means the investigation being conducted by the competent body in relation to a business concentration.

(iv) Refusing without justification to supply information requested or supplying incomplete, incorrect, altered, misleading or false information.

These infringements may lead to fines exceeding one thousand (1,000) UIT (approximately USD 1,446,000) subject to a limit of 12% of the sales or gross revenue of the perpetrator of the infringement or its business group.

9.12 Substantive Analysis to Classify a Concentration

Article 7 of Law 31112 points out that the test that must be applied by the authority in relation to the economic analysis of a concentration involves identifying whether it causes a significant restriction of competition in the markets involved. Although it refers to the markets involved, in various resolutions the Commission has carried out the substantive analysis applying a standard definition of relevant markets[51].

In the case of horizontal concentrations, the recent Guidelines for Classification of Concentrations include the case law of the Commission developed since Law 31112 came into force. In particular, they have established the following criteria for analysis using the Herfindahl-Hirschman Index (HHI), so as to conclude that the transaction is unlikely to create risks to competition:

(i) If the HHI is below one thousand five hundred (1,500), or

[51] This is the case of Resolution No. 013-2023-CLC/INDECOPI.

(ii) The HHI is above one thousand five hundred (1,500) and below two thousand five hundred (2,500), and the change in the index is below 200 points, or

(iii) The HHI is greater than two thousand five hundred (2,500), and the change in the index is below one hundred (100) points.

However, the Commission will consider that, despite the circumstances described above, there are risks to competition if other economic aspects are identified such as:

(i) One of the operators involved that takes part in the concentration is a potential competitor.

(ii) One or more economic operators involved are important innovators or maverick operators, which adopt disruptive strategies in order to compete actively.

(iii) The operators involved are close competitors.

(iv) The operators involved have ownership links (such as minority shareholdings) or contractual links (such as collaboration agreements) which may reduce their independence or autonomy.

(v) There are market factors which facilitate coordination or signs of coordination have emerged in the past.

(vi) There are cases in Peru in which risks to competition have been identified.

(vii) There is evidence or information which constitutes a sign of possible risks to competition.

An interesting aspect in relation to the substantive analysis is that the Commission will consider the possible competitive pressures to which the operators involved in the transaction might be subject that may be exerted by the informal supply, bearing in mind that the informal or underground economy in Peru accounts for a significant percentage of the national economy.

On the other hand, the Commission has paid attention to possible vertical anticompetitive effects in concentrations. The authority has adopted the international experience of the European Commission[52] and the Federal Trade Commission (FTC) to develop an analysis of vertical impacts, strengthening the predictability of its decisions.

In fact, based on the experience of the European Commission and the FTC, in recent decisions of the Commission[53] in which it has identified vertical overlaps, the authority has investigated whether there may be significant risks to competition arising from the following situations or theories of harm:

(i) Closure of customers: this is a situation in which a downstream enterprise has a very significant share of the market. This enterprise could facilitate the distribution of products

[52] In fact, in the *Vinci / Cobra Servicios* transaction the Commission referred to the standards set forth in the Guidelines for the assessment of nonhorizontal concentrations in accordance with the Council Regulation on the control of concentrations between undertakings. In: Official Journal of the European Union. 2008/C 265/07. Available at: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52008XC1018(03)&from=ES

[53] In this respect, consult Resolutions 098-2021/CLC-INDECOPI of December 17, 2021 (Vinci – Cobra case) and 043-2022/CLC-INDECOPI of July 19, 2022 (Al Manaki / Holding Hotelera GHL case).

or services of a related upstream enterprise, preventing other enterprises of that link in the chain from accessing an important demand segment.

(ii) Closure of inputs: this is a situation in which an upstream enterprise has a significant share in the production of a key input for downstream activities in which an enterprise of its business group operates. The upstream enterprise could have incentives to restrict access by other downstream enterprises to the input, for the purpose of hindering their activities in favor of its related enterprise.

In order to rule out the existence of these possible effects, the Commission has adopted as a criterion that a concentration could give rise to vertical risks when the enterprises involved have a market share equal to or greater than 30% in the respective links of the production chain, in line with the experience of the European Commission and the FTC.

10. Disciplinary procedure before INDECOPI for anticompetitive conduct

The legislation applicable in these procedures is that established in Title V of DL 1034 ("Administrative Disciplinary Procedures"). The various stages of this procedure (and the authority in charge) are indicated below.

10.1 Part one: the responsibility of the Directorate

(i) Preliminary investigation stage (commenced ex officio): under the legislation there is a prior stage of preliminary investigation by the Directorate, for the purpose of investigating the market, compiling evidence to allow accusations to be brought.

(ii) Issue of resolution on commencement of administrative disciplinary procedure: by this resolution, the Directorate formalizes the accusation, which must meet the requirements, such as identification of the economic operators that are accused of the alleged infringement, statement of the facts giving rise to the initiation of the procedure, etc.[54].

(iii) Period for presentation of defense: in this period the parties under investigation can present their defense to the commencement of the administrative disciplinary procedure. It lasts thirty (30) working days.

(iv) Admission of the infringement: if they consider it appropriate to do so, the parties can choose not to contest the accusation, and can admit that there was an infringement, in exchange for a reduction of the applicable fines (up to 15%).

(v) Early termination mechanisms: at the same time, the parties are granted a period in which they can resort to an early termination, either by admitting the alleged conduct and/or presenting commitments to discontinue their conduct, in exchange for early termination of the procedure and a reduction of the fines greater than that for a mere admission (up to 30% approximately). In this respect, the parties have forty-five (45) working days from the issue of the resolution to commence the disciplinary procedure to present their commitments.

[54] Article 21 of DL 1034.

(vi) Evidentiary stage: at this stage the Directorate can receive various documents (such as economic reports, testimonies, expert opinions and other instruments)[55] from the parties that wish to strengthen their defense, and carry out additional evidentiary steps. The time limit for the parties to send this additional evidence is seven (7) months from the expiration of the stage of presentation of defense.

(vii) The Directorate's Technical Report: finally, within thirty (30) working days from the expiration of the evidentiary period, the Directorate issues a Technical Report, in which it sets forth its conclusions on whether or not to pursue accusations, in relation to what was drawn up in the resolution to commence the procedure, with the following items, where applicable: (i) proven facts, (ii) finding of administrative infringement, (iii) identification of those responsible, (iv) proposal for ranking of the penalty, and (v) proposal of appropriate corrective measures.

10.2 Part two: the responsibility of the Commission

(i) Response period: in this period the Commission will receive within thirty (30) working days the responses or defenses of the parties in relation to the Technical Report.

(ii) The Commission's decision (final resolution): the Commission has a period of sixty (60) working days, from the end of the previous period, to issue a final ruling. It can opt for one of the following decisions in this respect: (i) summon the parties to make oral submissions so that they explain their positions, and/or (ii) issue the final resolution on the case.

(iii) Appeal: the parties can appeal the Commission's final resolution, within a period of fifteen (15) working days. The file is thereby raised to the second instance.

10.3 Part three: the responsibility of the Chamber

(i) Appeals contesting the Commission's decision are heard by the Chamber.

(ii) After the file is submitted, within a maximum period of one hundred and twenty (120) working days, the Chamber considers the appeal and issues a final resolution. This ruling brings the administrative proceedings to an end.

11. Judicial proceedings

Since DL 1034 provides that final rulings of the Chamber end the administrative procedures, no additional administrative appeal can be filed. In this sense, only an action for judicial review can be filed against them in the courts, in accordance with the relevant legislation.

In accordance with the Third Final Additional Provision of Law 31112, actions for judicial review of resolutions issued by INDECOPI in relation to elimination of anticompetitive behavior and prior control of business concentrations are filed at first instance in the Judicial Review Chamber of the relevant High Court. In this case, the Civil Chamber of the Supreme Court decides on appeal and the Constitutional and Labor Chamber hears cassation appeals, if any, in accordance with the

[55] Article 28 of DL 1034.

provisions of Law 27709, amending article 9 of Law 27584, which regulates judicial review proceedings.

In addition, in relation to competition, the time limit for filing an action for judicial review is three months, in accordance with the provisions of article 18 of the Consolidated Amended Text of Law 27584, governing Judicial Review Proceedings.

12. Other procedures

12.1 Competition Advocacy

The Commission, pursuant to the power granted by article 14.e) of DL 1034, can suggest, urge or recommend to entities of the public administration to implement measures to restore or promote competition. Among such cases would be the elimination of entry barriers or the application of economic regulation to a market in which competition is not possible.

12.2 Market Studies and Reports

The Directorate, pursuant to the power conferred by article 15.2.g) of DL 1034, can conduct studies and publish reports. The parameters for drawing up these documents are established in the Market Studies Guide.

12.3 Guidelines and Guides

The Commission, pursuant to the power conferred by article 14.e) of DL 1034 and on the basis of a proposal made by the Directorate, can issue Guidelines and/or Guides on matters within its powers.

In addition, guidelines can be prepared by the Commission in relation to a specific subject, according to the powers delegated by other pieces of primary legislation, for example, in relation to control of concentrations (articles 12.2, 18.4, 58 of Law 31112) and rewards linked to the reward program (article 28.2 of DL 1034).

12.4 Opinion on draft laws and legislative initiatives

INDECOPI, through its Chair of the Governing Council, can propose to the relevant Government authorities the adoption of the measures that it considers necessary to ensure protection of the rights and principles governing the functions assigned to the institution; this is in accordance with article 7.3.c) of Legislative Decree 1033, the Law governing the Organization and Functions of INDECOPI.

13. Claim for damages

13.1 Applicable scenarios

Article 52 of DL 1034 provides that any person that has suffered damage as a consequence of anticompetitive behavior which has been held to exist by a final ruling, may pursue in the Courts a civil claim for damages, even if he has not been a party to proceedings pursued before INDECOPI.

13.2 Functions of INDECOPI

An action for damages can also be filed by the Commission, following a favorable report of the Directorate, and complying with the prerequisites established in article 82 of the Code of Civil Procedure and the Guidelines on compensation of damage caused to consumers due to anticompetitive behavior, approved by Resolution No. 007-2021/CLC-INDECOPI.

There are no precedents in this regard and, in fact, there are still several questions regarding the declassification of documents necessary to verify the wrongful act or the damage.

GARRIGUES

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COMPARISON OF THE COMPETITION LAW INSTITUTIONAL FRAMEWORK IN BRAZIL, CHILE, COLOMBIA, ECUADOR, MEXICO, AND PERU

Document prepared in collaboration between the teams of Garrigues and CeCo

Institutional structure

BRAZILIAN REGIME

COMPETITION AUTHORITY

Administrative Council for Economic Defense (CADE)

INVESTIGATIVE BODY

General Superintendence (GS)

COMPOSITION

CADE's General Superintendent and staff, organized in units

NOMINATION

CADE's General Superintendent is nominated by the President of Brazil, and confirmed by the Senate

DURATION

General Superintendent has a two-year term, which can be renewed for another two years

RULING BODY

Administrative Tribunal for Economic Defense

COMPOSITION

CADE's President and Six Comissioners

NOMINATION

CADE's President and Commissioners are nominated by the President of Brazil, and confirmed by the Senate

DURATION

4 years (reappointment is not allowed)

STUDIES BODY

Department of Economic Studies (DEE)

COMPOSITION

Chief Economist and staff

NOMINATION

The Economist Chief is jointly nominated by CADE's President and the General Superintendent

DURATION

Not defined

DISMISSAL

(i) due to a Senate's decision, motivated by the President of Brazil; (ii) due to a final and unappealable criminal conviction for an intentional offense, or as a result of a disciplinary proceeding; (iii) due to the commitment of a prohibited conduct; and; (iv) due to absence in three consecutive hearing sessions or twenty non-consecutive ones.

LEGAL CONSULTANCY

Attorney General's Office at CADE

COMPOSITION

Attorney General and staff, organized in units

NOMINATION

Attorney General is nominated by the President of Brazil, and confirmed by the Senate

DURATION

2 years (possibility of reappointment)

ENFORCEMENT SUPERVISION

Federal Prosecutor's Office at CADE

COMPOSITION

Federal Prosecutor and staff

NOMINATION

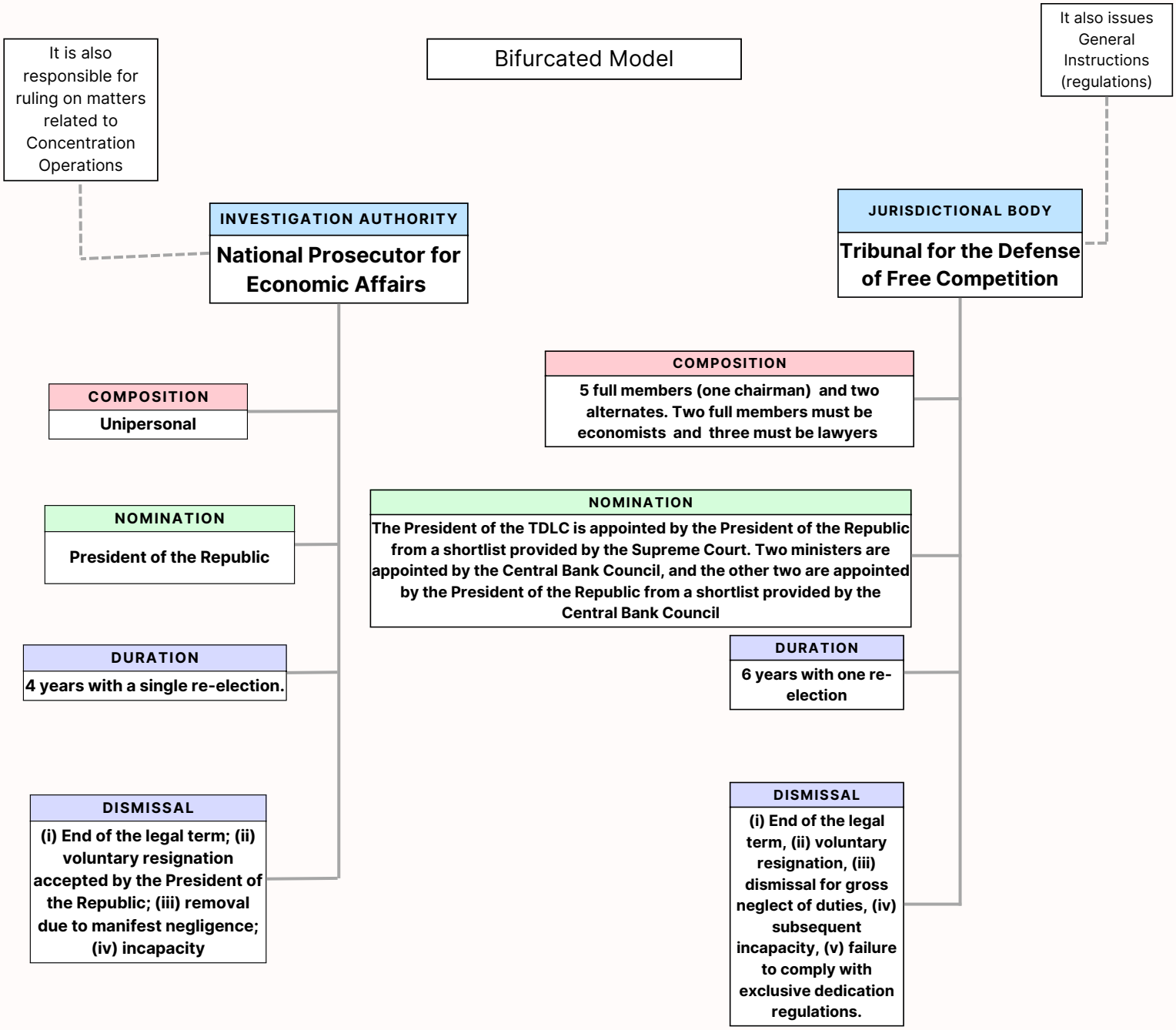
General Federal Prosecutor

DURATION

Not defined

Institutional structure

CHILEAN REGIME



Institutional structure

COLOMBIAN REGIMEN

COMPOSITION
Unipersonal

NOMINATION
President of Colombia

DURATION
4 years

DISMISSAL
(i) Completion of the legally established term; (ii) voluntary resignation accepted by the President of the Republic; (iii) dismissal from service by the President of the Republic.

COMPETITION AUTHORITY
Superintendency of Industry and Commerce (SIC)

ADJUDICATING BODY
SIC

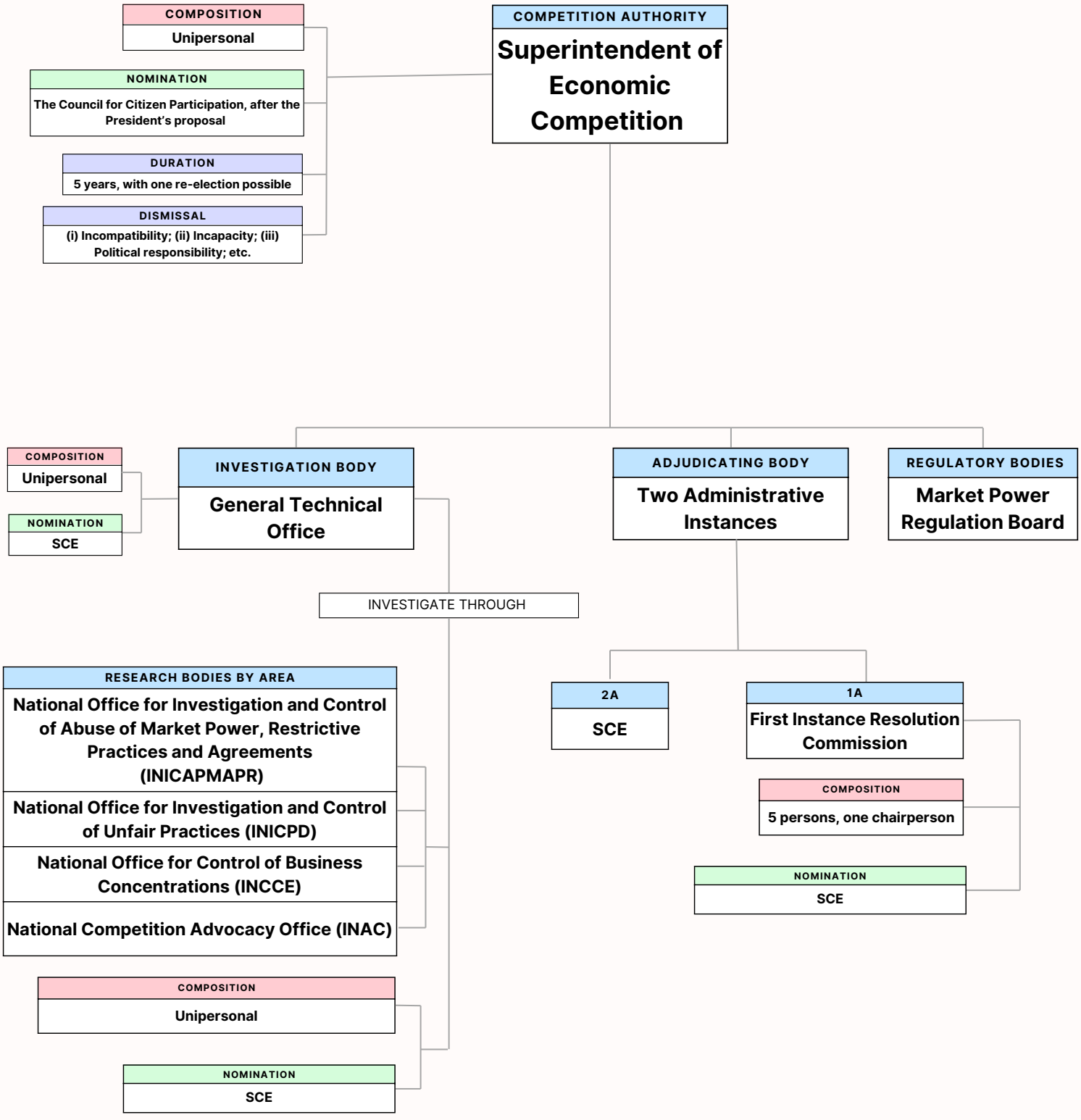
INVESTIGATION BODY
Deputy Superintendent for the Protection of Competition

COMPOSITION
Unipersonal

NOMINATION
SIC

Institutional structure

ECUADORIAN REGIME



Institutional structure

PERUVIAN REGIME