OVERVIEW OF COMPETITION LAW IN LATIN AMERICA

IBRAC | BRAZILIAN INSTITUTE OF STUDIES ON COMPETITION, CONSUMER AFFAIRS AND INTERNATIONAL TRADE

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APRIL 2016

SUMÁRIO

ABOUT IBRAC

The Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade – IBRAC is a nonprofit private entity established in 1992 to foster the development of research, studies and debates involving competition, consumer law issues and international trade.

In order to achieve that end, IBRAC has played an active role in the interaction with the Brazilian antitrust authorities (Conselho Administrativo de Defesa Econômica – CADE) and a number of other governmental and non-governmental institutions, all of which have translated into constant meetings and workshops to discuss specific topics of relevant subjects.

In addition, IBRAC also promotes events, notably the International Seminar on Competition Defense, which is held every year with the attendance of illustrious panelists from Brazil, and from many other jurisdictions that interact with the Brazilian antitrust system, notably the United States of America, the European Community, countries in Latin America and Asia.

IBRAC is basically a forum for discussion. Within this context it also maintains a permanent university extension course on antitrust law in São Paulo, whose classes are given by leading professionals and authorities in the Brazilian competition segment, and we promote our own publication, Revista do IBRAC, which is one of the leading publications in the area in Brazil.

For further information on IBRAC, please visit our website at www.ibrac.org.br, or write to ibrac@ibrac.org.br.

April 2016

Eduardo Caminati Anders – President

Guilherme F. C. Ribas – Director of Publications

NOTE FROM IBRAC'S PRESIDENT

I am delighted to have been asked to write an introduction to this work, which I believe is of great importance for the international anti-trust community.

Contextually, it is a work that represents IBRAC's second international initiative, providing a useful and important insight into the current state of play of anti-trust law in Brazil, taking into account above all the leading role that the country has assumed in this arena.

This being so, and taking advantage of a propitious climate to explore the topic from a comparative perspective, lawyers who are highly regarded in their own countries have joined forces to offer the international community an objective, practical and thorough guide to anti-trust law in their respective jurisdictions. The synergy existing between the authors is reflected in this work, which is notable for the quality and soundness of the studies it contains. In addition to a broad overview, this work provides specific explanations of issues of the highest importance in the Brazilian anti-trust agenda, and will thus serve as an essential guide for practitioners and students.

In particular, I must also recognize the efforts and the dedication of our director of publications, Guilherme Ribas, and of the lawyers Miguel del Pino and Santiago del Rio, who have divided the subject matter into topics, organized the chapters, and so on, so as to ensure an interesting and up-to-date approach and provide readers with an agreeable experience.

In brief, since IBRAC published its first international work in 2015 (Overview of Competition Law in Brazil) and now with this second work, its aim has been to make Latin America's mark in the general framework of international discussions about anti-trust law. As will become clear from a reading of the articles, such discussions in Brazil are fully in tune with the challenges faced in the major international jurisdictions.

It is intended that this publication will encourage others, which will assuredly be of high technical excellence and precision, so as to achieve the level of quality required of a global benchmark.

This work will prove a stimulating read, especially in view of what is currently happening in Brazil, and I am convinced that many other similar initiatives will be needed and will in fact be undertaken, so that Brazilian publications can take their place in the arena of international anti-trust law.

I am sure you will enjoy reading this work!

April 2016

EDUARDO CAMINATI ANDERS - President

NOTE FROM THE EDITORS

Over the last decade, competition law in Latin America has begun a stride towards an autonomous enforcement, with its own case law and focus on Latin America issues. Today, nearly all countries can count on a set of dedicated laws as well as agencies to enforce them. Accordingly, many Latin American law firms are now adding autonomous competition law teams to their traditional services.

This evolution comes hand in hand together with an increasing level of interactions between the jurisdictions for transnational competition matters. Many Latin American countries are setting up communication and interaction procedures so as to ensure a level of uniformity in their investigations of anticompetitive conducts and transactions. The strengthening of bonds between the regulators also poses a challenge for the private practitioners, who will now have to adapt and react to a regional level of antitrust enforcement.

The purpose of this book is to offer to the reader a general overview of competition law in Latin America, seen through the eyes of leading practitioners for each jurisdiction, addressing key issues on antitrust matters for day-to-day application when dealing with these jurisdictions. However, this book does not attempt to unify nor streamline the differences between the countries, but rather provide an outlook that will hopefully help practitioners when determining their regional approach to a case, be it a conduct investigation or a merger control filing.

As the reader will be able to assess, even though Latin America is a mixed tapestry with very different political and economic contexts, there are certain trends that can be traced across the region. Examples can be found in the emergence of leniency procedures in order to help regulators with their cartel investigations or the more in-depth merger control review procedures which have been honed throughout the latest years, showing in certain cases a departure from the decisions that other well-established regulators may have had on the matter.

Compared to other jurisdictions, antitrust enforcement is but a nascent activity in Latin America, but the steps that have been taken towards a professionalization of the field show that regulators and practitioners will keep pushing for more and healthier economic operations in the region. The greatest challenge for all involved is to step up to the challenge.

Eduardo Caminati Anders

Miguel Del Pino

Guillherme F. C. Ribas

FOREWORD

Latin America is in the midst of an antitrust revival. The last few years have seen rapid acceleration in law and policy development, significant institutional reforms, and firm commitments of political resources to both. Following the widespread adoption of competition laws in the 1990s, many Latin American countries lost momentum and experienced long periods of dormancy. The region is now awakening. Taking stock of the many changes underway across Latin America is a formidable task, yet this compilation succeeds, providing a timely snapshot of this rapidly evolving field.

The enactment of Latin America's first, basic competition laws from the mid-20th century was followed by decades of inactivity. In the 1990s, as part of broader, market-oriented economic reforms, many countries adopted or modernized their competition laws, which raised expectations for their implementation. Since then, however, progress in most countries has not been steady. Major reductions in agency resources—both financial and human—, and changes in leadership, political support and stability, and the quality of collateral institutions such as courts and universities, have impeded Latin American authorities' full policy implementation. It is this trend that we see now changing in a number of countries across the region.

This new era in Latin American competition is marked by a growing realization that effective competition policy and enforcement are essential for economic growth and consumer welfare. There is also increasing awareness that effective antitrust law enforcement must be grounded in sound economic analysis and international best practices. Of course, each country is following its own path, but in almost every case a clearly visible transformation is underway, manifested in the recent adoption of competition laws (Ecuador, Paraguay) and significant reforms to improve antitrust architecture and procedures (Brazil, Chile, Colombia, Mexico).

Another crucial development is the elevation of competition to a top priority of many Latin American countries' political agendas. For example, earlier this year the new President of Argentina proclaimed the precedence of competition enforcement, underscored by the appointment of a well-respected economist with a solid antitrust background to lead the country's competition agency, and announced the government's intention to strengthen the authority's powers and resources.

Important for competition globally, Latin America's antitrust revival is positioning the region to provide critical lessons for countries in nascent stages of competition development. Undoubtedly, much work remains to be done as each country faces its unique challenges, but overall, the groundwork has been laid and governments around the region are demonstrating their commitment to bringing these developments to fruition.

In light of this progress, the Overview of Competition Law in Latin America provides a much needed survey of the rapidly changing antitrust landscape in the region. It covers recent institutional and procedural reforms as well as developments in all substantive competition areas, including merger control, anticompetitive practices, and cartel enforcement. Companies doing business in Latin America and their counsel should carefully consider the impact of these trends

in light of increasing enforcement activity across the region, with an eye to identifying and minimizing antitrust risks when dealing with these jurisdictions.

This compendium, prepared by leading practitioners from 12 Latin American jurisdictions, provides a detailed account of antitrust developments in country-specific chapters. The Overview of Competition Law in Latin America will be an authoritative resource, on which antitrust practitioners, enforcers, and scholars can rely as they navigate the field.

March 2016

Krisztian Katona

U.S. Federal Trade Commission*

Washington, DC

* The views are of the author's alone and do not necessarily represent the views of the U.S. Federal Trade Commission or any of its individual Commissioners.

ABOUT THE EDITORS

EDUARDO CAMINATI ANDERS. Lawyer. President of IBRAC; Vice-President of the Council of IBRAC, 2010/2011. Member of the Applied Corporate Law Institute – IDSA (Instituto de Direito Societário Aplicado – IDSA). He is also member of the Antitrust Committee of the São Paulo Bar Association (Comissão de Direito Concorrencial da OAB/SP - CECORE); President of CECORE, 2010/2012. Author of books and legal papers. He is listed in several publications such as Chambers Global, Who´s Who Legal, PLC Which Lawyer, among other publications. Partner at Lino, Beraldi, Belluzzo e Caminati Advogados.

MIGUEL DEL PINO joined Marval, O'Farrell & Mairal in 1998 and has been a partner since 2008. His area of specialization is centered on competition and mergers and acquisitions. His professional work focuses on advising clients and representing them before the antitrust authorities on matters relating to pre-merger control, cartel investigations, anti-competitive investigations and general market investigations. He has also dealt with mergers, acquisitions and joint venture transactions, advising buyers and sellers on the transfer of shares or assets in Argentina. He has been very active in advising foreign clients on setting up businesses in Argentina and compliance with local regulations. He has published several works related to his area of expertise and has participated as a panelist and moderator in different conferences related to his area of expertise. He is an assistant professor of competition law on the postgraduate courses in business and economics law at the Universidad Católica. He graduated as a lawyer from the Universidad de Buenos Aires in 1994, and in 1997 obtained a master's degree in law from the University of Pennsylvania (Philadelphia).

GUILHERME FAVARO CORVO RIBAS is a partner of the competition and regulation practice group of Mundie e Advogados. Ribas worked as head of department at the Secretariat at Economic Law - SDE (Ministry of Justice), where he coordinated the first dawn raids ever carried out in Brazil and prepared the 2004 governmental antitrust compliance guidelines. Ribas is Publications Officer at IBRAC, and was President of its Board of Directors (2012-2014). He holds a PhD in Administrative Law from the University of São Paulo (thesis: evidence in cartel investigations) and a Master Degree in Commercial Law from the same university (dissertation: intellectual property, antitrust law and tying arrangements). He is also post-graduated in Antitrust Law from Fundação Getúlio Vargas de São Paulo.

ABOUT THE AUTHORS

ARGENTINA

Miguel Del Pino joined Marval, O'Farrell & Mairal in 1998 and has been a partner since 2008. His area of specialization is centered on competition and mergers and acquisitions. His professional work focuses on advising clients and representing them before the antitrust authorities on matters relating to pre-merger control, cartel investigations, anti-competitive investigations and general market investigations. He has also dealt with mergers, acquisitions and joint venture transactions, advising buyers and sellers on the transfer of shares or assets in Argentina. He has been very active in advising foreign clients on setting up businesses in Argentina and compliance with local regulations. He has published several works related to his area of expertise and has participated as a panelist and moderator in different conferences related to his area of expertise. He is an assistant professor of competition law on the postgraduate courses in business and economics law at the Universidad Católica. He graduated as a lawyer from the Universidad de Buenos Aires in 1994, and in 1997 obtained a master's degree in law from the University of Pennsylvania (Philadelphia).

Santiago Del Rio is senior associate of Marval, O'Farrell & Mairal. He joined the firm in 2006 and has been involved in competition issues ever since. He regularly provides advice to companies regarding merger control regulations in Argentina over a wide range of markets, as well as providing counsel to companies that either undergo antitrust investigations or decide to initiate them, during both the Antitrust Commission's investigation and the challenge of the decision before the appellate courts and the Supreme Court of Justice. Between 2010 and 2011 he was seconded to the Spanish firm Uría Menéndez, where he dealt with both European Union and Spanish competition matters in the firm's Brussels and Madrid offices. He participated in Phase I and II merger control proceedings, anti-competitive investigations under Sections 101 and 102 of the TFEU, as well as appeals before the European Court of Justice. He graduated with honours in 2005 from the Universidad del Salvador, and holds a postgraduate diploma in economics for competition law from King's College University.

Contact details

BOLIVIA

Diego Villarroel is an associate at FERRERE'S Bolivia office. He is a member of the antitrust and arbitration & litigation groups. In the antitrust area, he has participated in administrative procedures followed by the regulator (AEMP), for alleged anticompetitive conducts by domestic and international clients. He has advised companies from different industries for potential complaints before the regulator against their competitors for possible anticompetitive practices. He also performs preventive analysis and training to clients on antitrust matters to companies from various industries, such as telecommunications, automotive and pharmaceutical.

BRAZIL

André Franchini Giusti. Senior Associate of Siqueira Castro Advogados since 2013, member of the Antitrust and Corporate teams. Graduated in Law at Faculdade de Direito de São Bernardo do Campo in 2010 and specialized in Corporate Law at FGV in 2012.

Aurélio Santos is the leading partner of Cascione, Pulino, Boulos & Santos Advogados antitrust practice area. He has extensive experience in representing clients in complex antitrust matters and has been recognized among the best Competition and Antitrust lawyers in Brazil by Chambers and Partners, Latin Lawyer, Global Competition Review among others. LL.B., Law School of the University of São Paulo. Master of Laws (LL.M.), Law School of the University of São Paulo. Non-governmental advisor, 2010 Annual Conference of the International Competition Network (ICN). www.cpbs.com.br.

Barbara Rosenberg is head of the antitrust practice at Barbosa, Müssnich e Aragão Advogados and former Director of the Antitrust Division (SDE) within the Ministry of Justice (2003-2005). She is Vice President of IBRAC.

Beatriz Ponzoni is an associate at Castro, Barros, Sobral, Gomes Advogados, where she practices competition law. Beatriz has a Bachelor's degree and is a Master's of Law Candidate in Civil Procedure Law at the Law School of the University of São Paulo, as well as being a LL.M. Candidate in Competition Law at the New York University School of Law.

Bruno Drago has over 15 years' experience in the field of competition law. He earned an LL.M degree from the King's College of London in 2005 and a doctorate degree from Universidade de São Paulo in 2014. Mr. Drago was an associate attorney at Howrey LLP, in Brussels, where he worked on competition issues before the European Commission (2005–2006) and in Washington, DC (2007). He is a Director of IBRAC and of the Commission of Competition and Economic Regulation Studies of the OAB/SP. Mr Drago worked in several cases that significantly impacted the market, including merger cases and administrative proceedings, such as leniency and CDC negotiations, abuse of dominance and intellectual property, as well as local and international cartels.

Bruno Greca Consentino is a senior associate at the competition, international trade and compliance practices at Inglez, Werneck, Ramos, Cury e Françolin Advogados. He has more than 12 years of experience in advising national and international clients in complex cases in his specialty practice areas. Bruno also worked as in in-house counsel for 5 years, an experience which allows him to give highly business-oriented advice.

Cristianne Saccab Zarzur. Partner at Pinheiro Neto Advogados, with focusing practice on competition law. LL.B. degree from the Mackenzie University, São Paulo (1995). Specialization degree in economics from the Getúlio Vargas Foundation (1996). Foreign associate at the

competition and intellectual property law firm Howrey Simon Arnold & White, LLP (2000/2001). Former President of the Brazilian Institute of Competition and Consumer Relations – IBRAC.

Daniel Oliveira Andreoli is a partner of TozziniFreire Advogados. He has significant experience in complex antitrust matters, representing national and international companies. He is frequently asked to speak on antitrust topics and is NGA of the Brazilian antitrust authority in the ICN meetings. Daniel holds LL.M. in Corporate and Commercial Law from King's College London of the University of London, UK. He also studied at the Academy of American and International Law, organized by the Center for American and International Law, USA. Daniel is President of the Antitrust Committee of the São Paulo Section of the Brazilian Bar Association (CECORE/OAB-SP), is a member of the Board of IBRAC and is the coordinator of the Antitrust Task Force of the Brazilian Association of Private Equity & Venture Capital (ABVCAP).

Fabianna Vieira Barbosa Morselli has over nine years' experience in the field of Competition Law. Ms. Morselli graduated from Universidade Presbiteriana Mackenzie Law School in 2010 and earned a postgraduate degree in Economic Law from Fundação Getúlio Vargas in 2014. Ms. Morselli worked in relevant cases to the Brazilian case law, advising both domestic and foreign clients on cross-border transactions, merger control filings and investigations of anticompetitive practices, including cartels and cases relating to abuse of dominance. She acted as associate attorney at Shearman & Sterling LLP, in Brussels, where she worked on competition issues before the European Commission (2014/2015).

Fabricio Antonio Cardim de Almeida is the head of the antitrust practice at Stocche Forbes Advogados in São Paulo, Brazil. He holds a J.D. and an LL.M. from University of São Paulo's Law School and an LL.M. from Columbia Law School. Fabricio has previously worked as an International Antitrust Consultant in the U.S. Federal Trade Commission's Office of International Affairs. He is a member of IBRAC and of the ABA Section of Antitrust Law and serves as a NGA to the International Competition Network. Fabricio is admitted to the bar of the State of São Paulo, Brazil.

Francisco Niclós Negrão has a magna cum laude highest honors Economics B.A. from Brandeis University (BU), with a Justice Brandeis Scholarship. He has a Master's degree in International Economics and Finance from Brandeis University GSIEF, with a semester at Università Commerciale Luigi Bocconi. He is also a Bachelor of Laws from Centro Universitário de Brasília (CEUB). Francisco is the current IBRAC Director of International Trade. He is a Certified Compliance and Ethics Professional – CCEP from the Society for Commercial Compliance and Ethics – SCCE. He is a former Finance and Control Analyst of the Brazilian Treasury Secretariat at the Ministry of Finance (2003-2004), acting in the negotiation of foreign funding operations with international organizations. Phi Beta Kappa. Morris and Anna Feldberg Award for excellence in Economics.

Gabriel Nogueira Dias is a lawyer distinguished for his academic expertise and intense professional engagement in highly complex cases. He has a Law degree by the University of São

Paulo (USP) and was granted an LL.M and an LL.D by the Law School of Bonn – Germany. He acted as adviser to the President of the Administrative Counsel of Economic Defense (CADE) and, while occupying such position, was directly responsible for the development of new Rules and Opinions. He is a former IBRAC Antitrust Director. Visiting Professor in several Schools, he is the author of several articles as well as an awarded book published by the distinguished German Publisher Mohr Tieback.

Guilherme J. Dantas. Partner of Siqueira Castro Advogados since 2015, member of the Antitrust and Corporate teams. Graduated in Law at PUCCamp in 1997 and specialized in Economic Law at FGV in 2003.

José Gabriel Assis de Almeida. Docteur en droit (PhD) from the Université Panthéon Assas – Paris II (1994), Diplôme d´études approfondies en droit communautaire et européen from the Université Panthéon Sorbonne – Paris 1 (1988). Tenured law professor at UERJ State of Rio de Janeiro University (since 2005) and at UNIRIO Federal University for the State of Rio de Janeiro (since 1997). Lawyer admitted to the Rio de Janeiro Bar (since 1984), the Portuguese Bar (since 1987) and to the Paris Bar (from 1997 through 2005).

José Leça is the Legal Director of Antitrust and Regulatory Affairs at Telefonica do Brasil. He has studied at Catholic University in Brazil, Coimbra University in Portugal and completed its LLM Degree at University of Pennsylvania in USA. He is a member of the regulations study group of IBRAC and Director of the Technology and Telecommunications Law Brazilian Association (ABDTIC).

Joyce Midori Honda. Partner in the area of the ntitrust at Souza, Cescon, Barrieu & Flesch Advogados. She has frequently been recognized as one of the main lawyers in Brazil by Chambers&Partners, The Legal 500, Who's Who Legal and Expert Guides. She represents domestic and foreign companies, investment funds and individual clients in concentration acts, investigations on breaches of the Brazilian competition law, including cartel conduct and execution of leniency agreements with the Board of Directors of the Economic Defense. She holds a degree in Law from Pontifícia Universidade Católica de São Paulo (PUC), she is a Specialist in Economic Law by Fundação Getulio Vargas (FGV) and she holds a Master's degree (LL.M.) in Law by London School of Economics and Political Science. Ms. Honda has acted in the Brazilian Mission with the World Trade Organization (WTO), in Geneva, Switzerland, and she is a Councillor at IBRAC and Member of CECORE/OAB-SP.

Joyce Ruiz Rodrigues Alves is a member the antitrust and anticorruption practices at Dias Carneiro Advogados. She worked as an investigator in merger review and in bid rigging persecution in the Ministry of Justice. She worked in the in the Court of Audit of the State of São Paulo also investigating bid rigging and corruption. She holds LL.B. from PUC/SP and post-graduated diploma from Kings College London.

Juliana Maia Daniel is senior associate of the competition and regulation practice at Lefosse Advogados in São Paulo. Juliana's legal practice for the past 9 (nine) years has been primarily focused on complex domestic and cross-border litigation, antitrust and compliance. Her practice has emphasis on commercial and corporate disputes involving antitrust, anti-bribery, contracts, civil liability, real estate, and public law. Juliana also has a solid experience advising Brazilian and foreign clients to create and implement compliance programs, including internal investigations and audits, conducting negotiations, defining business strategies and supporting other groups in due diligences and M&A proceedings. Juliana is a member of the Brazilian Bar Association – OAB and obtained her Law Degree from the University of São Paulo (USP), her LL.M. from Institut d'Etudes Politiques de Paris (Sciences Po) in Paris, France, and her Masters of Laws Degree from the University of Sao Paulo (USP).

Marcela Abras Lorenzetti is a lawyer at Grinberg and Cordovil, a competition and trade law boutique in São Paulo, Brazil. She has been working with antitrust law since 2012. She received her LL.B. degree from Pontifícia Universidade Católica de São Paulo in 2015. She has previously contributed to Overview of Competition law in Brazil.

Marcio Dias Soares is partner of the antitrust practice group of Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados. He represents clients in a wide range of antitrust matters, including merger review cases, antitrust investigations and litigation, internal auditing, preparation of compliance programs and employee training, as well as general antitrust counseling. He is a member of the board of IBRAC and a Country Representative in the International Committee of Antitrust Law Section of the American Bar Association (ABA). He is graduated from Universidade do Estado do Rio de Janeiro and holds a Master of Laws (LL.M.) from Columbia Law School.

Marcio de Carvalho Silveira Bueno is a partner of TozziniFreire Advogados. He has over 15 years of experience with practicing competition law and representing domestic and multinational companies. Marcio has been a frequent speaker in seminars and conferences. Marcio took part on CADE's internship program (1998). Graduate of the Law School of the Pontifícia Universidade Católica de São Paulo (PUCSP). He is the current Competition Director of IBRAC and was Vice-President of the Antitrust Committee at the Brazilian Bar Association, São Paulo Section (2010-2012).

Marcos Pajolla Garrido. Senior Associate at Pinheiro Neto Advogados, with focusing practice on competition law. LL.B. from the São Paulo University (2007). Specialization degree in Competition Law from the Getúlio Vargas Foundation (2009). LL.M. in corporate and commercial law from the London School of Economics and Political Science (2015).

Mauro Grinberg is the senior partner at Grinberg e Cordovil, a competition and trade law boutique in São Paulo, Brazil. He is a former Commissioner of the Brazilian Antitrust Agency, and a former Attorney of the Treasury. He has been a frequent contributor to specialized publications, including Cartel Regulation of Global Competition Review. He has been mentioned by most publication, including Global Competition Review, Legal 500 and Chambers and

Partners, as one of the leading antitrust lawyers in Brazil. Among others, he has extensive works on cartels. Besides being a member both of International Bar Association (Antitrust Committee) and American Bar Association (Antitrust Section), he is a founder, a former President and Board Member of IBRAC.

Paulo Brancher. Partner at Barretto Ferreira e Brancher Attorneys at Law (BKBG). Professor of Business Law at the Law School of São Paulo Catholic University (PUC/SP). Paulo holds a PhD in International Economic Relations Law from the same University. He is listed in the following international directories: "Legal 500", "Who's Who Legal"; "Chambers & Partners Latin America"; and "Best Lawyers".

Paulo Eduardo Lilla is head of the competition and regulation practice at Lefosse Advogados in São Paulo. Paulo holds a PhD and a Master Degree in International Law at University of São Paulo – USP and was a Visiting Scholar at Stanford Law School (Winter-Spring 2012). Paulo is an expert in Competition Law, particularly focused on national and cross-border transactions' notifications to the Brazilian Competition Defense System and client defense in anticompetitive practices investigations. He is particularly knowledgeable about matters involving the interface between Competition Law and Intellectual Property and he has published several academic works. Paulo is also experienced in Regulatory Law, Intellectual Property, Anti-Bribery & Compliance and International Business Law. He is a member of the São Paulo Attorneys Institute – IASP and the IBRAC.

Ricardo Botelho is partner at Cascione, Pulino, Boulos & Santos Advogados. He represents clients in antitrust investigations and merger review processes and advises in preventive counseling on practices and compliance programs. He also assists clients in international trade and commercial defense matters and market regulation issues, including insurance law matters. Recognized among the best Competition and Antitrust lawyers in Brazil by Chambers and Partners, Latin Lawyer 250, The Legal 500. LL.B., Law School of the University of São Paulo. Master in Business Economics, Fundação Getúlio Vargas (FGV-SP). Master in EU Competition Law, King's College London, UK (with Distinction). www.cpbs.com.br.

Ricardo Inglez de Souza the head of the competition, international trade and compliance practices at Inglez, Werneck, Ramos, Cury e Françolin Advogados. As head of the competition practice, he advises domestic and international clients in all competition law matters, including merger notifications, investigations of antitrust violations, leniency, compliance programs and distribution practices. Brazilian and international publications recognize him as a leading professional in his field, and it includes a nomination as one of the GCR 40 Under 40 (2016).

Ricardo Lara Gaillard. Partner in the areas of Antitrust and Compliance and Anticorruption at Souza, Cescon, Barrieu & Flesch Advogados. He has frequently been recognized as one of the main lawyers in Brazil by Chambers&Partners. He represents foreign and domestic companies, investment funds and individual clients in concentration acts, investigations on breaches of the Brazilian competition law, including cartel conduct and in execution of leniency agreements with the Board of Directors of the Economic Defense. He holds a degree in Law from Pontifícia

Universidade Católica de São Paulo (PUC) and he is a Specialist in Corporate Law by Instituto Brasileiro de Mercado de Capitais (IBMEC). He was an international associate at a major Washington law firm between the years of 2011 and 2012. Since 2014 he is certified by the Society of Corporate Compliance & Ethics (SCCE) as a Certified Compliance & Ethics Professional (CCEP).

Tiago Gomes is a partner at Castro, Barros, Sobral, Gomes Advogados, where he practices Corporate Law and is the co-head of the Competition / Antitrust team. Tiago is a graduate from University of São Paulo Law School and holds a Masters Degree with emphasis in Commercial Law from the University of São Paulo Law School.

CHILE

Claudio Lizana is partner of Carey and co-head of the firm's Antitrust and Regulated Markets, Mergers and Acquisitions, and Public Law Group. His practice focuses on mergers and acquisitions, corporate law, business law, securities, and antitrust and trade regulations.

Fabián Piedra is a member of Carey's Antitrust and Regulated Markets, Mergers and Acquisitions, and Public Law Group. His main practice areas include antitrust, litigation, regulation, public law, and mergers and acquisitions.

Jaime Barahona is senior associate at Guerrero Olivos and member of the Antitrust practice group. He has a law degree from Universidad Diego Portales, with post-graduate studies at the Pontificia Universidad Católica de Chile and Universidad de Los Andes. He held the position of Deputy National Economic Prosecutor at the FNE, from 2006 to 2014. Prior to joining the FNE he spent two years as the first Secretary of Chile's Competition Tribunal (TDLC). Jaime Barahona has represented Chile in different international fora on competition, including the OECD, the International Competition Network (ICN) and UNCTAD. He has taught Competition Law in undergraduate and graduate programs at Chile´s major universities, and is a member of the Chilean and the American Bar Association.

Tomás Kubick is admitted to the bar in Chile (2010). He studied law at Pontificia Universidad Católica de Chile (2008), and has an LL.M in Competition, Innovation and Information Law at New York University (NYU) School of Law (2015). He joined Guerrero Olivos in 2008. His areas of practices include corporate, M&A, competition and consumer protection law. He teaches Business Law at Pontificia Universidad Católica de Chile and is a member of the Chilean Bar Association.

COLOMBIA

Alejandro García de Brigard joined the firm in 2002. He leads the firm's Antitrust and Competition Law practice, and has experience in all areas of antitrust law, including merger control, cartels and leniency, abuse of dominance, and unfair competition. Adding to his Antitrust practice, as a member of the firm's Corporate and M&A team, Mr. García advises important local and foreign companies in connection with the structure, negotiation and closing of M&A

transactions. Mr. Garcia is admitted to practice in Colombia (2005) and in the state of New York (2009). Mr. García also holds a B.S. degree in Military Sciences with the rank of Second Lieutenant (EJC-Rsv.) from the Colombian Army's Military Academy, as well as a law degree from the School of Law of the Pontificia Universidad Javeriana and a LL.M degree from the School of Law of New York University.

HONDURAS

Julio Alejandro Pohl, Lawyer from the Universidad Autónoma de Honduras, Senior Associate at Gufa Law, with practice areas related to M&A, antitrust, corporative matters, public contracts, private public partnerships and taxation. Has advised major investors in different fields, related to the acquisition of local companies or joint ventures for the development of business in Honduras. Among others, it has participated in the conformation of the Joint Venture for an important toll road infrastructure; as well as acquisition by foreign companies of an important amount of participation in local energy companies. In antitrust practice, it has been involved in petitions to the commission for the investigation of anticompetitive conducts in the flour market; as well as assisting in the notification of acquisition of an important oil company in the country.

MEXICO

Luis F. Amado-Córdova has more than twelve years of experience and has conducted several antitrust compliance seminars to train clients' personnel. In 2012, he worked in Baker & McKenzie London office, where he advised on merger control, abuse of dominance and cartel matters. He has been ranked as a leading practitioner by Chambers Latin America (2012). He has been appointed as the Latin America representative before the Baker & McKenzie's Abuse of Dominance Global Task Force. He is experienced in analyzing and drafting pre-merger filings. He regularly assists a wide range of industry clients on cartel and abuse of dominance investigations.

Gerardo Calderón-Villegas has extensive experience in handling antitrust, anticorruption and compliance matters. On 2013, he worked in Baker & McKenzie Washington, DC office where he was involved in antitrust and compliance matters. He is ranked as a leading practitioner by Chambers Latin America and serves as a Non-Governmental Advisor for Cofece before the International Competition Network. His main areas of practice are competition/antitrust litigation and counseling, administrative litigation and constitutional trials (amparo), where he advises and represents clients on all type of proceedings before Cofece. He also assists clients in conducting anticorruption internal investigations, developing compliance programs and delivering training.

PARAGUAY

Alejandra GUANES is an associate at the Asuncion-based law firm of FERRERE. Her practice focuses primarily on corporate law and counseling for both domestic and foreign companies on commercial and corporate matters, including financing, distribution agreements, due diligence

and regulatory banking affairs. She has extensive experience in copyrights, neighboring rights and industrial property, as well as in the areas of civil and commercial, labor, family and corporate affairs and procedures. GUANES has carried out postgraduate studies at the Faculty of Law of the University of Rosario (Argentina). She has obtained a law degree (Summa Cum Laude) from the Faculty of Law and Social Sciences of the National University of Asuncion.

PERU

Carlos A. Patrón is Professor of Law, Pontificia Universidad Católica del Perú and Partner at Payet, Rey, Cauvi, Pérez Abogados. He is a graduate from the Pontificia Universidad Católica del Perú and holds an LL.M. degree from Yale University and an M.Sc. degree in Public Policy from the University of Oxford, where he attended as a Shell Centenary Scholar. He has been a Visiting Associate at the offices of Sullivan & Cromwell LLP in New York and has in the past held the positions of Head Clerk of the Consumer Protection Commission, Advisor of the Economic Studies Department, Assistant Clerk of the Tribunal for the Defense of Competition and Assistant Clerk of the Unfair Competition Commission at the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI).

URUGUAY

Alejandro ALTERWAIN leads FERRERE antitrust team in Uruguay. He has participated in major antitrust claims and filings with the national antitrust authorities, involving industries such as telecommunications, entertainment, food processing and pharmaceutical. He regularly conducts antitrust trainings to clients. Alejandro studied law at Universidad de la República (Uruguay) and received his degree as attorney in 2003. He earned an LL.M. at Columbia University (New York, United States) in 2006. His practice also includes Intellectual Property Law. Alejandro teaches at ORT University in Montevideo and is the author of several national and international publications.

VENEZUELA

José H. Frías, from D'Empaire Reyna Abogados has participated in many of the most significant competition cases in Venezuela in the last years, including his representation of AT&T in the acquisition of Directv; Telecom Italia Mobile (TIM) in connection with the sale of Digitel; United Airlines in an investigation brought by the Venezuelan travel agencies' association; Procter & Gamble in its acquisition of Gillette. He worked as a foreign intern at the New York office of Skadden Arps in 2001. José H. Frías studied law at Universidad Católica Andrés Bello (1993) and received an LLM from McGill University (2000).

OVERVIEW OF COMPETITION LAW IN ARGENTINA

Miguel del Pino

Santiago del Rio

I – OVERVIEW OF ANTITRUST LAW

The current applicable body of law is the Antitrust Law No. 25,156 (the "Antitrust Law") which, pursuant to Section 3, is applicable to "all persons or companies, either public or private, that carry out economic activities, either with or without the purpose of obtaining a profit, in all or part of the national territory and those that carry out economic activities outside the country, as long as their acts, activities or agreements may generate effects in the national market."

a. Theories of harm present in the law

The Antitrust Law prohibits certain acts relating to the production and exchange of goods and services if they restrict, falsify, or distort competition or if they constitute an abuse of dominant position, provided that in either case they cause or may cause harm to the general economic interest. Such behavior or conduct is not unlawful as such, nor must it cause actual damages; it is sufficient that the conduct is likely to cause harm to the general economic interest. The notion of the general economic interest has been associated with that of consumer surplus.

b. Authority in charge of enforcement of antitrust law and regulations

The original drafting of the Antitrust Law set out the creation of the National Tribunal for the Defense of Competition (the "Antitrust Tribunal") within the scope of the Ministry of Economy, which would be the ultimate antitrust regulator in Argentina. However, said Antitrust Tribunal was never created. The Supreme Court ultimately set out, by means of two cases (Recreativos Franco, SC.,R.1172, L. XII and Credit Suisse First Boston, Ref: S.C.C. 1216. L. XLI, both dated June 5, 2007), the continuation of the two-tier regulatory system that had been set out by the previous Antitrust Law No. 22,262 composed by the National Commission for the Defense of Competition (the "Antitrust Commission") which would perform technical reviews on mergers and investigations and issue recommendations to the Secretary of Trade, which would be the ultimate ruling body.

By means of the amendment set out by Law No. 26,993 (the "Amendment Law"), the notion of the Antitrust Tribunal has been eliminated, while setting up an "Enforcement Authority" that "will be assisted" by the Antitrust Commission. However, the Enforcement Authority has not yet been appointed, nor a regulatory decree been issued.

In the meantime, the double tier traditional regulatory system remains in place: procedures are conducted by the Antitrust Commission which issues a recommendation to the Secretary of Trade that has the final decision power. For the purpose of this article, all mentions to the "Antitrust Commission" should be referred to this double tier system as well as to the Enforcement Authority, should it be appointed.

c. Nature of antitrust enforcement: administrative, criminal or otherwise

The antitrust enforcement of the Antitrust Law is mainly of an administrative nature, based on fines, injunctive measures in order to avoid the performance of anticompetitive conducts and temporary restrictions to carry out trade activities.

In addition to said provisions, Section 51 of the Antitrust Law sets out a civil liability procedure allowing for private claims regarding antitrust damages. Furthermore, pursuant to Section 300 of the Argentine Penal Code, any person that may generate a rise or a decrease in the price of a merchandise, public offer funds, or securities by means of false news, fake negotiations, or by an agreement among the main holders of the good, in order to sell or to refrain from selling it at a specific price, will be sanctioned with imprisonment, which may range from six months to two years. As it can be seen, not all types of conduct are included, but mainly those related to price fixing. These types of conduct would be investigated by criminal prosecutors, but there have been no relevant cases to date.

d. Investigational powers of authority

Section 24 of the Antitrust Law provides the Antitrust Commission with several standard enforcement powers, such as the ability to summon witnesses for hearings, examinations of books and documents, the issuance of requests of information to other regulators, the initiation of investigations ex professo and the execution of dawn raids with a court order.

Since anticompetitive investigations are time-consuming, in certain cases lasting more than 10 years without a resolution, the Antitrust Commission has resorted to the issuance of preventive measures within the terms of Section 35 to try to obtain more immediate solutions while claims are being analysed. There has, however, been a judicial challenge regarding the scope of those preventive measures as well as the body that can issue them, since precedents exist that set out that they must be executed by the Secretary of Trade.

e. Attorney-client privilege

There are no specific attorney-client privilege regulations in Argentina.

f. Interactions with other regulators

Over the last years, the Antitrust Commission has strengthened its ties with other antitrust agencies, most importantly, with the Brazilian CADE. This has led to an exchange of information with these agencies, especially dealing with multi-jurisdictional mergers. In that regard, pursuant to the "Cooperation Understanding between the Competition Authorities of the

Member States of the Mercosur for the Enforcements of their National Competition Laws" (the "Mercosur Understanding") which was approved on July 7, 2004, Argentina, Brazil, Paraguay and Uruguay should inform the other corresponding Member States on whether a proceeding was initiated on its jurisdiction that may be of interest to other Member State.

In the case of Argentina, the timeframe for said notification would be of 15 days as of the date of (i) initiation of the investigation phase in the event of an anticompetitive conduct or (ii) filing of a merger control notification. The Mercosur Understanding also takes into consideration the possibility that should two agencies from Member States be working on related proceedings, they would consider the possibility of coordinating their activities by taking into account the objective set out by the other agency.

This Mercosur Understanding follows the "Cooperation Agreement between Argentina and the Federative Republic of Brazil on cooperation between their Antitrust Authorities in the application of their antitrust laws" (the "Argentina-Brazil Agreement") - signed in Buenos Aires on October 16, 2003, but was accepted by the Argentine Federal Congress on December 2010 - almost to the letter. As such, while the Argentine-Brazil Agreement entered into effect in Argentina at a later stage, it could be considered that the Mercosur Understanding would be an extension of the scope of the former one.

While no publicly available information has been provided regarding the enforcement of the Mercosur Understanding in Argentina, the Antitrust Commission has informed that the Argentina-Brazil Agreement was first successfully used in a case on June 16, 2011.

g. Treaties in place

Please refer to the previous section.

h. Standards of evidence

The Antitrust Law sets out a rule of reason doctrine, by means of which the Antitrust Commission must prove that a behavior or conduct causes or is likely to cause harm to the general economic interest.

In Mayol v. Shell,[1] the Antitrust Commission stated that a "hard core cartel" was prejudicial to the general economic interest without it being necessary to prove any actual harm. Upon appeal, the Federal Court of Appeals for the City of Posadas overturned the decision since it considered that the Antitrust Commission had not followed a real competitive analysis in order to evaluate whether an illegal conduct had been committed. The court stated that the Antitrust Commission did not specify the relevant market in which the participants offered their products, and therefore failed to analyze the real competitive effect of the conduct and whether it may have harmed the general economic interest.

On a recent case[2], another Court of Appeals has considered that even though indicia could be used in order to determine the existence of a collusive activity, the case built by the

[1] *Mayol v. Shell*, Docket No. 064-004881/2001 (2006).

[2] Sentence issued in proceedings *"Honda Motors Argentina S.A. and other c/ Estado Nacional – Secretaría de Comercio s/ Recurso Directo Ley 25.156"*, Docket No. 81000803, Federal Court of Appeals of Comodoro Rivadavia.

regulator must meet the necessary evidentiary requirements which had not taken place in such case. In particular, the Court understood that the regulator had carried out a partial interpretation of the elements that had been attached to the proceedings and had not been able to show a coherent sequence of events that would have unfolded as regards the alleged conduct, nor had analysed whether the alleged conducts could have been attributed to different reasons other than the existence of collusion.

i. Methods of engagement with authority

There are no specific regulations as regards the methods of engagement with the authority, beyond Antitrust Commission-mandated hearings. There are no state-of-play meetings or similar procedures.

j. Judicial review of decisions

The appeal and judicial review of decisions on merger control decisions is regulated by Sections 52 and 53 of the Antitrust Law. In the event of a rejection or conditioning of a transaction, pursuant to Section 53 of the Antitrust Law the notifying parties can file an appeal before the Antitrust Commission within 10 business days. Pursuant to the changes introduced by the Amendment Law, the competent court for the review of the appeal will be the Court of Appeals on Consumer Relations (which has not yet been incorporated) or the applicable local Federal Court of Appeals. In practice, the prior applicable courts remain the ones considered competent under the previous drafting of the Antitrust Law, namely the Federal Civil and Commercial Court of Appeals and the Court of Appeals on Criminal Economic Matters.

It is of note that pursuant to the Amendment Law, in the event of the imposition of a fine the parties will have to carry out the payment of the fine prior to the filing of the appeal. This solve et repete system entails a departure from the previous system in which the filing of the appeal suspended the payment of the fine until a final judicial resolution would be issued.

There are no current estimates for judicial review, but in average it is a largely protracted one.

k. Private litigation

Regarding private claims, Section 51 of the Antitrust Law states that individuals or companies affected by the conduct prohibited under the provisions of the Antitrust Law may invoke the right to a compensation for the damages suffered in before a competent court.

As of today, there has only been one major case entailing private antitrust litigation, namely the Auto Gas case[3], in which the plaintiff was awarded Argentine Pesos 13,094,457 of compensation for the damages suffered as a result of an abuse of the dominant position. In Auto Gas, the court merely referred to the analysis carried out by the Antitrust Commission and established a connection between the conduct that the Commission found illegal and the damages suffered by the plaintiff's.

[3] *Auto Gas*, National Commercial Court No. 14, Clerk's Office No. 27, Judgment of September 16, 2009.

While there has been only one case to date providing damages, there are several cases currently pending. However, there have not been any other judgments in that regard due to lengthy court review times in Argentina.

II – MERGER CONTROL

a. Types of transactions

Pursuant to Section 6 of the Antitrust Law, certain transactions are deemed to be economic concentrations subject to merger control review when they result in the assumption of control of one or more companies by means of any of the following acts: (1) merger; (2) transfer of businesses; (3) acquisition of shares or equity interests, any interest thereto, convertible debt securities or securities that grant the acquirer control of, or a substantial influence over, the issuer; and (4) any other agreement or act through which assets of a company are transferred to a person or economic group, or that gives decision-making control over the ordinary or extraordinary management decisions of a company. In order for these transactions to be subject to the merger control procedure, the notification threshold must be met and no exemptions should be applicable.

In case of doubts on the need to notify a transaction, Resolution No. 26/2006 allows the parties to request for an Advisory Opinion of the Antitrust Commission in which it has to analyse the matter and decide whether the notification must take place or not. In the event the transaction under analysis has closed, the request for an Advisory Opinion suspends the seven days term for post-closing notification, but should it be decided that the transaction is notifiable, that term restarts as of the suspension date.

b. Notification of foreign-to-foreign mergers

Foreign-to-foreign transactions are caught by the Antitrust Law if they generate effects in Argentina. Such transactions must be notified if both parties perform activities in Argentina, either through a local corporate presence or through imports into Argentina.

In the case of foreign-to-foreign transactions, there is a special test used to measure the effects that the parties of the transaction have in Argentina. According to this test, the effects in the local market of a foreign-to-foreign transaction must be substantial, normal and regular for the previous antitrust clearance to apply.

There is no precise rule to determine when the effects can be considered substantial, normal and regular. The Antitrust Commission has decided several cases based on, first of all, the market share of the products imported by the parties of the foreign-to-foreign transaction and, second, the regularity of the imports over a certain period of time (the three previous years). Pursuant to those cases, the effects are substantial if the exports into Argentina represent an important percentage of the total relevant market in Argentina of that particular product, however, it has left on record that the analysis has to be made on a case-by-case basis without any specific shareholding setting out a threshold for substantiality (this position was taken, for instance, in Advisory Opinion No. 932 dated June 19, 2012). The effects are regular and normal if the imports have been constant during the three previous years.

c. Definition of "control"

Section 6 of the Antitrust Law refers to both the notion of control as well as of "substantive influence". In this regard, the Antitrust Commission has followed the definition of control adopted by the European Commission, defining it as the ability to determine the strategic commercial policy of a company. In Advisory Opinion No. 124, the Antitrust Commission described the existence of joint control as the situation where shareholders must necessarily reach an agreement regarding strategic commercial decisions. It also determined that it is necessary to analyze the existence of veto rights in order to define the existence of joint control. Those veto rights might include approval of the budget, business plans, regular investments, regular indebtedness and appointment of key officers. The Antitrust Commission established that holding one or more of such veto rights is sufficient to confer control.

The Antitrust Commission has also determined, by means of several Advisory Opinions that transactions that imply a change in the nature of control (from joint control to exclusive control or vice versa) are also deemed to be economic concentrations.

d. Jurisdictional thresholds

Economic concentrations require approval if the aggregate turnover of the companies involved in the transaction exceeds Argentine Pesos 200 million Argentina. The "turnover" is defined as the combined gross sales of products or services of the target and the buyer during the preceding fiscal year arising from their ordinary businesses, net of discount sales, value added tax and other taxes directly related to the volume of business. Sales in foreign currency must be converted at the official exchange rate published by the Banco de la Nación Argentina.

e. Triggering event for filing and deadlines

The transaction that meets the notification thresholds must be notified to the Antitrust Commission for review, prior to, or within seven days (calendar days) of the the date of the closing of the transaction.

The date of closing of the transaction, according to the Antitrust Law and its regulations, means:

- In the event of mergers: the execution of the final agreement of merger provided for in Section 83 of Argentine Companies Law No 19,550 (this agreement must be executed once all conditions for merging are met and is the effective date of merger between the parties).

- In the event of a transfer of a business as a going concern: the execution of the final document of transfer of a business as a going concern to be registered with the Public Registry of Commerce.

- In the event of a transfer of stock and or quotas: the date of execution of the transfer of shares or quotas according to Section 215 of the Argentine Companies Law No 19,550 (the effective date of transfer of the shares).

The Antitrust Commission has considered, by means of Advisory Opinion No. 27, dated February 3, 2000, that those transactions which meet the criteria set out by Local Securities Law No. 26,831, the term for the filing of the notification would be of one week as of the date of the formal publication of the acquisition or exchange offer (as opposed to mere news of the transaction or informal press releases). It is of note that the transaction under review in said case was a local one.

However, a difference must be made as regards foreign transactions, since in the Sanofi/Aventis case (Resolution No. 21, dated February 9, 2006), when imposing a fine for late filing, the Antitrust Commission considered that the due date for the filing of the notification should have been one week after the closing of the transaction, even though the transaction had been structured by means of a public offer. As such, the criteria set out by Advisory Opinion No. 27 were not followed and it was considered that the triggering event for filing was the effective closing of the transaction, rather than the publication of the offer.

f. Exemptions

The following transactions are exempt from the notification requirement:

- the acquisition of companies in which the purchaser already holds more than 50 per cent of the shares (which has been interpreted by the Antitrust Commission by means of Advisory Opinions as comprising those cases in which the acquirer already holds exclusive control over the undertaking, regardless of the effective shareholding it holds);
- the acquisition of bonds, debentures, non-voting shares or debt securities;
- the acquisition of only one company by only one foreign company that has no assets or shares of other companies in Argentina (first landing exemption);
- the acquisition of wound-up and liquidated companies (that performed no activities in Argentina during the preceding fiscal year);
- the acquisition of companies if the total local assets of the acquired company and the local amount of the transaction each do not exceed Argentine Pesos 20 million, provided, however, that the exemption would not apply if any of the involved companies were involved in economic concentrations in the same relevant market for an aggregate Argentine Pesos 20 million in the last 12 months or Argentine Pesos 60 million for the last 36 months (de minimis exemption);
- gratuitous transfers of goods to the Argentine state, provinces, municipalities and the city of Buenos Aires; and
- the transfer of goods among mandatory heirs, by acts among living persons or by cause of death.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

The Antitrust Law sets out that in those merger control proceedings in which the parties belong to regulated markets, the opinion of the regulator will be requested by the Antitrust Commission, irrespective of the fact whether said regulator also has a specific approval regime.

h. Information requested for the filing

The filing is carried out in a pre-determined F-1 Form which requires:

- Corporate information on notifying parties: contact details, shareholding structure of the notifying parties, information of all the subsidiaries of acquirer and target in Argentina, organizational charts pre and post-closing;
- A description of the transaction;
- Product and geographic relevant market definition and analysis of the effects of the transaction on these markets;
- Analysis of all the products or services provided by the parties in Argentina;
- Description of production process, substitutability and market shares of affected markets;
- Background information of the parties: previous mergers, antitrust investigations and filing of the transaction in other jurisdictions, if applicable.

The following documents must be attached to the F-1 Form: (i) a legalized power of attorney which must be granted in Spanish, duly legalized by the Apostille in the event of a foreign company carrying out the notification; (ii) financial statements of the local subsidiaries of the acquirer and target, duly legalized before the Argentine Consejo Profesional de Ciencias Económicas; (iii) a corporate chart of the notifying parties and the target company; (iv) a copy of the transaction agreement or its latest draft (as well as any other transaction document that may be relevant for the merger control analysis) and (v) a copy of an economic report of the transaction, should the parties have commissioned the drafting of it.

In exceptional cases raising serious doubts of their compatibility with the Antitrust Law, an F-2 Form may be required by the Antitrust Commission. It is also a pre-established questioner focusing on relevant market and product detailed information, including efficiencies generated by the transaction. If the Antitrust Commission still considers that the information is not sufficient, it may request a tailor-made F-3 Form.

As of late, F-2 and F-3 Forms have become extremely rare since the Antitrust Commission focuses its analysis in the F-1 Form stage during which it issues several and substantial requests of information.

i. Sanctions applied for late or no filing

Late filing fees of up to Argentine Pesos one million per day of delay. There are no penalties for closing before clearance, as long as the notification is carried out within the deadline.

j. Parties responsible for filing

Responsible parties for filing are both transferor and acquirer of control. In certain cases, the Antitrust Commission has accepted that the target of the transaction carry out the filing alongside the acquirer of control, due to certain events such as leveraged buyouts in which it would be extremely difficult for each individual shareholder transferring control to execute the filing. In the event of mergers, both parties carry out the filing.

k. Filing fees

There are currently no filing fees.

l. Effects of notification

As analysed below, parties to the transaction are allowed to close it and the notification has no suspensory effects.

m. Gun jumping and closing – sanctions

Section 8 of the Antitrust Law sets out that any transaction subject to merger control before the Antitrust Commission will not generate effects vis-à-vis the parties or third parties until it has obtained clearance of said body, either expressly or tacitly. However, that very same Section of the Antitrust Law also establishes that the notification must be performed before or up to one week after the effective closing of the transaction.

The contradiction between the right to notify a transaction prior to closing and the lack of effects until it has obtained clearance has been interpreted by the Antitrust Commission in the sense that even though the transaction may not generate effects, the parties are authorized to close it, subject to the condition subsequent of the Antitrust Commission approving it (Advisory Opinion No. 62, dated August 9, 2000).

Thus, there are no gun jumping sanctions in Argentina since post-closing notification is expressly admitted.

n. Type of remedies and their negotiation

Transactions can be cleared with remedies, which can entail both divestitures and behavioural commitments. The Antitrust Commission has shown as of late a strong interest in behavioural remedies related to pricing issues in order to use them to assuage inflation concerns. Furthermore, there has been a growing increase of remedies regarding ancillary restraints so as to adjust them to the current interpretation to their duration by the Antitrust Commission. The Antitrust Law does not set out a specific stage for remedies discussion. Parties can negotiate with the Commission at any stage prior to the issuance of the resolution.

Upon the finalization of the negotiation of remedies, the transaction will be approved under the terms of Section 13.b) of the Antitrust Law, conditioning the approval of the transaction to the performance of the remedies. Once the parties have executed those remedies, they will have to prove it to the Antitrust Commission, so as to obtain the regulator to issue a decision under Section 13.a), which entails a full clearance. There is no specific timeframe for the divestment, although the Antitrust Commission usually sets out an average timeframe of 12 to 18 months for it to take place.

o. Timetable for clearance

The Antitrust Law provides that the Antitrust Commission has to issue a decision within 45 days after the notification or the transaction will be deemed as tacitly approved. Pursuant to Resolution 40/2001, upon notification of an F-1 Form, the Antitrust Commission would have 15 working days to either request an additional F-2 Form, or to authorize the transaction. In the event of filing of an F-2 Form, the Antitrust Commission would have 35 working days as of the time of the original notification to issue a resolution on the case or to request an additional F-3 Form. Upon filing of an F-3 Form, the Antitrust Commission would have 45 working days as of the original filing in order to issue a resolution on the case.

However, in practice, the Antitrust Commission considers that this deadline is interrupted by its requests of information. Under this "stop-the-clock" interpretation, the current average review timeframe is of 30 months without leaving the F-1 Form stage and with an upward trend. There are no specific tools for speeding up the procedure such as short forms or exceptional procedures.

p. Involvement by third parties

Third parties are not expressly allowed to intervene in the merger control proceedings nor have access to file. The sole intervention by means of third parties would be if the Antitrust Commission summons for witness hearings, in which a questionnaire on the market and its concentration will have to be answered and the witness will be asked to present its opinion on the effects of the transaction.

q. Types of resolutions that may be issued

Upon submission of the notice, the Antitrust Commission and the Secretary of Trade have 45 business days (term that is suspended in case additional information is requested) in which to decide whether to:

- unconditionally approve the transaction (Section 13.a);
- approve the transaction but impose conditions (Section 13.b); or
- reject the transaction (Section 13.c).

If a decision is not issued within 45 business days of the filing of the application and relevant documents, the transaction shall be considered as tacitly approved. However, as mentioned above, the Antitrust Commission currently applies a stop-the-clock interpretation which considers that the first request of information stops the 45 business-day term until it has obtained all necessary answers to the issuance of its decision.

r. Review of ancillary restraints

All merger control decisions analyze ancillary restraints, should they be present in the transaction. The clearance decision will normally cover any ancillary restrictions that are known at the time of the review. These types of provisions are valid as long as they comply with certain restrictive rules based on the case law of the Antitrust Commission when analyzing merger

control cases, based on the template set out by the European Commission's case law on non-compete clauses.

As a general rule, in the case of sales in which goodwill is transferred, a non-compete obligation of two years has been accepted by the Commission. In those cases in which there is also a transfer of know-how, a longer term of five years has been accepted by the Antitrust Commission. Both of the above mentioned terms shall be valid as of the effective transfer of the shares and/or the assets and/or business. In the case of Joint Ventures, the non-compete obligation can be set out for the entire duration of the Joint Venture and the Commission has already accepted these types of provisions. An additional term for a short period of time (i.e. six months) has been accepted by the Antitrust Commission post-Joint Venture.

The Antitrust Commission has started to differentiate those cases in which the acquiring party already held joint control and has considered that said intervention in the target company would limit the timeframe to only two years.

On top of the duration criterion, the parties must satisfy the classic ancillary restrains conditions of being product specific and geographically limited.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

In order to determine the existence of a dominant position, Section 4 of the Antitrust Law sets out that a person holds said condition when: (i) it is the only buyer or supplier of a given product within the market; (ii) when, without being the only supplier or buyer, it lacks substantial competition or; (iii) it is able to determine the economic feasibility of competitors because of a certain vertical or horizontal degree of integration. In addition, Section 5 establishes three relevant factors to determine the existence of a dominant position: (i) the degree of substitution for a product or service; (ii) the existence of regulatory barriers, and; (iii) the extent to which a company can unilaterally set prices or restrict output.

It is important to bear in mind that the Antitrust Law does not set out that a dominant position is anticompetitive per se, since its Section 1 states that those conducts sanctioned by the law are the ones that may generate harm to the general economic interest. A non-exhaustive list of abuse of dominant position conducts is provided under Section 2 of the Antitrust Law, but said description must only be taken into account for illustrative purposes, since the threshold in all cases will be whether the conduct has had an impact regarding the general economic interest.

As such, the fact of being a dominant participant in the market will not trigger an antitrust accusation, but a greater degree of care will have to be employed by said company. Furthermore, the Antitrust Law does not set out a market share threshold on what should be considered a dominant position. As a consequence, its analysis will have to be carried out on a case-by-case basis regarding each specific market.

Fines for anticompetitive practices are the same as regards unilateral and collusive conducts, being of a fine ranging from Argentine Pesos 10,000 to Argentine Pesos 150,000,000. The Imposition of the fine is calculated based on (i) the losses of the persons affected by the prohibit activity performed by the defendant; (ii) the benefit unlawfully obtained by the persons

involved in the forbidden practice; and (iii) the value of the assets of all the persons involved in the forbidden practice. Furthermore, please note that the Antitrust Law provides that the Antitrust Commission can also request a judicial order to liquidate or partition companies, or to divest businesses in cases of infringement of the Antitrust Law. Directors, managers, administrators, statutory supervisors, attorneys-in-fact and legal representatives of such entities may be held jointly and severally liable together with the infringing entity.

b. Exploitative offenses

Excessive pricing has been analyzed regarding several sensitive markets such as medicine supplies in Commission v. Bago[4] in which the Commission held that significant increases in price having no foundation in legitimate commercial reasons could indicate an abuse of dominant position. As valid commercial reasons, the Antitrust Commission has accepted factors beyond the scope of the supplying company, such as the imposition of foreign surcharges for long-distance communications in Smolensky v. Telintar,[5] as well as specific industry factors, such as safety standards for handling radioactive material in Autoridad Regulatoria Nuclear v. Search.[6] It has also discarded accusations regarding abusive pricing when the prices were regulated by the state, as shown in Torrisi v. El Popular.[7]

c. Predatory pricing

Predatory pricing is sanctioned under Section 2.m of the Antitrust Law, which describes it as "[s]elling goods or providing services at prices below cost, without a reason based on commercial usual practices in order to exclude competition in the market . . ." The Antitrust Commission has sanctioned a very limited number of cases relating to predatory prices, and in most cases the conduct was considered ancillary to another, principal type of anticompetitive conduct.

The Antitrust Commission's current review process on predatory pricing was evidenced in Decoteve v. Cablevisión,[8] in which it set out the conditions that must exist in order to establish predatory pricing, namely (i) dominant position, (ii) intent to carry out a market exclusion of competitors, and (iii) barriers of entry so as to prevent the entry of new competitors after the pricing, so as to be able to recoup the losses caused by the predatory pricing. In the event those circumstances are met, predatory pricing liability may be established if the dominant firm's prices were below average total cost.

d. Price discrimination

Price discrimination falls under Section 2.k of the Antitrust Law, which contains the following description: "To impose discriminatory conditions for the acquisition or selling of assets or services without reasons based on usual commercial practices of the corresponding market."

[4] *Commission v. Bago and others*, Docket No. 106.179/89 (1992).
[5] *Smolensky v. Telintar and others*, Docket No. 609.259/92 (1995).
[6] *Autoridad Regulatoria Nuclear v. Search*, Docket No. 064-011746/99 (2000).
[7] *Torrisi v. El Popular*, Docket No. 064-019229/2001 (2002).
[8] *Decoteve v. Cablevisión*, Docket No. S01:0130563/2005 (2010).

The guidelines for the determination of price discrimination can be found in Lafalla v. Juan Minetti[9] in which the Antitrust Commission considered that for price discrimination to take place three factors were necessary, namely: (i) the possibility of effectively carrying out a segmentation of the market; (ii) the encumbering of or restriction on reselling the product; and (iii) the existence of market power. Additionally, an adequate geographical market definition proved to be essential as a factor to be taken into account in the differentiation in pricing, as shown in Falcioni v. EG3.[10]

The landmark case (and the most important fine imposed as of that moment) concerning price discrimination in Argentina was Commission v. YPF,[11] in which the Commission considered the following factors: (i) the dominant position held by the accused party; (ii) the non-essential market shares of its competitors; (iii) the tracking of YPF's prices by other participants in the market; (iv) high barriers on entry onto the relevant market; and (v) the prohibition on reimporting YPF's own exports to other countries in which it did not hold a dominant positions and thus charged significantly lower for its products. The Commission imposed a fine of USD 109,000,000 as per the exchange rate on the day of the issuance of the fine. In a follow-up case in 2009,[12] the Antitrust Commission decided not to impose a sanction on the same company since it considered that the company no longer held a dominant position.

e. Resale price maintenance

Resale price maintenance (RPM) is encompassed by Section 2.g of the Antitrust Law, which defines it in the following terms: "To set, impose or carry out, directly or indirectly, in agreement with competitors or individually, in any manner, prices and conditions for the acquisition or sale of assets, rendering of services or manufacturing."

The printing of recommended resale prices in the products has been considered by the Antitrust Commission as competitive, as long as the reseller retains the freedom to choose the final price, as stated in Federación Argentina de Supermercados y Autoservicios v. Danone.[13]

The Antitrust Commission considered that maximum resale prices have a positive benefit on consumers since the consumers end up paying lower prices. In FECRA v. YPF,[14] the Antitrust Commission pointed out that, by recommending resale prices, the producer was trying to undercut downstream players selling the products at higher prices than those that were considered more convenient by the manufacturer in its competition against other players on the market. The Commission also took this position in Cámara de Comerciantes de Derivados del Petróleo, Garages y Afines de Tucumán v. YPF,[15] among other cases initiated against YPF. In principle, pursuant to these precedents, the setting of maximum resale prices would not generate an antitrust concern.

While there have been precedents concerning minimum resale prices, their scarcity and lack of uniformity do not allow for a unified understanding of the conduct. In the Recorridos de

[9] *Lafalla v. Juan Minetti*, Docket No. 064-006002/2000 (2000).
[10] *Falcioni v. EG3*, Docket No. 064-19885/2000 (2001).
[11] *Commission v. YPF and others*, Docket No. 064-002687/97 (1999).
[12] *Lafalla v. YPF*, Docket No. S01:0227185/2003 (2009).
[13] *Federación Argentina de Supermercados y Autoservicios v. Danone*, Docket No. S01:018144/2004 (2005).
[14] *FECRA v. YPF*, Docket No. 607.043/93 (1994).
[15] *Cámara de Comerciantes de Derivados del Petróleo, Garages y Afines de Tucumán v. YPF*, Docket No. 614.364/93 (1995).

la Tarde v. AAE case,[16] the Antitrust Commission held that the imposition of minimum resale prices was legal, while in Commission v. TeleRed Imagen,[17] it held that such minimum RPM allowed for collusion. In TeleRed, there was an agreement whereby the owners of the soccer matches broadcast rights agreed on the prices with the paid-TV operators. The Antitrust Commission considered that the fixing of minimum resale price in this case was a mechanism ensuring the collusion among paid-TV operators. However, TeleRed was ultimately revoked by the Court of Appeals, and the appeal decision was upheld by the Argentine Supreme Court of Justice. Both courts expressed that there was no effective restriction on competition evidenced in the case. They stated that there was no evidence that, as a consequence of the agreements among the paid-TV operators, the prices charged to consumers were maintained artificially high producing harm to consumers.

In a recent case[18], the Antitrust Commission condemned Clorox Argentina S.A. to pay a fine for the alleged setting of a gap in prices imposed by the defendants to wholesalers in relation to the commercialization of bleach, in detriment of second-tier brands. Such conduct had been allegedly implemented by the defendant through the shortage or elimination of discounts and rebates to wholesalers who did not abide to such price difference. According to the Antitrust Commission, the conduct allegedly carried forward by Clorox impeded the second brands to compete through the price of the product, as it forced the supermarkets to commercialize such brands to a higher price than the one that they would normally offer in a situation of free competition. The Antitrust Commission considered that Clorox, through its dominant position in the local market, and by setting a gap in prices, was imposing minimum sale prices of its products and the ones of its competitors. As of the date of this publication, the case has been overturned upon appeal due to the enforcement of the statute of limitations.

f. Tying arrangements

Section 2.i of the Antitrust Law characterizes these agreements as the acf of "[c] onditioning the sale of an asset to the acquisition of another one or the hiring of a service or conditioning the usage of a service to the hiring of another one or the acquisition of an asset."

In Ferrari v. Supercanal,[19] the Antitrust Commission held that a supplier's offer of secondary supplemental services which could be freely rejected by the customer without termination of the primary contract could not be considered a tie-in sale. Further, in Ferrari v. Plan Ovalo,[20] it disregarded a claim regarding alleged restrictions to acquire insurance services in car financing schemes other than those suggested by the defendant company, since several separate insurance offers were available. The Antitrust Commission also highlighted the interest of the party providing financing to the prospective car buyer in setting out specific requirements that the buyer be duly covered in the event of an accident for the duration of the financing agreement.

Another case[21] involved an alleged abuse of dominant position by a sports channel operator, whereby it tied the supply of a high-definition sport channel to the hiring of a new

[16] *Recorridos de la Tarde v. AAE*, Docket No. 600.221/92 (1992).
[17] *Commission v. TeleRed Imagen and others*, Docket No. 064-002331/99 (2001).
[18] *Commission v. Clorox Argentina*, Docket No. S01:0137849/2006 (2015).
[19] *Ferrari v. Supercanal*, Docket No. 333.165/31 (1995).
[20] *Ferrari v. Plan Ovalo*, Docket No. 064-000802/2000 (2000).
[21] *Telecentro v. Fox Sports Latin America*, Docket No. S01:0316202/2011 (2011).

signal by a cable company. While the Antitrust Commission has not yet issued a decision on the matter, it ordered a preventive injunction ordering that the operator refrain from tying one signal to another.

g. Bundling (including loyalty and market share discounts)

The relation between discounts and exclusive dealing was analyzed by the Antitrust Commission in Bieza v. Sierras del Mar,[22] in which it stated that the granting of discounts was of no interest to the regulator, except in those cases in which the discounts were related to exclusivity provisions.

Additionally, in Compañía de Radiocomunicaciones Móviles S.A. v. Telecom Argentina Stet- France,[23] the Antitrust Commission considered that bundling would generate concerns if it also entailed predatory pricing conduct.

h. Exclusive dealing

There have not been a great number of precedents on exclusive dealing. The issue raised in Commission v. Acfor,[24] in which the Antitrust Commission prohibited granting two distributors of Ford vehicles exclusive distribution for sales to the Argentine government administration since the government agencies located within their territories had to acquire vehicles solely from those Ford distributors. The Court of Appeals overturned this decision arguing that the supplier had the right to choose how to carry out the distribution of its products and that it had done so in a competitive market.

In a later case[25] concerning a sub-distributor that was prevented from contracting an agreement with a distributor because the supplier disallowed such sub-contracting, the Antitrust Commission held that if the market under analysis is duly supplied or competitive, producers and distributors must be guaranteed their freedom to conduct business in the manner of their choice.

In SADIT v. Massalin and others,[26] the Commission held that the imposition of exclusive intra-brand distribution can have a twofold effect. On the one hand, it can be anticompetitive if it results in a market power increase, allows market power to be exercised in a more efficient manner, or restricts the entry of new competitors. On the other hand, exclusive distribution can also be pro-competitive if the parties had the prior option of contracting with other parties or if the exclusivity generates cost savings or increases the quality of the products.

i. Refusal to deal

The conduct known as refusal to deal is defined as follows in Section 2.l of the Antitrust Law: "To deny with no justification the provision of a specific request for the acquisition or sale

[22] *Bieza v. Sierras del Mar*, Docket No. 107.337/81 (1984).
[23] *Compañía de Radiocomunicaciones Móviles S.A. v. Telecom Argentina Stet-France and others*, Docket No. 064-012623/2000 (2005).
[24] *Commission v. Acfor and others*, Docket No. 100-6-22-0869/79 (1983).
[25] *Pregal v. Basualdo and others*, Docket No. 323413/91 (1994).
[26] *SADIT v. Massalin and others*, Docket No. 064-000960/97 (1997).

of an asset or hiring of a service which had been carried out in the current conditions of the corresponding market."

In the majority of cases that implied an alleged refusal to deal behavior, the Antitrust Commission rejected the claims by stating that the real grounds for those allegations were commercial or business disagreements between the supplier and the purchaser of a product.

Furthermore, it has stated in several cases, such as Casa Amado v. Massalin[27] and Kosloff v. IATA—JURCA[28], that an abuse of dominant position must be proved beyond the mere freedom of the parties to carry out a commercial agreement. Thus, in Campos v. Buena Vista Columbia Tristar Films of Argentina[29], the Commission held that the lack of a commercial background for the specific market and unusually aggressive attitudes during the initial stages of negotiation could be considered as a justification for the refusal to deal. It has also accepted that a spotty credit history or preexisting debts can also be considered a legitimate justification for refusing to deal (as stated in Axelirud v. Páginas Doradas[30] and Representaciones Siderúrgicas v. Siderar[31]).

Another factor that has been taken into account by the Antitrust Commission in upholding refusals to deal is the existence of alternative and adequate sources of supply, as evidenced in Ferretería Alborelli v. R.O.R. Mayorista.[32]

However, the Commission has held that refusals to deal may be unlawful in cases where the supplier could offer no specific commercial reason for its refusal other than the connection of the rejected party to a competing group of the supplier.[33]

j. Essential facilities

While this anticompetitive behavior is not expressly described by the Antitrust Law, the Antitrust Commission may construct an essential facilities doctrine based on the general prohibition of abuse of dominance.

In its first case concerning a potential essential facilities claim, A. Savant v. Matadero Vera,[34] the Antitrust Commission held that the granting of a public authorization (in this case, to run of a slaughterhouse in a small town) entails the responsibility to satisfy demands of all sorts, even from competitors in the downstream market, and that any denial to supply would have to be based on objective grounds. Other similar cases have involved a wide range of industries, such as access to ski resorts, the certification for the welding of metal coffins, or credit card network systems. Remedies have included granting access to the plaintiff firm as well as, in some cases, imposing moderate fines on the respondent.

The Antitrust Commission has also considered[35] that the owner of a transport company that also owned the sole bus terminal in a town had to allow other transport companies to have

[27] *Casa Amado v. Massalin*, Docket No. 84.596/83 (1985).
[28] *Kosloff v. IATA—JURCA* , Docket No. 064-002855/97 (1998).
[29] *Campos v. Buena Vista Columbia Tristar Films of Argentina* , Docket No. 064-001065/98 (1999).
[30] *Axelirud v. Páginas Doradas* , Docket No. 064-007195/2001 (2003).
[31] *Representaciones Siderúrgicas v. Siderar* , Docket No. 064-0147/2001 (2005).
[32] *Ferretería Alborelli v. R.O.R. Mayorista* , Docket No. S01:0171584/2003 (2006).
[33] *Decoteve v. Pramer* , Docket No. 064-006301/99 (1999).
[34] *A. Savant v. Matadero Vera*, Docket No. 30.782/81 (1982).
[35] *Empresa Almirante Guillermo Brown and Others v. Terminal Salta*, Docket No. S01:0030739/2002 (2011).

access to it on equal terms. As such, the Commission stated that, while companies had the freedom to determine their own agreements, dominant companies could not block access to their competitors in the downstream market without a valid commercial justification; it also stated for the record that the denial of access to the terminal would entail a monopoly in the downstream market.

k. Customer termination

While customer termination has not been identified as anticompetitive conduct, the Antitrust Commission has launched a series of investigations in order to determine whether the said terminations could point towards the existence of an abuse of dominant position, primarily in conjunction with the essential facilities doctrine. However, there have not been any relevant precedents that could provide guidelines for the Antitrust Commission to follow in dealing with the matter.

A special sub-classification regarding customer termination can be considered as anticompetitive, as described in Section 2.ll of the Antitrust Law, which prohibits "[t]he suspension of provision of a dominant monopolistic service in the market to a public service or public interest operator."

l. Termination of intermediaries

Like the behavior with respect of customers discussed above, the termination of agreements with intermediaries has not been characterized as anticompetitive conduct, but it could be prove to indicate one, such as failure to comply with a supplier's RPM. The Antitrust Commission has launched investigations in answer to claims from intermediaries whose agreements had been terminated, in an effort to identify whether an abuse of the dominant position was committed. However, there have been no relevant precedents that could offer any guidelines for the Antitrust Commission to follow.

m. Termination of relationship with competitors

The types of conduct that have been adjudicated by the Antitrust Commission have mostly pertained to situations that may have led to the termination of relationships with competitors, such as the lack of consensus regarding possible collusion or situations relating to the essential facilities doctrine. These cases have been largely deemed to be ancillary to the main anticompetitive conduct.

n. Settlements

Pursuant to the provisions of Section 36 of the Antitrust Law, the alleged infringer may propose a "commitment" to the immediate or gradual cessation of the actions which originated the accusation. Such commitment can be submitted at any time prior to the Antitrust Commission's issuance of a resolution on the matter. If the proposal is accepted, the investigation is automatically suspended, and the Antitrust Commission must supervise compliance with the terms of the undertaken commitment.

In this regard, the Antitrust Commission has stated that ". . . the legal figure set forth in Section 36 of Law No. 25,156 should not be automatically granted, being reserved only for those cases in which the irrelevance of the conduct under analysis, measured by the near inexistent prejudice to the general economic interest . . . ."[36]

(II) COLLUSIVE CONDUCTS

a. Introduction

Section 2 of the Antitrust Law contains a non-exhaustive list of prohibited practices, among which the following provisions regarding collusive practices are included:

– fixing, agreeing, or manipulating, either directly or indirectly, the sale or purchase price of goods and services offered or demanded on the market, as well as exchanging information for the same objective or effect;

– horizontally dividing areas, markets, clients, and supply sources;

– agreeing or coordinating bids in competitions or public biddings;

– coordinating the limitation or control of technical development or of investments in the production or marketing of goods and services;

– preventing, hindering, or obstructing third parties from entering or remaining in a market, or excluding them from it;

– fixing, imposing, or practicing in any way, directly or indirectly, in agreement with competitors or individually, prices and conditions for the purchase or sale of goods, provision of services, or production.

The sanctions that can be imposed are the same ones as analysed under III.i.a.

b. Horizontal price fixing

Section 2.a of the Antitrust Law describes this conduct as "fix[ing], agree[ing] or manipulat[ing] in a direct or indirect manner the price for the sale or acquisition of assets or services that are offered or demanded on the market, as well as exchanging information in this regard."

In the Bariloche Liquid Petroleum case,[37] the Antitrust Commission stated that the key factors that encouraged collusion included low elasticity of demand, the lack of close substitute products, low quantity of operators, the homogeneous product quality, the existence of trade associations, and significant barriers to entry. The Commission also noted that long duration of the conduct was also a factor.

In Federación de Clínicas Sanatorios, Hospitales y Otros Establecimientos Privados de la Provincia de Buenos Aires v. Rouc-OCEFA,38 the Antitrust Commission stated that an

[36] *Petroquímica Cuyo v. PBB Polisur*, Docket No. S01:0468538/2010 (2012).
[37] *Bariloche Liquid Petroleum*, Docket No. 064-003996/98 (2003).
[38] *Federación de Clínicas Sanatorios, Hospitales y Otros Establecimientos Privados de la Provincia de Buenos Aires v. Rouc-OCEFA and others*, Docket No. 034-003749/95 (1998).

analysis of a possible horizontal price-fixing conduct must take into account whether the market-wide increase could have been generated by external reasons, as was the case in the 1995 "Tequila crisis," for example. The Commission has also noted that certain regulations set out by the state in sensitive markets as part of state economic policy and their subsequent impact on price homogeneity across the industry could be justified by an emergency situation in the economy, as evidenced in Confederación de Asociaciones Rurales de Buenos Aires y La Pampa v. Bunge Argentina.[39]

However, external forces, such as an economic crisis, need not necessarily impact all the involved companies in exactly the same manner, as shown in Administración General de Puertos Sociedad del Estado v. Centro Coordinador de Actividades Portuarias[40], in which the Antitrust Commission did not accept a defense based on the increase in variable costs in order to justify a market-wide fixed-price surcharge.

In the Cement case41, the Antitrust Commission was not able to fully prove the existence of price coordination; however, since it had already been to verify the existence of a market allocation scheme as well as the coordination of production output between the undertakings, it did not delve into the issue in full. The Commission issued one of its most important sanctions as of today in the Cement case, in which the total amount of the fines surpassed the USD 100,000,000 mark as of the currency exchange rate of the date of issuance.

A recent curious case42 entailed a fine to eight car terminals to pay the highest fine ever since pursuant to the Antitrust Commission they had colluded in a price agreement. The claim was started against the car dealers present in the Customs Special Area for a presumed infringement of the Antitrust Law, derived from an alleged breach to Law No. 19,640 (the Tax Law). The complainants alleged that the car dealers did not transfer the tax exemptions set by the Tax Law to the final consumer. Pursuant to the analysis of the Antitrust Commission, the car terminals were charging in the customs special area the same price as in the rest of the Argentine territory where the tax exemptions did not apply. Therefore, the prices for cars in the customs special area were allegedly higher than they should be. According to the accusation of the Antitrust Commission, this conduct performed by the car terminals corresponded to a conscious parallel behaviour. Unlike other previous cartel cases, the Antitrust Commission did not have evidence to prove the alleged agreement. As a consequence, the Antitrust Commission decided to accuse the terminals solely on the basis of conscious parallelism but with no evidence of an agreement. The sanction applied by the Antitrust Commission to this case is the highest fine ever applied (Argentine Pesos 1.06 billion Argentine pesos total). The case would be later overturned upon appeal for lack of evidence of harm to the general economic interest, as analyzed on Section I.i.

[39] *Confederación de Asociaciones Rurales de Buenos Aires y La Pampa v. Bunge Argentina and others*, Docket No. S01:0486731/2006 (2007).
[40] *Administración General de Puertos Sociedad del Estado v. Centro Coordinador de Actividades Portuarias and others*, Docket No. 602.494/94 (1996).
[41] *Cement*, Docket No. 064-012896/99 (2005).
[42] *"Hugo Atilio Riello Gasperini y José Luis Catalán Magni re. Antitrust Commission intervention",* Docket No. S01:0000803/2008 (2014).

c. Horizontal agreements to allocate customers or territories

Section 2.c of the Antitrust Law defines market allocation by prohibiting the practice of ". . . horizontally allocate[ing] zones, markets, clients and sources of supply."

In the Sand Producers case,[43] the Antitrust Commission uncovered a scheme mounted by sand producers in the Buenos Aires area that had the backing of naval sand transport unions. A cartel was founded whereby he sand producers and the unions formed an agreement setting production quotas. If one of the competitors in that market decided to leave the cartel, the transport unions would block their transportation.

The best known case regarding these types of agreement in Argentina is the Cement case[44] in which six major cement-producing companies were accused of staging a nationwide market allocation and production output-setting framework which lasted almost 20 years. The Antitrust Commission's investigation began in 1999, when a disgruntled employee revealed to a newspaper that the cement companies were allegedly exchanging information and dividing their market shares through an agreement. According to the findings of the Antitrust Commission, the exchange of detailed confidential market information was performed via the cement trade association. The Antitrust Commission found records of real-time software that was used to exchange current commercial records between the cement companies. As mentioned above, the Commission issued in this case one of its largest fines to date.

d. Agreements not to compete

These agreements are either analyzed as part collusive practices as outlined in this section or by the ancillary review carried out by the Antitrust Commission on its merger control review.

e. Horizontal boycotts

While the Antitrust Commission has not rendered any specific decision in this matter, it must be taken into account that horizontal boycotts could be considered as an exclusionary collusion, and as such an investigation could be launched.

f. Joint ventures and other competitive collaborations

The absence of case law regarding joint ventures and other competitive collaboration, as well as the provisions of the Antitrust Law, could lead to the conclusion that these types of behavior are not considered to be anticompetitive per se unless they entail harm to the general economic interest. As such, as long as collaboration among competitors cannot be determined to constitute collusion or produce any other anticompetitive effect, it cannot be considered as anticompetitive under the Antitrust Law.

[43] *Sand Producers*, Docket No. 70.332/84 (1986).
[44] *Cement,* Docket No. 064-012896/99 (2005).

g. Trade associations

Over the past thirty years, the Antitrust Commission has been probing the recommendations and impositions by trade associations. In one of its earliest cases, Commission v. Cámara Inmobiliaria Argentina,[45] the Commission imposed a sanction on a realtor trade association due to an industry-wide communication that was intended to produce systematic price adjustments in real estate properties in Argentina. However, the Commission has accepted that the publication of "reference" prices is not anticompetitive per se, provided that pricing decisions would be independently taken by each member of the association.[46]

A common thread running through trade associations was manifested in the healthcare industry, where medical associations forbade their members to negotiate directly with the healthcare providers instead of carrying out their negotiations within the association, as shown, among others, in Dirección de Bienestar de la Armada v. Agremiación Odontológica de La Plata, Berisso y Ensenada y Sociedad Odontológica de La Plata.[47]

In the Cement case,[48] the intervention of the trade association was considered to be vital to the market allocation scheme, since it allowed the parties to fully coordinate and oversee the operation of each one of its members.

h. Bid rigging

In the Liquid Oxygen case,[49] after performing several raids on the liquid oxygen companies and obtaining documentary evidence, the Antitrust Commission unveiled an alleged cartel that had been rigging bids for liquid oxygen. The four members of this alleged cartel were thought to have actively set among themselves the amounts and conditions of their offers in each bid so as to determine who would be the supplier for each public hospital. This was considered as a division of market among competitors, and it lasted for five years. The Antitrust Commission seized emails that evidenced the information exchange corresponding to the bids to be offered by the accused parties to the public hospitals. As a result of the investigation, a major fine of over USD 30,000,000, as of the currency exchange rate of the date of issuance, in total, was imposed on the parties. A similar case, related to the medicine jelly market, was decided on similar grounds on late 2015.

Interlocking directorates

While there is no specific provision in the Antitrust Law pertaining to interlocking directorates, in Unisys Sudamericana v. Impresora Internacional de Valores[50] the Antitrust Commission stated that the presence of a preexistent link between the companies competing in a public bid resulted from a market structure issue rather than being a form of anticompetitive con-

[45] *Commission v. Cámara Inmobiliaria Argentina*, Docket No. 100.676/81 (1981).
[46] *Commission v. Asociación Empresaria Hotelera Gastronómica de Mar del Plata y Zona de Influencia*, Docket No. S01:0251931/2002 (2008).
[47] *Dirección de Bienestar de la Armada v. Agremiación Odontológica de La Plata, Berisso y Ensenada y Sociedad Odontológica de La Plata*, Docket No. 614.897/92 (1997).
[48] *Cement*, Docket No. 064-012896/99 (2005).
[49] *Liquid Oxygen*, Docket No. 064-011323/2001 (2005).
[50] *Unisys Sudamericana v. Impresora Internacional de Valores and others*, Docket No. 064-005104/2001 (2001).

duct. In Ventachap v. Siderar,[51] the Antitrust Commission examined whether there had been any collusive agreement due to the membership of a director appointed by a foreign competitor (which held a minor shareholding on the Argentine undertaking) in the Board of Directors of a local company, but found none.

Facilitating practices

Facilitating practices are not specifically covered by the Antitrust Law, and the Antitrust Commission cases have not specifically dealt with this issue. However, in the event that the Antitrust Commission should be able to prove that these practices might entail collusion between competitors and thus prejudice the general economic interest, an investigation could be launched.

Information exchange

As mentioned above, exchange of information is specifically covered by Section 2.a of the Antitrust Law.

The key case concerning information exchange in Argentina was the Cement case,[52] in which the Antitrust Commission uncovered an alleged information exchange cartel carried out within a cement industry association thanks to which companies exchanged statistical data that provided detailed, up-to-date information regarding geographic areas, manufacturing output, types of client, types of commercialization packages, and other sensible data.

The information exchange was considered to be anticompetitive since it deprived competitors of their independency when establishing their commercialization strategies; it also serving to monitor companies' conduct to ensure compliance with the cartel. The Antitrust Commission held that shared information should not have included prices, client lists, productions costs, quantities, or manufacturing outputs. Furthermore, the degree of information as well as the fact that it was being constantly updated was taken into account by the Antitrust Commission.

Leniency program

There is currently no leniency program in Argentina.

Settlements

Please refer to the analysis under II.i.n.

[51] *Ventachap v. Siderar*, Docket No. 064-008057/1998 (2004).
[52] *Cement*, Docket No. 064-012896/99 (2005).

OVERVIEW OF COMPETITION LAW IN BOLIVIA

Diego Villarroel

I. OVERVIEW OF THE ANTITRUST LAW

a. Applicable law and regulations

Up to 1994, Bolivia did not have a regulation providing antitrust policy. In that year, Law No. 1600 (the "Law 1600") of the Sectorial Regulation System (Sistema de Regulación Sectorial – "SIRESE") was passed. Law 1600 regulates, inter alia, antitrust in the telecommunication, electricity, hydrocarbons, transportation and water sectors.[1] The companies outside the said fields are excluded from this regulation's scope.

The sectors not covered by Law 1600 (i.e., pharmaceutical, automobile, food, etc.) had their first antitrust regulation in 2008 when Supreme Decree No. 29519 (the "SD 29519") was adopted. The purpose of SD 29519 is "to regulate the competition and consumer protection in the face of wrongful conducts negatively influencing the market"[2] except in those industries already regulated by law.[3] There are some industries and sectors neither covered by Law 1600 nor SD 29519, as for example banking and financial institutions.

In 2009 the new Political Constitution of the State was enacted, which, in line with the Constitution of 1967, specifically guarantees antitrust prohibiting "private monopoly and oligopoly, as well as any other form of association or agreement of private individual or entities, whether Bolivian or foreign who intend to control and to have exclusivity in the production and commercialization of assets and services."[4]

b. Theories of harm present in the law

The regulators have not set forth specifically the theory of harm that, according to its interpretation, is present in antitrust regulations. However one may find a theory of harm on the basis of the legal asset protected by the antitrust law.

Law 1600 provides that the legal asset protected by antitrust is the public interest.[5] In the same line, the Authority of Company Control (Autoridad de Fiscalizacion de Empresas,

[1] Article 1, Law 1600.

[2] Article 1, SD 29519.

[3] Article 2, SD 29519.

[4] Article 314, Political Constitution of the State. The constitutional regulations forbid only *private* monopolies and oligopolies. This has been interpreted by the Constitutional Tribunal and local doctrine as that monopolies and oligopolies conducts, arising from the State initiatives (*public monopolies*), are not deemed anticompetitive.

[5] Article 10 (b) of the SD 29519 stipulates that among the attribution of the Regulatory Authorities "*to foster, within the legal framework, the competence and efficiency of the activities in the sectors regulated by SIRESE and investigate possible monopoly conducts, anticompetitive and discriminatory in the companies and*

"AEMP") considers that the legal asset protected is free competition, as an element of general interest.[6] In view of that, if the anticompetitive conducts investigated by the regulators does not violate the public interest, the regulator shall not take action.

The definition of the protected legal asset in Bolivia subtly varies from the doctrine and foreign jurisprudence, since the latter understands, more specifically, that the legal asset protected by antitrust is the general economic interest.

Notwithstanding the foregoing, when analyzing possible anticompetitive practices, the regulator should consider economic efficiency in general: looking after the interest of consumers, producers and the rest of the members of the productive and commercialization chains.

Finally, is important to ad, as it will be explained bellow (see Section III), that there are some anticompetitive conducts in which the regulator will apply the per se rule and other in which will apply the rule of reason. Thus, a proper construction of a theory of harm will depend on the conduct that the regulator is investigating and the rule that must apply (per se or reason).

c. Authority in charge of enforcement of antitrust law and regulations

For industries outside the scope of SIRESE and SD 29519, the authority in charge will depend on the industry involved. Thus, each industry regulator will be the authority in charge of enforcement of antitrust regulations. For example: in the case of insurance companies merger control, the authority will be the Authority of Inspection and Control of Pensions and Insurances (Autoridad de Pensiones y Seguros, "APS") whereas banking and finance institutions are overviewed by the Authority of Control of the Financial System (Autoridad de Fiscalización del Sistema Financiero, "ASFI").

In the same line, for regulated industries under SIRESE Law 1600, the authority in charge will also depend on the industry involved. For example: in the case of telecommunications and transport, the authority in charge is the Authority of Control of Telecommunications and Transport; for the downstream hydrocarbon sector, Bolivia has the National Hydrocarbon Agency (Agencia Nacional de Hidrocarburos, "NHA").

The authority in charge of industries regulated by SD 29519 is AEMP.[7] Regarding its application scope, the rules states that "natural and/or legal persons, except those who are already regulated by Law, who carry out economic activities with or non-profit, in the national territory, are forced to be governed by this Supreme Decree."[8]

In this context, in AEMP v. PIL Andina, the regulator interpreted that the companies already regulated by Law, are those which have a specific regulation regarding antitrust.[9] The company had argued that, since the dairy sector is already regulated by the PROLECHE Act, it was outside the scope of the application of SD 29519. The company did not consider that the said Act does not regulate anything related to antitrust.

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institution operating in such sectors, when they consider that they might contravene the public interest, according to Title V of this law". *See also*, in the same sense, Article 17 (a), SD 0071.

[6] The AEMP has stated that the legal asset protected is *free competition* as an element of *public interest. See AEMP v. PIL Andina,* Administrative Resolution RA/AEMP/DTDCDN N° 003/2013, January 11, pp. 66-67.

[7] Article 14, SD 29519.

[8] Article 2, SD 29519.

[9] *AEMP v. PIL Andina*…Ob. Cit., pp. 67 y ss.

In this regard, those industries or economic sectors having a specific regulation regarding antitrust, will escape the scope of application of SIRESE and SD 29519 (i.e., banking and finance companies).

d. Nature of antitrust enforcement

The nature of antitrust enforcement for antitrust systems in Bolivia is purely administrative.[10] The applicable legal and administrative procedure at the SIRESE, and its features, is practically the same as that of AEMP. Once an economic agent is served with the administrative resolution sanctioning the conduct, it would have the right to file a motion for reconsideration.

As soon as the company is served with the administrative resolution denying the motion for reconsideration, or once the legal deadline set for the AEMP to resolve the motion has expired, a hierarchical appeal may be filed before the same regulator, whom will have to send the appeal to the competent Minister.[11] For example: for companies regulated by SD 29519, the appeal must be submitted before the Ministry of Productive Development and Plural Economy (Ministerio de Desarrollo Productivo y Economía Plural, "MDP"); in the case of telecommunications, the appeal must be submitted to the Ministry of Public Works, Services and Housing (Ministerio de Obras Publicas, "MOP"); for the hydrocarbons sector, the appeal must be submitted before the Ministry of Hydrocarbons, etc.

From the issuance of the hierarchical resolution by the Minister denying the appeal, the first instance regulator can seek judicial recovery (enforcement) of the monetary sanction imposed on the economic agent.

e. Investigational powers of authority

Investigations related to anticompetitive conducts may originate from three sources:

(i) competitors reporting;

(ii) distributors, suppliers, sale points and consumer reporting; or

(iii) investigations started ex officio by AEMP.

Most investigations regarding antitrust law have been originated ex officio by AEMP. The authority is able to request all the information that considerers necessary to pursuit the investigation.

f. Attorney-client privilege

In Bolivia, attorney-client privilege is subject to professional secrecy. Professional secrecy is the legal obligation of certain professionals to keep the information they received from his clients. Such information cannot be disclosed.

[10] Article 17 to 21, SD 29519.

[11] Article 66 (III), Administrative Procedure Law.

According to the Penal Code, the professional (i.e. attorney) that discloses information provided by the client will be punished with imprisonment and a fine. Thus, attorneys cannot be obligated to disclose such information.[12]

Also, Criminal Procedure and Civil Procedure Codes provide that the witnesses may not be obligated to respond if the answer to the question breaches professional secrecy.[13]

Finally, in administrative procedures, such of antitrust cases, people's right of access to public information (i.e., evidences, regulators decisions, person's briefs, etc.) may not be exercised when the required information is protected by professional secrecy.[14]

g. Interactions with other regulators

Regulators are able to request to other public entities, information that may be used for the antitrust investigation. There is some information that may be obtained by judicial order, such as financial data protected by the banking secrecy.

Also, once an administrative penalty is determined, antitrust regulators are empowered to forward the antitrust case background to the Public Prosecution Office[15] and other authorities. There have been cases in which AEMP has forwarded backgrounds to the General Direction of Consumer Defense (part of the Vice-minister of Commerce and Exports).[16] Notwithstanding, it does not seem that other authorities, as the ones mentioned, have initiated proceedings on the basis of the background provided by AEMP.

h. Treaties in place

The only treaty in place is the Decision No. 608, of the Andean Community of Nations.

i. Standards of evidence

There is not a standard of evidence applicable for antitrust cases. Nonetheless, is important to note that regarding the means of proof the AEMP may accept as valid, Bolivia has, inter alia, the following: oral or written agreements between the parties, correspondence, testimonies, searches in the companies, reviews of computer systems, accounting experts reports, requests for information from regulatory entities, economic studies and presumptions.

j. Methods of engagement with authority

There are no standing pre-requisites or methods to engage with the AEMP or SIRESE's regulators, different from submitting a brief with the arguments and evidence of the claim. As

[12] Article 302, Penal Code.

[13] Article 462 (2), Civil Procedure Code; Article 193, Criminal Procedure Code.

[14] Law of Administrative Procedure, Article 18 (2); Articles 30-32, RM 190.

[15] Article 21 (2), SD 29519.

[16] *See*, for example, the *AEMP v. Compañía Industrial del Tabacos S.A. (CITSA)*, Administrative Resolution RA/AEMP/DTDCDN N° 118/2012, November 30.

explained above, investigations related to anticompetitive conducts may originate from three sources:

(i) competitors reporting;

(ii) distributors, suppliers, sale points and consumer reporting; or

(iii) investigations started ex officio by AEMP.

There is only one case not initiated ex officio by AEMP. In Cervecería Amazónica v. Cervecería Boliviana Nacional ("CBN"), the Amazónica accused CBN for price discrimination and predatory pricing, which resulted in a fine against the latter.[17]

k. Judicial review of decisions

If the hierarchical appeal is rejected by the correspondent Minister, the final remedies are:

(i) an administrative appeal before the Supreme Court;[18] or

(ii) a constitutional claim before the Court of Constitutional Guarantees.[19]

The choice between these legal remedies shall depend on the legal aspects raised or not raised by the resolution in response to the motion for reconsideration and hierarchical appeal.[20]

The administrative appeal must be filed with the Supreme Court[21] which decision should concentrate solely on the law and not facts.[22]

Be it filed against the administrative resolution resolving the hierarchical appeal or the final ruling resolving the administrative appeal, the affected party with an unfavorable resolution, is able to file a constitutional claim.[23] This would only be filed in the event of a violation of constitutional rights (i.e., due process).[24]

[17] *See Cervecería Amazónica v. Cervecería Boliviana Nacional,* Administrative Resolution RA/AEMP/DTDCDN N° 168/2015, December 30.

[18] Article 70, Administrative Procedure Law

[19] This alternative rule is not set forth in the law; however it has been developed by jurisprudence from the Constitutional Tribunal. *See* Constitutional Sentence 0549/2012, June 9.

[20] For example, if the element identified relates to the wrong application of antitrust regulations, filing an Administrative Appeal would be recommended; on the other hand, if the identified element is, for instance, a violation, of a due process element at some stage of the administrative procedure, it is advisable filing a Constitutional Claim.

[21] Article 779, Civil Procedure Code

[22] Article 781, Civil Procedure Code

[23] Article 129 (II), Bolivian Constitution; Article 55(I), Constitutional Procedure Code

[24] Article 128, Bolivian Constitution; Article 51, Constitutional Procedure Code

l. Private litigation

There is no private litigation under Bolivian antitrust law. However, this does not prevent that after determining an anticompetitive conduct, the affected parties initiate criminal and/or civil actions against the offender.[25]

II. MERGER CONTROL

In Bolivia, unlike what occurs in other countries, there is no comprehensive system applicable to merger control. In SIRESE there are provisions which, to a certain extent, may be understood as merger control regulations.[26]

SIRESE's industry-specific regulations may vary from one regulated sector to the other. For example, Law 1600 and its regulations does not provided a mandatory merger filing but telecommunications and electricity regulations (part of SIRESE) does provide a mandatory merger control filing.

With respect to those industries outside the scope of Law 1600, there are some that present regulations of merger control (i.e., banking and finance). In the case of industries regulated by AEMP, under SD 29519, there are no merger control regulations. This system is fully corrective, prohibit and penalizing, exclusively, anticompetitive conducts.

. Types of transactions

Covered transactions for SIRESE industries, according to Law 1600, include any merger that if executed could constitute a violation of Article 18 of the Law 1600 (prohibition of mergers between competitors that may constitute a dominant position).[27]

b. Notification of foreign-to-foreign mergers

There are no specific regulations regarding foreign-to-foreign mergers. However, if the merger executed abroad will have effects in the Bolivian market, then the merger will be in the scope of merger control regulations.

There is a special case for upstream oil companies.[28] Pursuant the application of oil operation contracts, subscribed with Yacimientos Petrolíferos Fiscales Bolivianos ("YPFB"), when the operator (e.g., exploration or exploitation) will have a change of control at any level (i.e., parent company merger), it must receive a prior written consent from YPFB.[29]

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[25] *Ibid*.

[26] Article 18 (Prohibition of Competitors Mergers); Article 19 (Execution); Article 20 (Voidance of Pacts), Law 1600.

[27] Article 28, SD 24504.

[28] Since upstream oil companies are not regulated by National Hydrocarbon Agency ("NHA"), and are only supervised by YPFB, they are not subject to any kind of legal merger control provision. *See* Article 24, Hydrocarbon Law.

[29] Clause 20, paragraph 20.2, Operation Contracts model.

It must be noted that there are no antitrust criteria by which YPFB may reject the merger. This way, this kind of merger control is related more to a policy of the hydrocarbon industry than to an antitrust analysis.

c. Definition of "control"

Law 1600 expressly prohibits the merger between competitors when such merger is looking forward to obtain a dominant position in the market. In regards of Law 1600, dominant position refers to:

(i) when the Company is the only bidder of a certain good or service; or

(ii) despite not being the only bidder, it is not exposed to competition.[30]

The Law establishes that those Companies that may be affected by Law 1600's prohibition (merger between competitors) are able to concretize the merger if they send a non-mandatory consultation to the Sectorial Regulator.[31]

This non mandatory consultation has turned into a mandatory merger control filing. The Commerce Registry (Fudempresa) has determined that all SIRESE mergers, in order to be duly registered, must have authorization from the correspondent SIRESE regulator. It must be noted that, according to the Commerce Code, in order for a merger to be valid must be register before the Commerce Registry.[32] While this regulation remains in force, companies seeking to merge must follow such regulation. An alternative would be, in time to submit the merger for registration, the companies clarify and argue that the authorization requirement is inapplicable to the case.

Law 1600 differs from other SIRESE industries that have their own merger control regulation which are expressly mandatory. For example, in telecommunication sector, any right acquired by the telecommunication companies through the Authority of Control of Telecommunications and Transport ("ATT"), through license agreements or administrative resolution cannot be the object of any provision act (i.e., cession, rental, etc.), except there is an express authorization by the ATT or the act of provision does not imply a loss of effective control by the title holder.[33]

In the financial and banking sector Law of Financial Services No. 393 ("Law 393") stipulates as a general principle, that the ASFI must:

(i) approve the merger processes between entities of financial intermediation; and

(ii) must take into account the impact that such operations may have over the proportion of participation of the institutions in the financial system.[34]

In the insurance sector, According to Insurance Law, the transformation, merger and liquidation of insurance and reinsurance institution, as well as cession of portfolio and their acceptance, requires express authorization by the APS.[35]

[30] Article 18, Law 1600.

[31] Article 28 b), Supreme Decree 24504.

[32] Article 409, Commerce Code.

[33] Article 5, Supreme Decree 1391, General Regulation of Telecommunication Law.

[34] Articles 110, 221, 289, 401 and 508, Law 393.

Regarding the scrutiny that must be made by the APS when evaluating a merger process, in Inverbol S.R.L. v. Adriática Seguros & Reaseguros S.A, the Supreme Court of Justice stipulated that it "responds to the purpose to be the administrative authority which based on technical, financial, accounting and legal criteria, authorizes or not the merger agreed by the companies, and it is pertinent to them too, at the time of approving or rejecting the merger, based on the aforementioned criteria, consider the opposition formulated by the creditors reading the sufficiency or insufficiency of the guarantee of their rights; because no other sense has the regulation provision demanding that the merger agreement – which will be considered by the administrative authority – has the list of creditors who formulated their opposition."[36]

d. Jurisdictional thresholds

In the SIRESE, there is not a general jurisdictional threshold.

In the electricity sector, part of SIRESE, a merger or acquisition must be reported to the regulator if it grants an electric generation company a market share of more than 35%.[37]

In the others sectors with mandatory merger control, there is not a jurisdictional threshold.

e. Triggering event for filing and deadlines

Regarding Law 393 the institutions that intend to merge must submit an application of authorization of merger before ASFI, within 30 days from the date of the Merger Commitment.[38]

In SIRESE, there is not a general triggering event or a deadline to submit the filing. However, considering that the Commerce Registry will not allow the merger registration without the regulator's authorizations, one can conclude that the parties may not concretize the merger without such authorization.

In some SIRESE specific sectors, where the merger filing is expressly mandatory, merger parties are not allow to concretize the merger without regulator's green light.

Following is a brief explanation of the triggering event for some specific industries of SIRESE.

Hydrocarbon (downstream)

NHA created the "Tracking Form to Shareholding and Mergers" (TFSM).[39] The TFSM is a form that hydrocarbons entities must fill and give to the NHA every January, in order for the NHA to know its shareholdings. If in the course of the year the shareholding of the entity has suffered a modification, or the entity has merged, the TFSM must be filled and send again. In this

[35] Articles 7 and 43 (b), Insurance Law.

[36] *Inverbol S.R.L. v. Adriática Seguros & Reaseguros S.A*, Auto Supremo 372/2010, 28 de octubre.

[37] Article 15 (c), Electricity Law. There is not such limitation for transmission and distribution electricity companies.

[38] Article 3, Regulations for the merger of Supervised Institutions.

[39] *See* Administrative Resolution 775/2005 of 22 June.

regard, one can identify an ex post merger control, considering that once the company submits the form, the ANH may determine whether the merger violates or not the competition rules.

These rules apply only for companies dedicated to transportation, refining, commercialization of derivatives products and natural gas distribution networks (e.g., midstream and downstream), which are the only oil actors regulated by the NHA.[40]

SIRESE's merger filing also applies in hydrocarbon downstream sector, notwithstanding the application of the TFSM.

(i) Telecommunications

As mention above, if an agreement of merger or acquisition implied cession, loss of title holder status, or any act of provision, over the rights of a telecommunications operator, before concretizing the merger of acquisition, the operator must procure the permit by the ATT.

In fact, this is the interpretation assumed by ATT when they revoked the licenses awarded to the operators Fides Chiquitania, Fides Villazón and Fides Riberalta, upon considering that these companies, title holders of concession and operation licenses, had merged without the authorization by ATT. The regulator came to the conclusion that in view of the merger having occurred, the penalized companies had lost the effective control of the association. When this situation occurred, they had incurred in the prohibition of carry out acts of provision over their licenses and concessions.[41]

f. Exemptions

The only logical exemption that permits not to send a merger control filing is when the merging companies do not compete with each other. For example, in mergers Equipetrol - Oro Negro[42] and G&E – Compañía Nacional de Gas Sucre[43], the regulator ordered to authorize the mergers since the requesting companies, at the time of submitting the request, were not competitors in the same relevant market.

For other cases in SIRESE, the exemptions will be determined after the merger was denied by the sectorial regulator. For get an exemption resolution, the merger parties must send to the regulator an exclusion request. The regulator will authorize the merger if it benefits the market and does not affect competition.[44]

[40] Article 24, Hydrocarbon Law.

[41] *Radio Fides Case*, Regulatory Administrative Resolution, ATT, N° 55/2011, April 25. The companies affected at the time of submitting the hierarchical appeal before the MOP argued that the companies involved do not need the authorization to merge since based on the distribution of capital share of the association, they had not lost effective control of the association. Additionally, they argued that they violated their right to motivation of resolutions since the ATT had not argued, sufficiently, the loss of effective control of the associations involved. MOP revoked the challenged resolution, not because they agreed that it was not necessary to have a merger authorization, but because they considered that ATT had not argued appropriately what they considered a loss of effective control of the associations and why in this specific case it had occurred. *See* Ministerial Resolution, *Ministerio de Obras Públicas*, N° 94/2014, April 24.

[42] *See* Administrative Resolution SSDH N° 369/2009, April 23 and Administrative Resolution ANH N°708/2010, July 26.

[43] *See* Administrative Resolution 004/2006, January 6. *Electricity Superintedence*.

[44] Article 19, Law 1600.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

If a merger will result in a foreign direct investment into Bolivia, it must be registered before the Bolivian Central Bank.

Companies that participate in stock markets must inform APS of any relevant change regarding the company, including mergers.

h. Information requested for the filing

In SIRESE, the companies that send the merger request must file the following:[45] information of individuals, companies or institutions involved;

(i) the existence of any relationship, direct or indirect between individuals, companies or organizations, and between companies or entities with others that are competing in the specific market;
(ii) the magnitude of the current activities of the companies or entities and their market share in the markets affected by the agreement or merger; and
(iii) the grounds on which the application is based.

In the hydrocarbon sector, hydrocarbon companies, when sending the TFSM must inform:[46]

(i) the companies involved;
(ii) the new name of the company result of the merger;
(iii) the value of the transaction; and
(iv) the date of the merger.

Regarding Law 393, merging Financial Institutions must attach to their request the following documentation:[47]

(i) the Agreement of Merger signed by the institution subject matter of the merger;
(ii) special updated balances of the Agreement of Merger;
(iii) publications in a written means of communication of national circulation during three (3) consecutive days with the special balances in order to guarantee the rights of the institutions creditors to oppose the merger;
(iv) legalized copies of the Minutes of Extraordinary General Meetings of Shareholders or Extraordinary General Meetings of Associates of Associates of the institutions in which it must be evident the approval of Agreement of Merger and its details;
(v) legalized copies of the power of attorneys in favor of the legal representatives, specifying the powers and attributions for the merger;
(vi) signed confidentiality agreements;

[45] Article 24, SD 24504.

[46] *See* Tracking Form to Shareholding and Mergers, Heading IX.

[47] Article 3, Regulations for the merger of Supervised Institutions.

(vii) report on the evaluation of legal aspects, financial, organizational structure, computer systems, procedures, manuals and other necessary topics to determine the convenience and/or viability of carry out the merger.

i. Sanctions applied for late or no filing

Since in SIRESE the merger filing is in principle non-mandatory, there is no sanction for not sending the filing as long as the merger was executed without affecting the market. However, as stated above, considering that the Commerce Registry will not allow the merger registration without the regulator's authorizations, one can conclude that the parties may not concretize the merger without such authorization.

For industries with mandatory merger control, if companies do not submit the filing, then the regulator may:

(i) suspend or annul the merger process;

(ii) initiate an administrative procedure that could mean monetary sanctions for the merger companies;[48] or

(iii) revoke licenses of operation.[49]

j. Parties responsible for filing

The merging parties are responsible for sending the filings

k. Filing fees

No filing fees are provided for.

l. Effects of notification

For mandatory merger filings (i.e., telecom, insurance, financial and banking institutions), the notification will suspend the execution of the merger agreement until de regulator issues a resolution authorizing the merger.

m. Gun jumping and closing – sanctions

Mergers would not be concretized until the regulator issues a resolution authorizing the merger.

For sanctions please refer to Section II (i) "Sanctions applied for late or no filing".

[48] *See*, for example, Article 3, Section 3, Regulations for the merger of Supervised Institutions.

[49] *See*, for example, Article 5, Supreme Decree 1391, General Regulation of Telecommunication Law, and *Radio Fides Case*, Regulatory Administrative Resolution, ATT, N° 55/2011, April 25.

n. Type of remedies and their negotiation

As explained above, if the merger was not authorized, the affected parties may send an exclusion request in order for the regulator to permit the merger[50] if it benefits the market and does not affect competition.[51]

o. Timetable for clearance

For regulated industries, SIRESE and non-SIRESE (i.e., telecommunication, insurance, financial), the timetable for clearance will arise when the regulator issues a resolution authorizing the merger.

Regarding financial institutions, mergers parties will be permitted to concretize the Definitive Agreement of Merger, when ASFI issues the Authorization of Merger.[52]

p. Involvement by third parties

In SIRESE industries, third parties may be involved in two stages, when the merger parties:

(i) send the merger non-mandatory filing; and

(ii) when they send the exclusion request.

For the first case, the authority has 10 days to publish the merger consultation after its reception.[53] Anyone that may result affected by the merger can submit a formal opposition.[54]

The authority will consider the merger consultation and the oppositions submitted. If it is necessary, the authority is entitled to open a thirty day period for the parties to submit evidence. Once the period has expired, the authority must rule on the oppositions.

The same process applies for the exclusion request.[55]

As mentioned in Section II (h), in the banking and finance sector only the creditors of financial institutions may submit oppositions to a merger process. When evaluating if grants the merger, ASFI must consider the creditors oppositions.

q. Types of resolutions that may be issued

In SIRESE and non-SIRESE industries the regulator may:

(i) issue a resolution permitting the merger; or

(ii) issue a resolution in which orders not to concretize the merger.[56]

[50] Article 34, Supreme Decree 24504.

[51] Article 19, Law 1600.

[52] Article 8, Regulations for the merger of Supervised Institutions.

[53] The merger filing must be published in two national newspapers at three separate times

[54] Article 30, SD 24504. The opposition must be made within a twenty-day deadline from the day of the third publication

[55] Article 34, SD 24504.

In SIRESE, if after the merger was permitted the regulator finds out that the merger will affect competition, may take all the measures to avoid the execution of the merger.[57]

r. Review of ancillary restraints

There is no review of ancillary restraints.

III. ANTICOMPETITIVE CONDUCTS

Law 1600 (SIRESE's regulation) and SD 29519 present methodological differences regarding the classification of conducts deemed anticompetitive:

(i) Law 1600 divides anticompetitive conducts into anticompetitive agreements [58] and abuses of dominant position;[59]

(ii) SD 29519 divides them into absolute [60] and relative [61] anticompetitive conducts.

(I) UNILATERAL CONDUCTS

a. Introduction

Under SD 29519 unilateral conducts go by the name "relative anticompetitive conducts." When analyzing this conducts, the regulator must apply the rule of reason. Thus, the determination of the legality of a conduct will depend on the circumstances, characteristics and effects therein.

In this sense, the AEMP in order to penalize this kind of conducts must determine:

(i) the relevant market;[62]

(ii) that the investigated economic agent has substantial power in the relevant market;[63]

(iii) that there has been damage against the competitive process;[64]

(iv) the opportunity is also given to the investigated economic agent to eventually prove that the anticompetitive conducts generates efficiency gains and thus it should not be penalized.[65]

[56] Article 28 b), Supreme Decree 24504.

[57] Article 33, Supreme Decree 24504.

[58] Article 16, Law 1600.

[59] Article 17, Law 1600.

[60] Article 10, SD 29519.

[61] Article 11, SD 29519.

[62] Article 10, RM 190.

[63] Article 11 (1), RM 190.

[64] Article 11, SD 29519.

(i) *Determination of the relevant market, the substitution criterion*

There are a series of elements, mainly economic, to determine the relevant market.[66] From these elements, the most relevant one is the substitution criterion. In this regard, article 12 of Ministry Resolution No. 190/2008 stipulates as criterion to determine the relevant market, "the possibilities to substitute the asset or service for others whether domestic or foreign."

In that line, the Anticompetitive Practices Manual (Number 1.3.1) by the Ministry of Productive Development points out that:

> *"It is understood as relevant market when the trade field in which the competition has been restricted and the pertinent geographic area, defined in a way that covers all products or services reasonably substitutable (…) Regarding substitutability, the questions arising at identifying the market where an alleged monopolist is operating are: What other products may the consumer use? (…)*
>
> *When considering the market for a product or service, it proceeds to consider the availability of substitute products or services. The relevant market is made up by the firms offering similar or substitute products or services."*

AEMP, in the AEMP v. CITSA, using the substitution criterion, made a determination of the relevant market based on the characteristics determining the demand of products analyzed. In this regard, concluded that in the cigarette market, what is appealing to the demand are the effects such products produce on the nervous system, due to the nicotine they possess. Therefore, independently from talking about blonde cigarettes, black or those of other secondary characteristics, all cigarettes are part of one relevant market because they are substituted among themselves.[67]

In the same case, AEMP assumed the criterion that for the analysis of the relevant market-product, what the antitrust needs it is incorporating "all the products or services considered by the consumers as substitutes for them. Thus, it is pertinent to incorporate in the market product all the kinds of cigarettes representing substitutes for the consumers".[68]

Ultimately, the most important criterion to determine the relevant market is the possibility to substitute among themselves certain group of assets and services, whether from the viewpoint of the offer or the demand. If two or more assets or services cannot be substitutable, then, they are not part of the same relevant market.

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[65] Article 12 (1), SD 29519.

[66] Article 12, RM 190. These criteria are: (i) The possibilities to substitute the asset or the service by others, not only from domestic origin but also foreign, considering the technological possibilities, the measure in which the consumers have substitutes and the time required for such substation; (ii) the costs of distribution of the asset itself; its relevant supplies; those of its complements and substitutes from other areas and abroad, considering freights, insurances, tariffs and non-tariff restriction, the restrictions imposed by the economic agents or their associations and the time required to supply the market from those areas; (iii) the costs and probabilities the users or consumers have to turn to other markets; and (iv) the local, departmental, national or international regulatory restrictions limiting the user or consumer access to sources of alternative supply, or access of the suppliers to alternative customers.

[67] *AEMP v. Compañía Industrial del Tabacos S.A. (CITSA)*…Ob. Cit., p. 26.

[68] *AEMP v. Compañía Industrial del Tabacos S.A. (CITSA)*…Ob. Cit., p. 31. This precedent goes in line with the doctrine.

(ii) *Substantial power in the relevant market*

In order for the relative anticompetitive conducts to be penalized by AEMP, it must be proved that "the alleged responsible has the substantial power in the relevant market."[69] The criteria to determine if an economic agent has substantial power are the following:[70]

(i) *market share and the capacity to set prices and to restrict supply;*

(ii) *entry barriers*: according to AEMP they refer to the *"possible disadvantages of possible companies' entry in regards to companies already established in the market, such barriers show an important role to determine the structure in the industry such as the number of companies in the market and the company size distribution";*[71]

(iii) *the power of competitors in the relevant market:* it refers to the ability of the competitors to affect the participation within a relevant market of the investigated economic agent. AEMP, commonly, analyzes the power of competitors by differentiating the market shares of the investigated agent from those of the rest of the competitors.[72] This implies repeating the analysis of market shares itself. What would be appropriate is to analyze other criteria to determine the power of competitors. For example, analyze the evolution of the market share of the investigated agent and determine which has been the effect over it that the competition participation has had; and

(iv) *access of the economic agent and its competitors to supply sources:* it refers to advantages of the economic agents within a relevant market to access supply sources of the products subject matter of the investigation. Logically, the more complicated it is for a competitor to access supply sources, the more possibilities exist that the investigated agent have substantial market power.

Regarding SIRESE regulations they do not refer to the concept of substantial power but dominant position. However, one can understand both concepts, to a certain extent, as synonyms. However, some SIRESE regulators nay err as when, in certain cases, they base the analysis of the dominant position almost exclusively on the market share of the investigated economic agent.[73]

(iii) *Competition harm*

[69] Article 11, RM 190

[70] Article 13, RM 190. A criterion of analysis not stated in this regulation, but normally used by AEMP, is that of the market concentration, starting from the Herfindahl and Hirschman Index. For an example of the use by AEMP to this indicator *See AEMP v. Cervecería Boliviana Nacional (CBN),* Administrative Resolution N° 52/2011, September 13, p. 19 y ss.

[71] *AEMP v. PIL Andina…*Ob. Cit, p. 24.

[72]*See,* for example *AEMP v. PIL ANDINA…*Ob. Cit., p. 60. In the same sense *See AEMP v. Compañía Industrial del Tabacos S.A. (CITSA)*…Ob. Cit., p. 38.

[73]*See,* for example, Administrative Resolution N° 1019, February 15, 2010, General Superintendence (In the words of the Superintendence: "… from the analysis of the volumes commercialized monthly by PBD in the city of Santa Cruz, it can be established that such company had a market participation in the year 2004 of about 33% for diesel oil (…) Such participations do not show PBD as a dominant operator…").

The purpose of SD 29519 is "to regulate the competition and consumer protection in the face of wrongful conducts negatively influencing the market."[74] Thus, after identifying that the economic agent has substantial power in the relevant market, it must be confirmed that the alleged anticompetitive conduct restricted the free competition, e.g., caused competition harm.

According to the regulation, the anticompetitive effects that a relative anticompetitive conduct may have are: [75]

(i) unduly displace other market agents;

(ii) substantially prevent them from accessing; or

(iii) establishing exclusive advantages in favor of one or several agents.

AEMP cannot issue a penalty against the economic agents investigated before having demonstrated the existence of a real or potential affectation to the free competition. Also, even considering this rule does not apply for SIRESE regulators, they should not impose a sanction without proving that there has been competition harm, since without affectation to the legal asset protected, it is not possible to activate the penalties stipulated by the legal system.

(iv) Maximum amount of the fine

It should be noted that fines for anticompetitive conducts must not exceed 10% of the annual gross income of the sanctioned companies.

b. Exploitative offenses

Exploitative offenses, such as excessive prices, are not regulated by Bolivian law. However, price discrimination (See subsection d) and exclusivity agreements (see subsection h), analyzed below, could be considered as a manner of exploitative offenses.

c. Predatory pricing

The SD 29519 sanctions predatory pricing as "[the] systematic sale of goods and/or services at prices below their cost total medium or occasional sales below average variable cost when there are grounds for believing that these losses will be recovered by future price increases."[76]

In Bolivia, there is one precedent where AEMP sanctioned a company for imposing predatory prices. In Cervecería Amazónica v. Cervecería Bolivia Nacional (CBN), AEMP held that for the months of July-August 2014, the prices of a beer brand of CBN were below average variable costs, in an amount of - Bs. 0.05 per box.[77] For this conduct AEMP only warned CBN, ordering to stop such conduct, without imposing any fine, since, according to AEMP, the conduct had no real or potential impact on the market.

[74] Article 1, SD 29519.

[75] Article 11, SD 29519.

[76] Article 11 (6), SD 29519.

[77] *See Cervecería Amazónica v. Cervecería Boliviana Nacional…*Ob. Cit., p. 50.

d. Price discrimination

Price discrimination, unlike other jurisdictions, is the anticompetitive conduct that more interest had obtained from the regulator. SD 29519 penalizes this conduct prohibiting the "establishing of different prices, sale or purchase conditions, for different purchasers and/or sellers located in equality of conditions."[78]

Form a juridical-conceptual viewpoint, price discrimination appears when the same product is sold to two or more purchaser in equality of conditions at different prices. From the economics viewpoint, however, price discrimination occurs when a product is sold at prices which bring differences in ratios of their marginal costs.

Bolivia has three precedents regarding penalties due to price discrimination in the AEMP system. In AEMP v. Praxair and Hielo Seco[79], AEMP penalized Praxair because it sold some of its products (liquid oxygen) at a lower price in the city of La Paz, in relation to the price in the city of Santa Cruz. Praxair was not able to justify from the costs point of view why there was such difference. In AEMP v. PIL Andina[80], AEMP penalized this company because it sold one of its products (powder milk) at a lower price in the international market (export) in relation to the domestic market. In both cases, AEMP considered that the sanctioned company was generating exclusive advantages ("competition harm") in favor of the customer who they sold the product at a lower price.

Both cases have had an important practical and conceptual deficiency by AEMP. Both cases were facing price discrimination in the second line. This way, the anticompetitive effect of the discrimination was, supposedly, the generation of exclusive advantages in favor of the customer to whom the product was sold at a lower price. Thus, in order to a scenario of exclusive advantages exist; there should have been a relation of competition between the allegedly discriminated customers. However, in none of the cases, AEMP determined that between the allegedly discriminated customers there was a competition relation.

In the third price discrimination case, Cervecería Amazónica v. Cervecería Boliviana Nacional (CBN), AEMP sanctioned CBN since, according to such regulator, this company gave discriminatory benefits to its customers in the department of Pando, selling its product (beer) at a lower price in relation to the selling price to customers in other departments. This unjustified price reduction had the potential effect of displacing the company Cervecería Amazónica from the market, since the latter operates mainly in the market of Pando.[81]

e. Resale price maintenance

SD 29519 prohibits resale price maintenance as "[the] imposition of price and other conditions that a distributor or supplier must observe when commercializing, distributing or providing goods and/or services."[82]

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[78] Article 11 (10), SD 29519.

[79] *See AEMP v. Praxair and Hielo Seco,* Administrative Resolution RA/AEMP/DTDCDN/ N° 0030/2013, April 11, 2013, p. 12 y ss.

[80] *AEMP v. PIL Andina…*Ob. Cit., pp. 39 y ss.

[81] *See Cervecería Amazónica v. Cervecería Boliviana Nacional…*Ob. Cit., p. 48.

[82] Article 11 (2), SD 29519.

The regulator did not sanction a company for resale price maintenance to this day.

f. Tying arrangements

Tying arrangements can be inferred from SD 29519 article 11 (3), that prohibits "the sale, purchase or transaction subject to the condition not to use, purchase, sale, commercialize, provide the assets and/or services produced, processed, distributed or commercialized by third parties."[83] What is punished, basically, is to subject the sale of an asset or service to certain unlawful conditions.

In AEMP v. Cervecería Boliviana Nacional (CBN), according to AEMP, the penalized company prohibited their customers to commercialize beer from other brands within their stores. In the event the customers breached this obligation, CBN suspended or limited the sale of their product. This way, the company:

(i) limited their customers and consumers to be able to access other beer brands; and

(ii) limited access channels of their competitors to the market.[84]

g. Bundling (including loyalty and market share discounts)

SD 29519 does regulate bundling. However, in some cases anticompetitive bundling could be consider as a price discrimination policy, which is sanctioned by the SD 29519 (see above, subsection d).

In telecommunications, the law prohibits "illegal discounts in service connections or others."[85] It does not appear that the regulator has sanctioned a telecom company for the described conduct.

h. Exclusive dealing

SD 29519 prohibits agreements "among economic agents that are not competitors to each other, setting up, imposing or establishing commercialization or exclusive distribution of assets or services, by reason of subject, geographic situation or by determined periods, including division, distribution or allocation of customers or suppliers; as well as imposing the obligation of not manufacturing, distribute assets, render services for a fixed or determinable time."[86] What the regulation is penalizing is the subscription exclusivity agreements.

Exclusivity agreements are, commonly, of two types:[87]

[83] Article 11 (3), SD 29519.

[84] *AEMP v. Cervecería Boliviana Nacional (CBN)*…Ob. Cit., p. 47 y ss.

[85] Article 5, Supreme Decree 1391, General Regulation of Telecommunication Law.

[86] Article 11 (1), SD 29519.

[87] *See* FISCHER CASTELLS Federico Guillermo MAILHOS GALLO, Juan Maria, "Una aproximación a los pactos de exclusividad como elemento de los contratos de distribución", en AVV *Revista de Derecho de la Universidad de Montevideo* p. 233. Available at: http://revistaderecho.um.edu.uy/wp-content/uploads/2014/02/Fischer-Mailhos-Una-aproximacion-a-los-pactos-de-exclusividad-como-elemento-de-los-contratos-de-distribucion.pdf

(i) territorial exclusivity: it consists in the demarcation of a geographic fields within which only the distributor will have the right to trade the products of the supplier;

(ii) product exclusivity: it consists in imposing on the distributing institution the obligation to distribute exclusively the products of the main manufacturer.

In this line, in AEMP v. Cervecería Boliviana Nacional the penalized company, according to AEMP, committed the conduct since:

(i) had *territorial exclusivity* pacts, by virtue of which, their distributors were allocated a geographic area and they could not commercialize beer outside it;[88]

(ii) made their customers loyal through prizes and bonuses awarded based on their sales volumes. This situation caused a *tacit exclusivity of product*, in view that it encouraged their customers to purchase only the products it sold them.[89]

In another case, within the cigarettes market (AEMP v. Compañía Industrial de Tabacos S.A.), the Compañía Industrial de Tabaco S.A. (CITSA), a company operating on the sale and production of cigarettes, had signed agreements of commission with companies working on the distribution of their products. In such agreements, CITSA appeared as exclusive supplier for their commissioners: These commissioners could not purchase cigarettes from CITSA competitors. AEMP considered that these agreements of exclusivity were anticompetitive, inter alia, since they had caused CITSA competition to decrease and limited consumers' choice freedom.[90]

i. Refusal to deal

SD 29519 penalizes the "unilateral action consisting of refusing to sell, commercialize or provide specific people, assets and/or services available and normally offered to third parties."[91] In other words, the regulation penalizes any unjustified denial to negotiate the sale of an asset or service, which are normally offered to other people.

In AEMP v. Cervecería Boliviana Nacional (CBN), according to AEMP, in certain periods, CBN limited the sale of the product to some of their distributors. In AEMP's opinion, CBN came to this determination when their distributors, inter alia, decrease their sales levels. Ultimately, what CBN did was that in some periods, rejected to negotiate with its own distributors unjustifiably.[92]

j. Essential facilities

Essential facilities are not specific regulated under Bolivian Law. However, an essential facilities claim could be filed in applications of the refusal to deal prohibition (See subsection i)

[88] *AEMP v. Cervecería Boliviana Nacional (CBN)*…Ob. Cit., p. 39 y ss.

[89] *AEMP v. Cervecería Boliviana Nacional (CBN)*…Ob. Cit., p. 41 y ss.

[90] *AEMP v. Compañía Industrial de Tabacos S.A. (CITSA)*…Ob. Cit., p. 38 y ss.

[91] Article 11 (4), SD 29519.

[92] *AEMP v. Cervecería Boliviana Nacional (CBN)*…Ob. Cit., p. 50 y ss.

k. Customer termination

Essential facilities are not specific regulated under Bolivian Law. However, an essential facilities claim could be filed in applications of the refusal to deal prohibition (See subsection i).

l. Termination of intermediaries

In the line with the previous section, a termination of intermediaries claim could be file in applications of the refusal to deal prohibition (See subsection i).

For example, in AEMP v. CBN, the beer company was sanction, inter alia, because in some periods, rejected to negotiate the sale of the product with its distributors unjustifiably.[93] This rejection could be interpreted also as a termination of agreement with its distributor.[94]

m. Termination of relationship with competitors

Termination of relationship with competitors is not regulated under Bolivian Law.

n. Settlements

The Bolivian law does not allow settlements between the offender and the AEMP different to those already detailed in the leniency program as explained below (See subsection ii. l).

Bolivian law does not allow settlements between the offender and the AEMP different to those detailed below in the leniency program analysis.

However, during the preliminary hearing stage, the AEMP may take all measures it deems appropriate to resolve disputes of a private nature, including the conciliation between the offender and the claimants.[95]

When public interest may be affected, the conciliation agreement will only produce legal effects between individuals who have been part of the case and the investigation will continue to ensure the protection of such interest. Nonetheless, when public interest is not likely to be affected (i.e., the conduct is not significant), conciliation produces the shelving of the investigation.[96]

(II) COLLUSIVE CONDUCTS

[93] *Ibid.*

[94] The AEMP stated: "In November 2010 sales of CBN product to Mr. Mendoza are suddenly cut. This supply cutting steady the information provided by CBN regarding the practice of refusal to deal."

[95] RM 190, article 21

[96] *Ibid.*

a. Introduction

Under SD 29519 collusive conducts go by the name "absolute anticompetitive conducts." These conducts are punishable due to its simple existence, applying the per se rule. Namely, the regulator imposes the sanction against this kind of conducts, regardless of its characteristics and circumstances. The economic agent under investigation must demonstrate that the imputed conduct does not constitute an anticompetitive practice or that it never existed.[97] In this context, the determination of the relevant market, the existence of substantial power therein and competition harm, is of no importance.

In Bolivia there are four collusive conducts, named absolute anticompetitive conducts: (b.) Horizontal price fixing, (c.) horizontal agreements to allocate customers or territories, (d.) Agreements not to compete and arrange positions and (e.) horizontal boycotts.

It should be noted that fines for anticompetitive conducts must not exceed 10% of the annual gross income of the sanctioned companies.

b. Horizontal price fixing

Regarding the conduct object of this section, the SD 29519 prohibits agreements "to set, increase, agree or manipulate the price of sale or purchase of assets or services which are offered or requested in the markets, or interchange information with the same purpose or effect."[98] The agreements about the price of products are sanctioned since it deprives the consumer from sending signals to the suppliers so that they identify their preferences and the prices deemed most competitive.

The most known precedent for this type of collusive practices is the AEMP v. Cement Companies case.

The AEMP v. Cement Companies case had two chapters. Firstly, the AEMP penalized a group of cement trading and producing companies for the constitution of a cartel which purpose was (i) to fix cement prices in the market and (ii) divide the market thought their production limitation ("AEMP v. Cement Companies").[99] Then, the Bolivian Institute of Cement and Concrete (Insituto Boliviano de Cemento y Hormigón, hereinafter "IBCH") was penalized, since at the board of directors meeting in such institution, they agreed, according to the AEMP, about the said collusive conducts (AEMP v. IBCH).[100] It is worth mentioning that the IBCH is a "nonprofit organization which works on the investigation, transfer of technology and fostering cement and concrete applications", made up by the most important cement companies in the country, which, according to the AEMP, carried out the said conducts.[101]

In the AEMP v. Cement Companies according to the AEMP, the companies object of the investigation acting against the said regulation, agreed on the price of cement in the Bolivian market. The authority came to this conclusion by virtue of the following facts:[102]

[97] Article 10, SD 29519.

[98] Article 10 (I) (a), SD 29519.

[99] *AEMP v. Cement Companies,* Administrative Resolution RA/AEMP/ DTDCDN 115/2012, November 23.

[100] *AEMP v. IBCH,* Administrative Resolution RA/AEMP/ DTDCDN 72/2013, August 15.

[101] *See* IBCH webpage: http://www.ibch.com/index.php?option=com_content&view=article&id=1&Itemid=3

[102] *AEMP v. Cement Companies*…Ob. Cit., p. 13 y ss.

(i) simultaneous increase of prices by the two cement companies in the department of Cochabamba;
(ii) simultaneous price increases by other two cement companies in the department of Santa Cruz; and
(iii) minutes from a board of directors meeting of the IBCH, through which they would agree to set the price of sale of cement to certain construction companies.

c. Horizontal agreements to allocate customers or territories

The SD 29519 stipulates the prohibition to "divide, distribute, allocate or impose portions or segments of a current or potential market of assets and services, through customers, suppliers, times or spaces, determined or able to be determined."[103]

This conduct implies that the companies acting in certain market start to compartmentalize it, whether geographically, regarding certain products, or related to the people participating in it. This way, the competition is limited among these companies in each one of the subdivisions of the market created.

In AEMP v. Cement Companies, according to AEMP, it was demonstrated that the investigated companies had divided the Bolivian cement market geographically, distributing the different department among themselves. This way, there was, allegedly, a department allocated to certain companies and other departments allocated to other companies' members of the cartel.[104] For example: For a period of time certain cement company may only sell its products in Santa Cruz and another cement company may only sell its products in Oruro.

d. Agreements not to compete

SD 29519 penalizes the fact of "establishing, arranging, coordinating positions of refraining from biddings, competing, and public auctions."[105] The language of this regulation is more likely to sanction bid rigging. However, AEMP with a wide interpretation has concluded that agreements not to compete and arrange positions are in the scope of this rule.[106]

AEMP has not penalized any economic agent for this conduct. However, in AEMP v. Praxair and Hielo Seco, these two companies were investigated due to signing an agreement of administration, which according to AEMP, had the features of a non-competition covenant. Praxair and Hielo Seco were not penalized, since both companies were one economic unity, because they were affiliated to the same matrix: Praxair Inc. Company.

The regulator understood that, because both companies were one economic unit they could not be considered as competitors, and because they were not competitors, they were not liable for the alleged fact regulated by the stipulation. This means that in order for the charge to proceed due to making non-competition pacts, it is a previous requirement that the indicted

[103] Article 10 (I) (c), SD 29519.

[104] *AEMP v. Cement Companies*…Ob. Cit., p. 26 y ss.

[105] Article 10 (I) (d), SD 29519.

[106] *See AEMP v. Praxair y Hielo Seco*…Ob. Cit., pp. 45 y ss.

companies were competitors to each other and two companies affiliated to one same company cannot be deemed as such.[107]

e. Horizontal boycotts

According to SD 29519, it is prohibited between competitors "to establish the obligation not to produce, process, distribute, trade or purchase not only a restricted or limited amount of assets or rendering or transaction of a number, volume, frequency of restricted or limited services."[108]

The regulation penalizes the pacts by virtue of which the companies limit their capability of competition (i.e., of production, distribution), to benefit each other.

In AEMP v. Cement Companies, the companies' members of the penalized cartel, in the opinion of AEMP, were limiting their capability of distribution, production and trade in certain areas of the country. This is the cement companies would agree among themselves to limit their markets shares in certain departments, to facilitate access to a specific department of another cement company which was part of the Cartel. This way, these companies would allocate the market shares of each department in the country without competing with each other.[109]

f. Joint ventures and other competitive collaborations

Joint ventures and other competitive collaborations are not deemed anticompetitive. However, regarding SD 29519 and SIRESE, if this kind of collaborations has the purpose to fix prices in the market, allocate customers or territories, may be considered anticompetitive by the regulator.

In the financial and banking sector, Law of Financial Services No. 393 prohibits any form of association or agreement by natural or legal private people, Bolivian or foreign intending to have control or exclusivity on rendering determined financial services through anticompetitive practices in the financial system.[110]

There have been no cases where the regulator has sanctioned this kind of competitive collaborations.

g. Trade associations

If a trade association has the purpose or its conducts have facilitated and anticompetitive conduct, it may be sanction in application of antitrust regulations.

For example, as mentioned above, in AEMP v. IBCH (the association of cement companies), the regulator sanctioned IBCH since at the board of directors meetings in such

[107] *Ibid.*

[108] Article 10 (I) (b), SD 29519.

[109] *AEMP v. Cement Companies*…Ob. Cit., p. 126 y ss.

[110] Article 111, Law 393.

institution, they agreed, about the collusive conducts conducted by the cement companies (AEMP v. Cement Companies).[111]

IBCH argued that it could not be punished because it was not an economic agent since it was a non-profit institution. AEMP concluded that IBCH was an economic agent, even if it was a no profit institution, considering that provides consulting services to cement companies.

h. Bid rigging

SD 29519 penalizes the fact of "establishing, arranging, coordinating positions of refraining from biddings, competing, and public auctions."[112]

There has been one case in application of this regulation (See, AEMP v. Praxair and Hielo), which has been explained above, when analyzing "Agreements not to compete and arrange positions".

i. Interlocking directorates

Interlocking directorates are not expressly regulated under Bolivian law.

j. Facilitating practices

Facilitating practices are not expressly regulated under Bolivian law.

k. Information exchange

The information exchange is prohibited if it is used to conduct a horizontal price fixing. As analyzed above, the SD 29519 prohibits agreements "to set, increase, agree or manipulate the price of sale or purchase of assets or services which are offered or requested in the markets, or interchange information with the same purpose or effect."[113]

In AEMP v. Cement companies, as part of the basis of the resolution, the regulator find out that two cement companies were exchanging information with the object of increase prices. AEMP reached to this conclusion because of the following excerpt from a note between two cement companies: "Considering the difficulties of transport, it was noted that Cement Company 'X' could provide cement to Service Company 'Y' at a higher price in order to recover the high costs of import."[114]

l. Leniency program

Antitrust leniency program is established in Article 37 of RM 190.

[111] *AEMP v. IBCH*…Ob. Cit.,

[112] Article 10 (I) (d), SD 29519.

[113] Article 10 (I) (a), SD 29519.

[114] *AEMP v. Cement Companies*…Ob. Cit., p. 13.

When first time offenders accept responsibility, the fine will be reduced by a third. This applies both to absolute (which include cartels) and relative anticompetitive conducts.

In case of Cartels, the offender may be benefited by the law leniency program. For that purpose the member of the cartel must meet the following requirements:

(i) cooperate fully and continuously with the AEMP in support of the investigation;

(ii) perform the necessary steps to terminate its participation in the offending practice.

The first member of the cartel to enter the leniency program will be benefited with a reduction of up to 90% of the fine.

The following applicants may receive up to 50% of reduction while meeting the requirements aforementioned and provide elements of proof different to those the AEMP already has. To determine the amount of the reduction, the AEMP will take into consideration the chronological order of the filing of the applications, along with the elements of proof filed.

Settlements

Regarding settlements within antitrust claims please refer to point n) of Section III (i) above.

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OVERVIEW OF COMPETITION LAW IN BRAZIL

Marcio Dias Soares (I: b, d, f, h, i), José Gabriel Assis de Almeida (I: c, e, g),
Barbara Rosenberg (I: j, k, l), Juliana Maia Daniel and Paulo Lilla (I: m)
Cristianne Saccab Zarzur and Marcos Pajolla Garrido (II: a, b, d, f, g);
Beatriz Ponzoni and Tiago Gomes (II: c, q, r);
Joyce Midori Honda and Ricardo Lara Gaillard (II: e, h, j, k, l, o);
Fabricio Antonio Cardim de Almeida (II: i, m); José Leça (II: n, p)
Bruno Drago and Fabianna Vieira Barbosa Morselli (II: a, b, c, d, e, f, g);
Aurélio Santos and Ricardo Botelho (III (i): h, i);
Francisco Niclós Negrão and Gabriel Nogueira Dias (III (i): j)
Marcela Abras Lorenzetti and Mauro Grinberg (III (ii): a, b, c, d, e);
Paulo Brancher (III (ii): f, i);
Bruno Greca Consentino and Ricardo Inglez de Souza (III (ii): g);
Joyce Ruiz Rodrigues Alves (III (ii): h);
André Franchini Giusti and Guilherme J. Dantas (III (ii): j, k);
Daniel Oliveira Andreoli and Marcio de Carvalho Silveira Bueno (III (ii): l, m)

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations (including sector-specific competition regulation)

The legal framework for competition law is Brazil is primarily governed by Law No. 12,529, dated November 30, 2011 (the "Brazilian Antitrust Law"), while Law No. 8,137, dated December 27, 1990, and Law No. 8,666, dated June 21, 1993, provide for the criminal aspects revolving certain antitrust violations under Brazilian law.

The rules set forth by the Brazilian Antitrust Law are supplemented further by certain regulation issued by the Administrative Council for Economic Defense (Conselho Administrativo do Defesa Econômica – "CADE"), which is the agency in charge of the enforcement of competition law in Brazil. The most relevant pieces of regulation issued by CADE currently in force are: (i) Resolution No. 1, which sets forth CADE's Internal Rules and procedural rules applicable to both mergers and conduct investigation; (ii) Resolution No. 2, which sets forth additional rules governing the Brazilian merger control system; (iii) Resolution No. 10, which provides guidance on what types of "association agreements" shall be subject to prior merger clearance in Brazil; (iv) Resolution No. 12, which governs the consultation process before

CADE; and (v) Resolution No. 13, which establishes rules for the investigation of failure the file with CADE transactions that are subject to merger control in Brazil, as well as for the determination of a post-closing filing of transactions that do not meet the applicable thresholds under Brazilian merger control rules. More recently, CADE has issued guidelines on specific topics, such as gun jumping, leniency and compliance.

In principle, both the Brazilian Antitrust Law and Laws No. 8,137/1990 and 8,666/1993, as well as CADE's regulation and guidelines, apply across the board to all sectors, although there has been great debate about CADE's jurisdiction over the financial sector in Brazil (see subsection "C" below).

b. Theories of harm present in the law

The Brazilian Antitrust Law provides for different theories of harm as regards to anticompetitive behavior (i.e., collusion and unilateral conducts) and merger control.

In relation to anticompetitive behavior, the Brazilian Antitrust Law provides that, regardless of intent, any act that has the object or is able to produce anticompetitive effects, even if such effects are not achieved, shall be deemed to constitute a violation. The potential effects that the law refers to are (i) to limit, hinder or in any way restrain competition or free enterprise; (ii) to dominate a relevant product or service market; (iii) to arbitrarily increase profits, and (iv) to abuse monopoly power. In recent cases, CADE has interpreted this provision as being close to the European framework in that it establishes two different kinds of conducts: one that is illegal on its object (a "form-based" approach) and another that is illegal due to its actual or potential negative effects to competition (an "effects-based" approach). Such distinction is relevant for determining who bears the burden of proof regarding each element of the analysis of the conduct, i.e. CADE or the investigated party, as well as what should be the standard of proof applicable in each case (see subsection "I" below).

As for merger control, the Brazilian Antitrust Law determines that, in principle, a certain transaction shall not be approved by CADE if such transaction: (i) eliminates competition in a substantial portion of a given relevant market; (ii) creates or strengthens a dominant position; or (iii) results in the domination of a given relevant market. In case such effects are foreseen, CADE shall assess whether they can be balanced by efficiencies generated by the transaction (i.e., whether the net economic effect of the transaction is either positive or negative). When doing such an assessment, CADE will take into account whether the notified transaction is expected to: a) increase productivity or competitiveness in the market; b) improve the quality of goods or services; or c) encourage efficiency and technological or economic development. CADE will also assess whether a relevant portion of the resulting benefits are expected to be ultimately transferred to consumers.

c. Authority in charge of enforcement of antitrust law and regulations

The enforcement of antitrust law in Brazil happens at three levels: administrative, criminal and private. This section deals only with the administrative enforcement (see subsection "D" below).

The administrative enforcement falls upon CADE and the Secretary for Economic Monitoring ("SEAE"), of the Ministry of Finance, that compose the Brazilian System for

Competition Defense. The general idea is that CADE represents the interests of the State and applies State policy and SEAE represents the interests of the government and applies governmental policy.

Although linked to the Ministry of Justice, CADE is an independent state entity. Therefore, CADE's decisions cannot be appealed or reviewed by the Ministry of Justice. CADE's decisions can only be appealed to judicial courts (see subsection "J" below).

CADE is divided in three main bodies: the General Superintendence ("GS"), the Department of Economic Studies ("DES") and the Administrative Tribunal for Economic Defense ("Tribunal").

The GS investigates the antitrust violations and decides on less complex merger control cases, the Tribunal rules the antitrust violations and more complex merger control cases and the DES provides technical support for both, preparing economic studies and opinions.

The divisions of tasks inside CADE may not be the more effective for the enforcement of the law by an administrative authority once the arrangement does not completely ensure the respect of the rights of the defense, since the authority that presides over the investigation (the GS) is also the authority that supervises the investigation. This structure unbalances the positions of the accusation and the defense and creates a conflict of interests. For example, the GS in charge of the accusation is also the one that determines what evidence can or not be produced by the defendant.

A General Superintendent runs the GS. A President and six Commissioners form the Tribunal. Brazil's President appoints them all, after approval by the Federal Senate. The General Superintendent serves a two-year term, the reappointment for a second two-year term being possible. The President and the Commissioners serve a four-year term and cannot be consecutively reappointed. The General Superintendent and the Commissioners cannot be dismissed ad nutum and may only be removed from office in specific and objective situations.

SEAE's main role is to provide advice on any rules and resolutions issued by other governmental bodies and to develop studies with the purpose of evaluating competition in specific sectors of Brazil economy.

d. Nature of antitrust enforcement: administrative, criminal or otherwise

Antitrust enforcement in Brazil is primarily administrative in nature. Certain conduct, such as cartels, can also be criminally prosecuted, but (i) only individuals face criminal liability under Brazilian law, and (ii) the criminal enforcement is under the authority of the Public Prosecutors Offices and, ultimately, the Brazilian courts (CADE's jurisdiction is restricted to the administrative aspects of antitrust enforcement in Brazil). Lastly, although private enforcement is still limited, there is a clear intent of expanding the use of civil claims in Brazil, in particular in connection with cartel cases.

e. Investigational powers of authority

The investigational powers of CADE may be divided in soft and hard measures. Among the soft measures are the hiring of independent studies and the request of services or personnel

from other bodies and entities of the Federal Executive[1]. The GS and the Tribunal may also request copy of documents and information enclosed in any administrative proceedings pending or already ruled by other bodies of the Federal Executive. They may also request copy of any police proceedings or any lawsuits proceedings or any administrative proceedings pending or ruled by state public bodies or entities either at state or local level[2].

The hard measures are more invasive and can be of tree types. First, the request for information or documents sent to a private person (that can be a third party or the subject of investigation). Such request includes the request for oral testimony[3]. If the individual or the legal entity refuses to comply with the request, CADE may impose a fine[4]. However, Brazil Federal Constitution grants to all the right not to produce evidence against itself and the right to remain in silence[5].

The second hard measure is the inspection, at the headquarters or at any office or branch of the company under investigation, of any products, objects, documents, accounting books, computers, electronic files, with the possibility to make copies of any documents or electronic data[6]. If the company under investigation does not allow or hinders the inspection, CADE may impose a fine to the company[7]. The difference between this measure and the search and seizure (see below) is that the inspection is aimed only at companies that are under investigation and the inspection is conducted directly by CADE, without a court order. However, in view of conflicts with constitutional rights, the inspection is not a practical instrument of investigation.

The third hard measure is the search and seizure, under authorization of a judicial court, of any products, objects, documents, accounting books, computers and electronic files in possession of an individual or a company, for the purposes of the administrative probe or the administrative proceeding pending before the GS.[8] If the individual or the entity subject to the search and seizure refuses to comply, the judicial court may order the use of force and any other measures to ensure the result of the search and seizure. The search and seizure has been used several times by the General Superintendence[9].

f. Attorney-client privilege

Brazilian attorney-client privilege rules are generally different from Anglo-American and similar doctrines. The subject is regulated in Brazil under the principle of "non-violation of

[1] Brazilian Antitrust Law, Articles 9, items IX and XII (for the Tribunal), and13, item VI, a) and b) (for the GS).

[2] Brazilian Antitrust Law, Article 13, item VI, e) and f).

[3] Brazilian Antitrust Law, Article 13, item VI, a) and b).

[4] Brazilian Antitrust Law, Article 40.

[5] Brazilian Federal Constitution, Article 5, item LXII.

[6] Brazilian Antitrust Law, Article 13, item VI, c).

[7] Brazilian Antitrust Law, Article 42.

[8] Brazilian Antitrust Law, Article 13, VI, d).

[9] The search and seizure is usually put into place with the cooperation of the Public Prosecution Office and the Police. In 2003, the Secretariat of Economic Law - SDE (the predecessor of the GS), did the first search and seizure raid of cartel history in Brazil (Administrative Process N. 08012.002127/2002-14, ruled on by CADE in 2005).

lawyer's acts and expressions" as well as in accordance to legal rules that protect professional confidentiality. The laws and doctrines which are recognized in Brazil have been primarily oriented to protect communications between client and lawyer from being intercepted, and to protect lawyers from being required to produce client's confidential information in a court of law or to regulatory agencies.

g. Interactions with other regulators

In the 1990's, at the same moment Brazil was upgrading its antitrust law, several sector agencies were created in Brazil, such as the Electricity, Telecommunications and Oil and G Agencies, and CADE was required to co-exist with them.

Fortunately, the majority of the Laws that created these agencies contained provisions related to antitrust and allowed a certain level of cooperation with CADE who entered into agreements with several agencies, so the interaction between the majority of the regulators and CADE is mostly adequate.

The main unsolved problem is the interaction between CADE and the Brazilian Central Bank ("BCB") in what regards the merger of financial institutions.

In 2001, the conflict between CADE and the BCB become evident. The Attorney General Office issued an opinion (mandatory to all the state entities, including CADE) stating that the BCB was the sole authority with jurisdiction to decide on the merger of financial institutions. The main ground for the understanding of the Attorney General Office was that BCB's jurisdiction derived from Law No. 4.595/64, a supplementary act. Under Brazil Constitution, a supplementary act cannot be overruled by an ordinary act such as Law 8,884/94 (which was fully in force before the enactment of the Brazilian Antitrust Law) that empowered CADE to rule on any merger.

Nevertheless, a few months later, CADE, when ruling on a merger between financial institutions, affirmed its jurisdiction.[10]

Later, this conflict was brought before the Superior Court of Justice,[11] in a case where a bank argued that CADE had no jurisdiction over the merger of financial institutions. The Superior Court of Justice upheld such position on similar grounds than those used at Opinion issued by the Attorney General Office mentioned above[12]. The matter is still unsolved, because an appeal is pending at the Supreme Court of Justice.

h. Treaties in place

Brazil has entered into several cooperation agreements with foreign governments, such as Canada, the United States, Argentina and Russia, with respect to competition law. Those agreements provide for cooperation and coordination among the signatory governments, in

[10] Concentration Act No. 08012.006762/2000-09, ruled on by CADE in 2001.

[11] Special Appeal No. 1.094.218/DF, ruled on by the Superior Court of Justice in 2010.

[12] Against this decision, an appeal was filed before the Supreme Court of Justice that denied its admission on the grounds that the discussion was not constitutional (RE 664.189/DF, reporting Justice Dias Toffoli, ruled in 2014). An interim appeal against the decision that denied the admission of the appeal is still pending at the Supreme Court of Justice

particular with respect to discussions on competition policy and laws, the exchange information on economic sectors of common interest, laws, rules, as well as discussions on ongoing investigations to the extent allowed by the applicable confidentiality rules.

In addition, CADE itself has entered into several cooperation agreements with various foreign competition authorities, including the European Commission as well as agencies from the United States, Portugal, France, Japan, China, Russia, South Korea and many countries from South America. Such cooperation agreements provide for the sharing of experience, exchange of information and enforcement of competition laws, mutual assistance on enforcement activities, as well as the arrangement of seminars, meetings, and events.

i. Standards of evidence

As part of the Public Administration, CADE must abide by several rules aimed at ensuring due process in administrative proceedings. In particular, this means that, regardless of the object of the proceeding (i.e., investigation of anticompetitive behavior or merger control), CADE's decisions must be well grounded on evidence collected during the proceedings.

As indicated above (see subsection "B" above), CADE has recently taken the view that, similarly to the European competition framework, the Brazilian Antitrust Law allows for two types of approaches towards anticompetitive behavior: a form-based approach and an effects-based approach.

As a general rule, CADE has interpreted the Brazilian Antitrust Law in the sense that unilateral conducts must be assessed on their potential or actual effects to competition. According to this orientation, which is also reflected in CADE's guidelines, a conduct shall be deemed as anticompetitive only if its negative effects are not balanced by its efficiencies. In such cases, CADE bears the burden to demonstrate the conduct under investigation and its anticompetitive effects, while the investigated company may present justifications for adopting such conduct.

On the other hand, CADE has been moving towards applying a form-based approach in relation to certain conducts, such as horizontal price-fixing and even resale price maintenance, where CADE assumed that the practice under investigation could constitute an infringement regardless of any case-specific analysis of actual or potential effects. While this approach is not to be interpreted as a mere 'per se illegal' rule, CADE tries to place on the party under investigation the burden to present the appropriate justification behind the conduct under investigation, and to demonstrate that such conduct would not able to produce the alleged anticompetitive effects envisaged by CADE. CADE's approach is even stricter when it comes to hardcore cartel cases. CADE considers that this conduct represents, in itself, a violation of the Brazilian Antitrust Law, and concentrates its activities on collecting evidence of the existence of a cartel. For that purpose, CADE usually relies on direct evidence (i.e., evidence which demonstrates the facts under investigation), even though in recent cases it has taken the view that indirect evidence (i.e., facts from which it is possible to infer the occurrence of the facts under investigation) should be given the same weight of direct evidence.

Regardless of the approach taken by CADE, it faces a high standard of proof, in particular with respect to cartels. CADE has previously acknowledged that "it is certain that characterizing the existence of a cartel under Brazilian antitrust law is not an easy task for any

decision maker. From the configuration of evidence of collusion to the application of a fine, the authority must go through an enormous effort in order to reach the adequate decision." [13]

Finally, as regards merger control, CADE bears the burden of establishing that a transaction will produce negative effects to competition and should therefore be prohibited according the Brazilian Antitrust Law. While the Brazilian Antitrust Law does not provide for any specific standard of evidence to be met by CADE in such cases, CADE's guidelines indicate that a transaction will be rejected if CADE finds that it is likely to produce negative effects (i.e., coordinated or unilateral effects) to economic welfare that are not outweighed by efficiencies.

j. Methods of engagement with authority

Parties may engage with CADE by means of written petitions and in person meetings with the official in charge of the matter.

In case of meetings, CADE requests the parties to explain the scope of the meeting and, in those meetings, they may discuss any topics related to an investigation or merger control case, present arguments for a defence or, if that is the case, negotiate settlements and remedies. As a general rule, CADE makes the existence of the meetings public in CADE's website, but the content of the meeting is not registered and/or made public.

k. Judicial Review of CADE's decision

CADE's decisions are of administrative nature and, as such, they are subject to judicial court review. CADE's decisions have been commonly subject to challenges at Courts, even though this trend may be decreasing both for mergers and conduct cases.

As to merger cases, while the rule under Law No. 8,884/94 was to challenge CADE's decisions blocking or imposing remedies on transactions, as the parties had the incentives to do so to the extent they remained with the asset while challenging CADE's decision,[14] those challenges no longer exist under the pre-merger review system that is in place. This is the case as, with the suspensory regime in place since 2012, parties have no longer incentives to fight many years in Courts to try to buy an asset, and no seller would wait for such a long time. That said, the pre-merger review system has clearly affected the incentives to dispute merger cases in Court.

In relation to conduct cases, including cartel and unilateral conducts, the rule has been that decisions imposing fines are challenged in courts. However, as more cases are being settled with CADE prior to a conviction, especially cartel cases, the number of court challenges seem to have decreased. CADE's decisions have been mainly challenged under the allegation that CADE violated due process rules, or that it adopted low standards for convicting a conduct. CADE has

[13] *See* Administrative Process No. 08012.000677/1999-70, ruled on by CADE in 2004, Commissioner Roberto Augusto Castellanos Pfeiffer vote, paragraph 48.

[14] The more iconic example of a decision challenged by a private party that had a deal blocked by CADE is the "Nestlé-Garoto" deal. In this case; Nestlé bought Garoto back in 2002, as there was no suspensory regime the Nestlé already took over Garoto and, even though in 2005 CADE blocked the deal, Nestlé challenged the decision in court where it remains until today.

recently suffered two important losses,[15] but it is still early to assess how courts would deal with the amount of evidence required for a conviction.[16]

A party willing to challenge a decision and suspend its effects will probably be required to offer a bond to guarantee the judicial review, which may be granted with a bank guarantee or in some cases a real state (in other words, immediate disbursement or guarantee is required in order to appeal). Such a guarantee normally corresponding to the amount of the fine applied by CADE.

Finally, it is worth mentioning that there is still a large debate as to whether courts are allowed to review the merits of CADE's decision, of if its review should be limited to procedural aspects of such a decision.

l. Private Litigation

The Brazilian Antitrust Law allows cartel victims (or consumer associations or the District Attorney's Office, for instance) to sue third parties claiming for the damages resulting from antitrust violations.[17] Such private litigation cases are trending now in Brazil, as advocacy regarding this mechanism is becoming more intense, but case law on this matter is still very limited up to now.

Based on the Brazilian Antitrust Law and on the general civil liability rules, we can assume that whoever causes damages to a third party based on an illicit competition conduct is liable for paying the indemnification, provided that illicit behavior is proven and that the damages suffered (in Brazil) are attributed to such behavior and quantified. It is important to stress that, in addition to the specific provision setting forth joint and several liability by all legal entities within the same economic group, liability for antitrust violations in Brazil follows strict liability rules, and not vicarious liability rules.

The very minor Brazilian experience in private cartel litigation makes it harder to estimate the true exposure to such risks, the amount and/or standard of evidence required to prove illicit behavior and grant an indemnification and/or to quantify the damage, as well as the assessment of other related topics, such as the acceptance of the pass-on defense. Among others, even though the Brazilian law does not require an administrative decision to take place prior to a damage award, in practice it may be hard to prove a cartel directly before the civil courts, as there is no discovery process (as in the common law systems) in Brazil, and considering that the civil courts would not have investigative powers to assess the existence of a cartel. Likewise, if some type of administrative decision were to be required, it is not clear if a final decision would be indeed needed for an award (e.g., it may be that a civil court finds that the mere opening of a formal investigation by the GS to be enough or rather that a final decision by CADE would be required).

[15] CADE's conviction on the "generics" cartel case was overruled by the Court of Appeal of the 1st Region, maintaining a decision of the lower Court. Likewise, one of the record cartel fines imposed on the "hospital and industrial gas" Cartel case was overruled by courts in 2015 (Ordinary Suit No. 004916062.2010.4.01.3400).

[16] Since search and seizures started to be used as an investigative tool in Brazil in 2003, gradually CADE has been able to collect better quality evidence. In this context, while more due process rules have been challenged and allowed private parties to win some cases in courts (see prior footnote), on the other hand, CADE has been more focused in trying to avoid that kind of nullity.

[17] Brazilian Antitrust Law, Article 47.

It is also worth noting that there are no specific rules in terms of civil claims for the beneficiaries of leniency agreements and/or parties applying for settlements. According to the Brazilian Civil Code (Article 942), all parties involved in a violation subject to civil indemnification are jointly and severally liable for the damages awarded, a provision that could be applicable also for antitrust claims. In this context, and considering that it is possible that courts understand that cartel members have joint and several liability, it is not possible to exclude the possibility that leniency or settlement applicants end up having larger exposure in terms of civil claims, as the applicants would have confessed sooner than all other players (who may simply be found guilty and never confess at all).

As said, even though a plaintiff is not prevented from bringing a claim prior to the issuance of an administrative decision, in practice (and possibly due to the lack of a discovery process in Brazil), he may feel more encouraged to do so once the administrative decision has been granted, or at least if there was any form of confession by the parties. Confession in settlement cases become public when they occur and, as such, they may trigger further indemnification claims. At the same time, we are aware about cases being initiated solely on the basis of the technical note issued by CADE when it opens the investigation and in which is describes the evidence public available. CADE has been increasingly taking further measures to avoid the disclosure of confidential documents delivered to it, but it is not yet possible to know how courts in Brazil and elsewhere would deal with this.

Under Brazilian Law, the indemnification is defined by the extension of the actual damages (Brazilian Civil Code, Article 944). Therefore, there seems to be no possibility of double/treble damages or punitive damages being awarded by the Brazilian courts, or of any other damage except for those ones actually incurred.

There are two kinds of damages that may be awarded in cartel cases: (i) incidental damages (danos emergentes) and (ii) loss of earnings (lucros cessantes). While the incidental damages should be equivalent to the amount overpaid by the claimant due to the raise of prices resulting from the cartel, the loss of earnings should equal the profits that were not made by the plaintiff from the sale of goods because its prices were higher than those of its competitors, as a result of the overpriced input sold by parties to the investigated cartel. The estimation of any damages in cartel cases would expectedly be made pursuant to expert reports

Regarding the application of the pass-on defense in the Brazilian Courts, there are no precedents that could be used to provide a precise evaluation. Nonetheless, we cannot exclude that Brazilian courts may accept a pass-on defense if the evidence provided by the defendant in support of its allegations is deemed sufficient. In other words, if it is proven that the plaintiff has not suffered any damage and passed the additional costs on to the consumer, it may be hard for any claim by such plaintiff to be successful in court. As said, this is yet to be tested before the courts.

In any case, even if all incidental damages have been passed on to consumer, possibly damages can be awarded on antitrust grounds for loss of earnings, if such hypothesis is supported by concrete evidence. In any case, this is also yet to be tested before the courts.

Finally, under Brazilian law, it is possible to bring a class action against cartel participants to recover losses (a) caused to consumers or (b) as a result of anticompetitive practices (Law No. 7,347/85, Article 1, II and V). Such claims can be brought by the Public Prosecution Office, the public legal aid office, the Federal, State and Municipal Government, public entities, consumer or antitrust associations (Law No. 7,347/85, Article 5). Apart from a

few specific provisions, the class action proceedings follow the same general rules applicable to individual actions.

The class action may claim for damages or seek an injunction against the cartel participant (Law No. 7,347/85, Article 3). In case the judge finds that the defendant is guilty of a cartel violation and caused damages to consumers, he or she may award compensation, which will revert to a public fund (Law No. 7,347/85, Article 13). Having said that, we are not aware of any precedents rendered by the Superior Courts in class actions aimed at redressing or preventing anticompetitive practices in Brazil.

A final condemnatory decision in the class action will have erga omnes effects within the territorial jurisdiction of the court; however, the dismissal of the case due to insufficient supporting evidence does not prohibit a new class action to be initiated, based on new evidence (Law No. 7,347/85, Article 16).

In addition, under Brazilian Antitrust Law (Articles 33 and 34), liability between cartel participants that are members of the same economic group is also joint and several. This means that a civil lawsuit could be possibly brought before Brazilian courts if (i) at least one involved entity is located in Brazil; (ii) at least one involved entity has branches or agencies in Brazil; (iii) at least one economic group involved in the investigation has controlled entities in Brazil. In any case, this is yet to be tested before the Courts.

m. Compliance

Since CADE made the fighting against cartels as its top priority, investigations and sanctions for this type of infringement have been increasing. As a result, companies are more interested in adopting compliance programs focused on antitrust matters, so as to prevent investigations and sanctions related with anticompetitive practices. Moreover, this interest was also boosted by the enactment of the Clean Companies Act (Law No. 12,846/2014), which foresees severe sanctions for bribery and corruption, as well as by the investigations and prosecution arising out of the massive domestic corruption case involving the state-owned oil company Petrobras.[18]

Considering this scenario, CADE issued on January 20, 2016 the so called Antitrust Compliance Guidelines, a guide with non-binding recommendations on how to best establish antitrust compliance programs.[19] The guide is a "toolkit" that offers mechanisms to detect and deal with antitrust violations that could not be avoided. Therefore, they have the ultimate goal of stimulating the antitrust culture in the corporate environment, though taking into account the particularities of each company and adequate resourcing.

CADE's Compliance Guidelines describe the following benefits for establishing a compliance program:

- Prevents risks of antitrust violations and reduces company's exposition to sanctions;

[18] The trend is now the adoption by of a combination of anti-bribery and antitrust compliance, especially by companies which operate in markets prone to cartelization.

[19] The Compliance Guidelines is part of a set of educational measures from CADE and has its earliest origins in the Regulatory Ordinance 14/2004, issued by the former SDE, which provided a prevention program for antitrust violations.

- Early identification of compliance issues, enabling companies to promptly respond to the problems and entering into leniency agreement with public authorities;
- Alignment of business practices, helping companies to better select their business partners and intermediaries;
- Builds a good reputation of the company;
- Enables company's employees to make decisions with more confidence, and therefore stimulates legitimate competition;
- Reduces costs and contingencies (avoiding penalties for antitrust violations and other negative consequences, such as unenforceability of contracts, indemnities, negative publicity, etc.).

In order to enjoy the benefits, companies must have *efficient* compliance programs. But efficiency, in this case, is not related to how much money a company spends for its compliance program, but to the effective *implementation* of adequate resources. In this regard, CADE's Compliance Guidelines provide the following common recommendations to allow small and medium-sized enterprises and large corporate groups alike, regardless of whether they wish to introduce a compliance program for the first time or are considering how to refine existing programs:

- Management Commitment (*tone at the top*);
- Adequate resourcing;
- Autonomy and independence of the compliance team;
- Risk Assessment;
- Training and Know-how of company's personnel/third parties;
- Monitoring;
- Documenting compliance activities;
- Disciplinary actions;

Finally, the Compliance Guidelines emphasizes how important compliance programs are as a mechanism that enables early identification of antitrust violations, allowing companies to enter into agreements with antitrust authorities (such as a leniency or a settlement agreement) and therefore reducing its exposition to fines and other penalties for antitrust violations.

II – MERGER CONTROL

a. Types of transactions

According to Article 90 of the Brazilian Antitrust Law, a transaction represents a concentration act and may be subject to CADE's scrutiny when:

(i) A merger of two or more companies previously independent occurs;

(ii) One or more companies directly or indirect acquire – by purchase or swap of shares, membership units (quotas), securities or share convertibles, or tangible or

intangible assets, by operation of contract or through any other means or ways – the control over or parts of one or more companies;

(iii) One or more companies incorporate another company or companies; and

(iv) Two or more companies enter into an associative agreement, consortium or joint venture agreement.

In the past years CADE has been engaged in refining the criteria for mandatory filings, through either Resolutions or case law, including the definition of concentration acts.

b. Notification of foreign to foreign mergers

Article 2 of the Brazilian Antitrust Law defines its territorial applicability. Accordingly, with respect to merger control, CADE's jurisdiction is extended to all transactions wholly or partially performed in Brazil, as well as to those performed abroad that may generate effects in the country.

In light of this, foreign to foreign mergers (concentrations between companies which are headquartered outside of Brazil) will be subject to a mandatory filing locally if (i) they generate effects in the Brazilian market; and (ii) the filing thresholds are met (which are detailed in subsection "D" below).

Past rulings issued by CADE ratify such understanding. Accordingly, foreign to foreign mergers dismissed by CADE usually involve transactions carried out abroad with no relation to the Brazilian market, and therefore with no potential to cause effects locally.[20]

An important particularity of foreign to foreign mergers concerns cases of local mandatory filing that raises competition concerns and therefore, demand remedies. In these specific cases, there has been interaction between CADE and foreign antitrust authorities in order to determine coordinated remedies that allow the approval of the transaction in different jurisdictions.[21]

c. Definition of "control"

CADE addressed the notion of control in 1998 through Resolution No. 15, stating that control means the power to govern the behavior of a firm, either directly or indirectly, internally or externally, de jure or de facto. The antitrust definition was consistent with the corporate definition set forth by the Brazilian Corporations Law,[22] though somewhat broader. Nonetheless, the development of competition law associated with scholars' insights about the notion of 'dominant influence' and the distinction between internal and external control led to interpretations focusing on the economic aspects rather than the legal aspects[23].

On May 29, 2012, CADE enacted Resolution No. 2, which specifies the scenarios in which the share purchases described in the Brazilian Antitrust Law, Article 90, item II, would

[20] See Concentration Acts 08700.008819/2014-43 and 08700.001204/2013-13, ruled on by CADE in 2014 and 2013 respectively.

[21] See Concentration Acts 08700.009924/2013-19, 08700.007621/2014-42, ruled on by CADE in 2014, and 08700.004185/2014-50, ruled on by CADE in 2015.

[22] Law No. 6,404, dated December 15, 1976.

[23] See Concentration Act No. 08012.010293/2004-48, ruled on by CADE in 2006.

entail mandatory filing. Under its Article 9, considering the turnover criteria are met, the acquisition of shares constitutes a concentration act if (i) the deal entails the acquisition of sole or joint control; or (ii) the deal does not entail the acquisition of sole or joint control, but satisfies the de minimis rules established in Article 10 (see subsection "F" below).

The new regulation brought more certainty to merger review since it replaced the vague notions of Law No. 8,884/94 and the concept of dominant influence by sharp definitions of control and the de minimis rule. Borderline cases, however, are still disputed.

d. Jurisdictional thresholds

The Brazilian Antitrust Law introduced a cumulative turnover threshold for determining whether a concentration act is subject to antitrust review. Accordingly, Article 88 of the law sets forth that a filing is mandatory when:

(i) At least one of the "economic groups" involved in the transaction registered gross revenues or volume of businesses equal to or exceeding BRL 750 million in the year preceding the transaction in Brazil; and

(ii) At least one other "economic group" involved in the transaction registered gross revenues or volume of businesses equal to or exceeding BRL 75 million in the year preceding the transaction in Brazil[24].

As clarified by Article 4 of CADE's Resolution No. 2/2012, the general definition of "economic group" takes into consideration (i) companies under common control and/or (ii) companies in which any member of the group holds at least 20% of the corporate or voting capital. There is a specific rule involving investment funds, which considers as members of the same economic group, cumulatively (i) the economic group of any shareholder that holds an ownership interest equal to or higher than 50% of the fund; and (ii) the companies controlled by the fund, as well as those in which the fund holds an ownership interest equal to or higher than 20% of the corporate or voting capital.

Finally, it should be noted that CADE may determine the filing of any transaction that does not meet the jurisdiction thresholds detailed above within one year of its consummation/closing.

e. Triggering event for filing and deadlines

There is no legal deadline for filing a reportable transaction with CADE. Reportable transactions are to be submitted and approved by CADE prior to their consummation; otherwise parties may be subject to gun-jumping penalties.

f. Exemptions

While the Brazilian Antitrust Law sets forth general rules to define whether the filing of a transaction with CADE is mandatory, specific resolutions issued by CADE refine such criteria and establish certain exemptions.

[24] Values adjusted by Ministries' of Finance and Justice Joint Resolution No. 994/2012.

CADE's Resolution No. 2/2012 regulates Article 88 of the Brazilian Antitrust Law with respect to the acquisition of ownership interest. Accordingly, it clarifies that such transactions, in addition to the turnover thresholds, must be filed with CADE when:

(i) Said transaction results in acquisition of single or shared control;

(ii) The investee is not a competitor nor is active in a vertically-related market: (ii.1) acquisition that confers a direct or indirect ownership interest equal to 20% or more of the voting or corporate capital; or (ii.2) acquisition made by an owner of 20% or more of the voting or corporate capital, provided that the ownership interest directly or indirectly acquired, from at least one seller taken individually, is equal to or higher than 20% of the voting or corporate capital;

(iii) when the investee is a competitor or is active in a vertically-related market: (iii.1) acquisition that confers a direct or indirect ownership interest equal to 5% or more of the voting or corporate capital; or (iii.2) most recent acquisition which, individually or together with others, results in an increase in ownership interest greater than or equal to 5%, where the investor already holds 5% or more of the voting or corporate capital.

CADE's Resolution No. 2/2012 also establishes that acquisitions of ownership interest made by a single controller are not subject to mandatory notification.

As for the **subscription** of securities convertible into shares, CADE's Resolution No. 2/2012 determines that notification is mandatory when (i) the future conversion into shares falls under any of the scenarios of ownership interest acquisition described above (what exempts the parties from notifying the future conversion); and (ii) the security entitles the acquirer to designate members for management or inspection bodies, or provides voting or veto rights over competition-sensitive issues.[25]

CADE's Resolution No. 10/2014, by its turn, defines what should be understood as associative agreements pursuant to Article 90 of the Brazilian Antitrust Law, and their mandatory filing for antitrust review once the turnover thresholds are met. Accordingly, reportable associative agreements are those with more than 2 years duration, involving horizontal or vertical cooperation or risk sharing that result in a relation of interdependence between the contracting parties.[26].

According to CADE's Resolution No. 10/2014, an interdependence relation is verified when the contracting parties (i) are competitors in the object of the agreement and their combined market shares is higher than or equal to 20%; or (ii) are vertically-related to the object of the agreement and at least one of them holds a market share equal to or higher than 30% in the market affect by the agreement, as long as it establishes (ii.1) that the parties will share profits or losses; or (ii.2) exclusivity.

[25] Public offer of securities convertible into shares are not subject to prior approval, but any decision-making rights granted to the acquirer shall not be exercised until the deal is cleared by CADE.

[26] Concentration Acts No. 08700.008736/2012-92, ruled on by CADE in 2012, and 08700.004957/2013-72, ruled in 2014.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

There is no specific law for merger control involving foreign investment in Brazil. The Brazilian Antitrust Law also does not bring any specific provision regarding special regulated sectors and in theory should be applicable to all of them.[27]

A relevant discussion in this respect concerns a dispute between CADE and the Brazilian Central Bank for monitoring competition in the National Financial System. It is still debatable and subject to controversy whether transactions between financial institutions should be reviewed and approved only by the Central Bank or cumulatively also by CADE (see chapter 1, subsection "G" above).

h. Information requested for the filing

The filing of a given transaction with CADE may require different notification forms according to CADE's Resolution No. 2/2012, which are (i) Annex I (Non-Fast-Track Procedures), and (ii) Annex II (Fast-Track Procedures). Generally speaking, both forms are to contain the information and documents relating to the transaction, the Parties and affected markets that must be submitted to CADE's review.

While in the Fast-Track Notification Form market information is limited to market share and sales figures on an annual basis, the Non-Fast-Track Form requires a much more extensive collection of data which encompasses, among others, rivalry, barriers, suppliers and clients, usually on a 3-5 years basis.

Also, in case of Non-Fast-Track Procedures, Parties are allowed to engage in pre-notification discussions. This is not only typically done by the Parties but also encouraged by the authorities to avoid amendments to the form once it is formally filed.

Parties must also provide a copy of all documents relating to the transaction, listing the corresponding relevant exhibits, including non-competition agreements or shareholders' agreements, if any. Therefore, and in theory, documents prepared for an officer or director discussing the competitive effect of the transaction would need to be submitted, and it is to be noted that CADE would have a more careful look at such presentations when assessing a non-fast-track transaction.

The form itself must be submitted in Portuguese. The main documents relating to the transaction (i.e. SPA, SHA), when executed in English, must be translated into Portuguese, by a sworn translator or through an official certification of the lawyer. CADE usually accepts a waiver for translating non-essential documents. In all cases the translation does not need to be presented on the filing date.

When the notification form does not contain all the necessary information, CADE is to determine, in a single case, the amendment of the document, under penalty of case dismissal. The amendment period stops the clock of the antitrust analysis and this has occurred several times since the new regime became effective.

[27] In addition to merger review clearance by CADE, regulated sectors in Brazil usually require special approval by their respective agencies.

Also, the delivery of misleading or false information, documents or statements is punishable by a pecuniary fine ranging from BRL 5,000 to BRL 5,000,000.00 and the antitrust approval request could also be rejected due to a lack of sufficient evidence.

i. Sanctions applied for late or no filing

The sanctions applied for late or no filing under the Brazilian Antitrust Law are the same to those applicable to gun jumping violations, as set forth in its Article 88, Paragraph 3 (see subsection "M" below).

Under the current pre-merger notification regime, since CADE's approval is a condition precedent for the consummation and/or closing of a transaction, there is no specific deadline for the Parties to file the transaction to CADE. According to Article 108, Paragraph 1, of CADE's Resolution No. 1/2012, the filing of the transactions shall be made "preferably after the signing of the first binding document between the Parties, but before the consummation of any act related to the transaction."

Even if a transaction does not trigger a mandatory filing as per the thresholds provided in the Brazilian Competition Act, CADE has the discretion, up to 1 (one) year after the consummation of the transaction, to request the Parties to file the transaction for its analysis.[28]

On June 23, 2015, CADE issued Resolution No. 13/2015, which regulates the Administrative Proceeding to Assessments Regarding Mergers ("APAC" in its acronym in Portuguese) in order to investigate late or no filings of transactions. According to its Articles 11 and 14, if CADE determines the filing of a transaction that has not been filed yet, Parties will have up to 30 (thirty) days to file as from their acknowledgment of CADE's decision. Once filed, the cases will follow the same procedures for merger review at CADE (including deadlines for CADE's completion of the analysis) with respect to the analysis of the merits of the case and Parties may still be subject to the sanctions indicated above for late or no filing under the separate APAC proceedings. Under the APAC proceedings, CADE may also execute with the Parties an Agreement to Preserve the Reversibility of the Transaction ("APRO" in its acronym in Portuguese), or determine the adoption of any interim measures to preserve the competitive scenario.

j. Parties responsible for filing

The notification is a joint obligation of the parties involved in the transaction. Precisely, CADE's internal rules further specify that the notification form, whenever possible, must be jointly submitted by (i) the buyer and the target in transactions related to the acquisitions of control or equity; (ii) the merging companies in merger transactions; and (iii) the contracting parties in the remaining cases.

[28] Article 108, Paragraph 4, of CADE's Resolution No. 1/2012.

k. Filing fees

The Brazilian Antitrust Law and related legislation establish a filing fee in the amount of BRL 85,000 effective January 2016. The filing fee is to be paid prior to the notification, and the parties must attach to the initial documentation a receipt attesting the payment was duly made.

l. Effects of notification

The Brazilian Antitrust Law establishes a pre-merger notification system according to which reportable transactions are to be submitted and approved by CADE prior to their consummation. Also, applicable rules establish that the Parties are not allowed to implement the transaction before the antitrust clearance is issued, further specifying that the competition conditions amongst the companies involved must be preserved, with the Parties keeping their own structures and being forbidden to transfer assets, to exercise any kind of influence or to exchange sensitive information – the so-called "gun-jumping" concept.

In this sense, as a rule, the notification has a suspensive effect. However, there are two exceptions to the suspensive effect:

Public tender offer transactions: Parties are allowed to close the offer before the antitrust clearance is issued but Parties are prevented from exercising the political rights linked to the acquired shares until the full antitrust clearance.

Precautionary authorization (which covers failing firm situations): Parties are allowed to require a waiver from the suspensive effect on any transaction, provided they can demonstrate: (a) there would be no irreparable harm to the competition conditions in the reportable market; (b) the specific waiver request could be fully reversed; and (c) there is the risk of substantial and irreversible financial losses in the event that such a waiver is not given by CADE, which should be evidenced through documents or reports. It should be noted that this request requires the approval of CADE's Tribunal and it may not make sense, from a timing perspective, to approve transactions which would be analyzed under the fast-track procedure.

In addition, the formal notification with CADE also makes the correspondent transaction public to the market, through a publication in the Brazilian Official Gazette, allowing any interested third party to oppose it in case it demonstrates negative impacts to the market, observing the applicable deadlines.

m. Gun jumping and closing – sanctions

"Gun jumping" refers to the act of proceeding with the closing of a transaction subject to mandatory antitrust filing and/or exchanging competitive sensitive information between the Parties to the transaction, prior to obtaining CADE's clearance.

According to Article 88, Paragraphs 3 and 4, of the Brazilian Antitrust Law, transactions "shall not be consummated before being reviewed [by CADE]" and "[u]ntil the final ruling on the transaction, the conditions of competition between the companies involved shall be preserved".

As per Article 108, Paragraph 2, of CADE's Resolution No. 1/2012, "the parties shall maintain their physical structures and competitive conditions unaltered until CADE's final ruling, being prohibited of transferring any assets and influencing each other, as well as exchanging

competitive sensitive information that is not strictly necessary to close the transaction agreement or any other binding document entered into by the parties".

In the event of gun jumping, the Parties are subject to fines ranging from BRL 60,000.00 to BRL 60,000,000.00, as well as to the annulment of the acts performed by the Parties and the opening of an administrative proceeding to investigate potential antitrust violations (Brazilian Antitrust Law, Article 88, Paragraph 3). According to Article 112, Paragraph 1, of CADE's Resolution No. 1/2012, "in the calculation of the fines, CADE will take into consideration the size of the companies, the intent, bad faith, and the potential of anticompetitive effects arising from the transaction, among other factors it might deem relevant".

On May 20, 2015, CADE issued the "Guidelines for the Assessment of Gun Jumping" ("Guidelines") that outline which acts the Parties to M&A deals, among other transactions, could or could not perform before obtaining CADE's clearance. The idea of the Guidelines was to provide businesses a better understanding of how the agency is likely to evaluate gun jumping cases.

The Guidelines contain non-binding provisions only and were not issued with the intent of exhausting all situations that could lead to gun jumping. Therefore, it is always necessary to evaluate on a case-by-case basis the existence of gun jumping risks and the appropriate means to neutralize them.

n. Types of remedies and their negotiations

The Brazilian Antitrust Law sets forth that CADE may (i) approve, (ii) reject or (iii) partially approve the filled transactions. In the latter case, the Tribunal may establish restrictions/remedies to the Parties in order to mitigate the undesired effects of the concentration over the affected relevant market (Article 61, Paragraph 1).

The remedies may include divestment of specific goods/activities or stock, spin-off, mandatory licensing of intellectual properties, among others (Article 61, Paragraph 2). Those remedies are usually classified in structural/divestment and behavioral remedies and the Tribunal has been adopting a wide range of examples of divestment and behavioral restrictions, including brand exploitation, divestment of business units or stake in companies, access to distribution networks, prohibition to terminate specific agreements or to suspend the commercialization of specific products or services.

Parties are also entitled to offer and negotiate with CADE remedies to address the competition issues related with the transaction. If the Tribunal accept the commitments presented, an "Acordo em Controle de Concentração" (Concentration Control Agreement – ACC) is executed and the transaction is approved subject to the conditions set forth in the ACC.

Negotiations can start at any time since initial filing until 30 days after the GS challenges the transaction before the Tribunal (the GS is not empowered to execute ACC). Usually, along with the description of the remedies related with the transaction, the Parties negotiate penalties for non-compliance, publicity, deadlines, production of reports (usually certified by independent third parties) and monitoring activities.

The negotiation may be kept confidential. Once the ACC is approved by the Tribunal, the document shall be made public (with the exception of any confidential information it may contain).

o. Timetable for clearance

The statutory period for reviewing a transaction submitted to CADE is 240 days. However, in the case of complex transactions, the 240-day period can be extended by 60 days, upon request of the parties, or by 90 days through a reasoned decision by CADE's Tribunal.

If CADE does not comply with such terms, the merger filing is thereby tacitly approved.

For fast-track procedures, although, there is no term specifically provided for in the law. The average term for approval has been 22 days, and the Parties then have an appeal term of 15 days, as from the date on which the approval is granted. For non-fast-track procedures, the average term for the clearance has been of 60-90 days.

p. Involvement by third parties

Third parties are entitled to request their participation in a merger control procedure. Article 50 of the Brazilian Antitrust Law establishes that affected parties and the entities entitled to file class actions and other related collective lawsuits (including prosecutors, eligible associations and public agents) can file a petition to be admitted in the process. Such request shall be filed within 15 days as of the publication of the initial note of the procedure in the Official Gazette.

Regulations detail the specific rights of the admitted parties. But, as a general rule, these parties are only entitled to participate in the process under the conditions set forth by the authority responsible for the review process. These parties usually provide information about the transaction and the reasons why CADE should pay attention to the deal, eventually recommending the rejection or the imposition of restrictions to address the competition issues presented, and are entitled to appeal before the Tribunal against an approval decision rendered by the GS.

CADE may also request other parties to participate in the process, demanding specific clarifications or information from other authorities, from private players or from any other important stakeholder (including trade associations). Additionally, CADE usually considers petitions from parties not formally admitted in the process and, depending on the information provided, frequently takes seriously their contributions.

q. Types of resolutions that may be issued

CADE has powers to issue resolutions framed to regulate actions and procedures related to CADE's functioning, to the format of its deliberations, to procedural rules and the organization of its internal services. With respect to merger review, as previously described, CADE has already issued several resolutions.

r. Review of ancillary restraints

Restraints of trade must be reasonably necessary to enable the proper functioning of the legitimate goals envisaged by the transaction. The ancillary restrictions shall, therefore, be subject to a rule of reason analysis within the merger review.

Pursuant to CADE's case law, a covenant not to compete is generally acceptable to protect the goodwill but must have its scope limited in time (5-year limit), be restricted to a geographic area and refer to the specific activity object of the deal.

Exclusivity covenants, on the other hand, are subject to greater scrutiny and must have its efficiency duly proved. That is because exclusivity generally entails market foreclosure without the protection of any specific asset related to the core of the transaction.[29]

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

When it comes to CADE's repressive role, the Brazilian watchdog has been historically focused on cartel prosecution, for various reasons. Nevertheless, one could identify that an increased level of unilateral conduct investigations is to come. This is in line with the maturity of an antitrust authority which has recently received several prizes for its efforts towards a free competition environment.

During the past years, CADE has reviewed very few cases in which abuses of dominant position were central to allegations of anticompetitive conducts. In most of these cases, the authorities were unable to collect the necessary evidence to demonstrate the existence of an infringement, not only because it lacked appropriate resources, but also in view of poorly formulated cases brought to the authorities by complaining parties. In view of this, the great majority of such investigations were shelved by CADE.

Article 36 of the Brazilian Antitrust Law provides that a violation of the economic order might exist whenever a given conduct is capable, even potentially, of limiting, restraining or in any way lessening free competition or free enterprise, leading to the control of a relevant market; increasing profits on a discretionary basis; or constituting an abuse of dominant position in a relevant market.

It shall be noted that the mere existence of market power is not to be considered a violation per se. A dominant firm may only be censured by CADE to the extent that an abuse of such dominance is verified. However, there is no clear definition under the Brazilian regime of what constitutes an abuse of dominant position. In general, this type of conduct falls into two categories: exclusionary offenses and exploitative offenses.

[29] See Concentration Act No. 08012.009500/2003-31, ruled on by CADE in 2005.

b. Exploitative offenses

The most intuitive way of exercising market power to maximize profits is to directly act on pricing or output. Abusive exploitative offenses include, for instance, excessive prices, reduced margins, resale price maintenance, excessive royalties, among others. They are typified under item III of Article 36 of the Brazilian Antitrust Law.

Pursuant to CADE's case law, not many cases involving this category of abuse have been properly investigated. In most of them, other kinds of exclusionary practices are also discussed.

c. Predatory pricing

The concept of predatory pricing is the idea of temporary reduction of prices by a dominant agent, below a certain cost measure, resulting in immediate economic losses, aiming to remove from the market one or more competitors, so that the dominant agent can subsequently charges monopolistic prices upon the success of its exclusionary strategy.

The Brazilian Guidelines for the Economic Analysis of Predatory Pricing[30] mentions that setting low prices is not in itself an anticompetitive practice. Thus, for predatory pricing to occur, the following elements must be coexisting: (i) market power; (ii) barriers to entry; (iii) losses recoupment; (iv) possibility of rapid increase in product supply; and (v) capacity of financing the conduct.

There are no precedents of conviction regarding predatory pricing in Brazil so far, despite many cases on this matter have been analyzed.[31]

d. Discrimination

The Brazilian Antitrust Law forbids the adoption of discriminatory practices, including discrimination of prices and other commercial conditions. The conduct of discrimination is verified when a supplier grants to a customer, or group of customers, more beneficial conditions if compared to others. Therefore, the analysis on whether there are elements able to justify the different conditions for different customers is vital. Under certain scenarios, such as scale and scope gains resulting from the purchase of large quantities, the adoption of more favorable commercial conditions may be justified under an economic perspective.

[30] Administrative Rule No. 70/2002 issued by SEAE.

[31] See Preliminary Investigation No. 08012.007897/2005-98, ruled on by CADE in 2008, Commissioner Luiz Prado's vote: "26 - In Brazil, the great majority of information filed on predatory pricing is dismissed, and no in-depth analysis on prices and costs is conducted. That is so because, generally, it is found that the companies that allegedly practice predatory pricing do not have market power, that the analyzed markets are effectively competitive and/or that there are no barriers to enter the market. Indeed, CADE has been considering that all of these factors remove the rationality or hinder the adoption of a predatory pricing policy aiming at eliminating competitors. This has also been the case for PA 08012.000668/1998-06 (SESI); PA 08012.003578/200-18 (Mercedes-Benz do Brasil SA and others); PA 08012.006358/1997-42 (Labnew Indústria e Comércio); PA 08012.006722/1999-45 (Shell Brasil SA); PA 08012.009943/2005-93 (ThyssenKrupp Elevadores SA); PA 08000.004490/1997-11 (ThyssenKrupp Elevadores SA); PA 08000.004490/1997-11 (Companhia União de Refinadores de Açúcar e Café); among others."

A relevant case under analysis by CADE - and which may become the leading one - concerns a complaint for discriminatory treatment on the supply of natural gas from Petrobras to White Martins, in the context of a joint venture created by the two groups to commercialize liquefied gas. Although no final decision has been taken on the investigation, CADE has determined, in parallel and for the first time in its history, the review of the joint venture formation submitted and approved by the authority conditionally in 2006, in addition to adopting the first Precautionary Measure under the new law, determining Petrobras and White Martins to suspend their current discriminatory arrangements.[32]

e. Resale price maintenance

In antitrust theory, censured practices of resale price maintenance include fixed and minimum prices imposed to distributors. In principle, suggested or maximum prices are not to be condemned.

Brazilian case law has recently evolved on the topic — "Case SKF"[33] and "Case Shell"[34] — currently presuming that fixing resale price is an unlawful practice. Under this scenario, the burden of proof is shifted, being upon the investigated party to prove the absence of anticompetitive effects and the generation of efficiencies as a result of such practice. Since the matter has not yet been consolidated by CADE due to the fact that some Commissioners diverged on the possibility of a presumption reversal when the defendant lacks market power, an investigation might be initiated even in those territories where the distributors' market share is small. Risks tend to be higher in territories where such shares exceed 20%.

f and g. Tying and Bundling

Practices of tying and bundling are driven by the attempt of a dominant company to leverage its market power into related markets. Along with predatory pricing, these are perhaps the most controversial areas in antitrust law.

In Brazil, these situations are challenged more generically by the authority as tying arrangements, described under Article 36, Paragraph 3, item XVIII, of the Brazilian Antitrust Law. Tying arrangements can take place when an agent conditions the sale of a product or service, understood as principal, to the sale of another product or service, understood as tied or linked product or service.

The first relevant case decided by CADE referred to the complaint filed against Xerox do Brasil Ltda.[35] CADE concluded that Xerox held a dominant position within the lease and

[32] Administrative Process No. 08012.011881/2007-41. Precautionary Measure ruled on by CADE in 2015.

[33] Administrative Process No.08012.001271/2001-44, ruled on by CADE in 2013. The Agency ruled for presumption of unlawfulness and at least one of its members (Commissioner Marcos Paulo Veríssimo) analyzed the effects. CADE's full bench agreed to enter judgment against the company; however, it disagreed on the motive. The main point of disagreement: the need to verify the company's market power to confirm its conduct.

34 Administrative Process No. 08012.011042/2005-61, ruled on by CADE in 2014. CADE's full bench found the conduct was presumably unlawful. CADE's full bench agreed to enter judgment against the company; however, it disagreed on the need to verify the company's market power to confirm the negative effects.

[35] Administrative Process No.23/1991, ruled on by CADE in 1993.

technical assistance service markets, and certain contractual clauses imposed on its clients prevented them from obtaining consumer material manufactured by third parties, inhibiting competition and creating difficulties for such third parties to operate in the market. Over the years, several other complaints lodged to CADE by interested or aggrieved parties were ultimately dismissed[36] and thus the guidance provided by precedents on this matter are very poor.

Fidelity Rebates

Another issue that often raises great concern refers to fidelity rebates, which are commercial benefits offered by the companies to boost consumption of their products or services to the detriment of their competitors. Fidelity to obtain rebates encourages a situation of de facto exclusivity or something very similar, prone to produce effects of market foreclosure, raise costs of competing brands and pose difficulties to competitors.

The leading case decided by CADE relates to the Brazilian giant brewing company AmBev and its fidelity program with points of sale, named "Tô Contigo!"37 The program offered rewards and discounts to points of sale in exchange for exclusivity or reduction of the sales of competitor's products. CADE's Tribunal concluded that the program would negatively impact competition and, therefore, should be terminated, imposing a fine of BRL 353 million.

Also on the topic of abuse of dominant position involving fidelity rebates, it is worth mentioning the investigation recently launched against BR Distribuidora, which granted benefits allegedly harmful to competition, to fuel stations of Rede Gasol.[38] Other less relevant cases were analyzed by CADE and ultimately shelved for various reasons.[39]

h. Exclusive Dealing

Exclusive dealings refer to arrangements that require a buyer to purchase all of its requirements or a large extent thereof from one seller, or a supplier to sell all of its products or services or a large extent thereof to the buyer.

The practice is covered by Brazil's general unilateral conduct rules and policies. The Brazilian Antitrust Law and CADE's regulation do not establish specific rules or standards governing legal assessment of exclusive dealing arrangements.

[36] Administrative Process No.08012.003578/00-18; Administrative Process No. 08012.009373/98-23; Administrative Process No. 08012.008659/1998-09; Preliminary Investigation 08012.001115/2007-79; Preliminary Investigation No. 08012.008340/2002-21; Preliminary Investigation No. 08012.004118/2002-50; Preliminary Investigation No. 08012.002500/2000-67, ruled on by CADE in 2005, 1999, 2007, 2008, 2003, 2005 and 2010, respectively.

[37] Administrative Process No. 08012.003805/2004-10, ruled on by CADE in 2009.

[38] Administrative Process No. 08012.005799/2003-54. The case has not yet been ruled and is still under CADE's review.

[39] Administrative Process No. 08700.003456/2003-05, ruled on by CADE in 2004. The allegations were that defendant raised the sale price of its products − vinyl flooring Paviflex − because of a reduction in rebates previously granted. The reason for such reduction was that the sale agents, which had not executed an exclusivity agreement, decided to acquire products from more than one seller. The case was closed on the grounds of statutory limitation.

The Brazilian Antitrust Law covers not only formal de jure but also de facto exclusivity. Therefore, exclusive dealing obligations do not have to be formalized (i.e., in a written agreement) to be affected by unilateral conduct rules.

Market foreclosure is normally the main concern to CADE in assessing exclusive dealing by a dominant firm, in the way that it may impede or make more difficult for established agents to compete in the relevant market (by avoiding their access to upstream suppliers or downstream distribution channels/main costumers), and may increase barriers to entry for new competitors (by imposing them the need to enter in both downstream and upstream markets to be able to effectively compete).

CADE's assessment of market foreclosure is usually based on broad qualitative analysis of the specific circumstance of the case. Although in some cases CADE has attempted to calculate the level of market foreclosure to better assess the anticompetitive effects of certain exclusivity arrangements, it has not developed so far clear legal tests and standards to define when they should be considered harmful to competition. In Administrative Process No. 08012.003921/2005-10, settled on July 4, 2012, the authorities calculated the level of foreclosure for different geographic relevant markets. Both Philip Morris Brasil and Souza Cruz agreed with CADE to end exclusivity arrangements with their dealers that prohibited the display of their competitors' products and in-store advertisements, putting an end to a pending antitrust investigation. In Administrative Process No. 53500.000502/2001, ruled on by CADE in 2008, there was also an attempt to measure the degree of market foreclosure in different municipal markets, but CADE expressly avoided defining a level of foreclosure below which exclusive dealing by a dominant firm would not violate the Brazilian Antitrust Law. CADE's Tribunal decided to dismiss the case, due to the lack of evidence to confirm the potential market foreclosing arising from the wholesalers' retention.

Firms may always claim reasons and defenses, including efficiencies, intended to outweigh the possible anticompetitive effects of the conduct. CADE has explicitly mentioned possible efficiencies in different cases involving exclusive dealings, such as relationship specific investments, facilitating innovation and cost reduction.[40] However, similarly to the assessment of market foreclosure, CADE usually conducts the balancing of the negative effects against the potential benefits of exclusive dealing based on qualitative arguments. More detailed quantitative analysis and definition of clear legal standards are not common.

i. Refusal-to-deal

Refusal-to-deal is "[t]o refuse the sale of goods or provision of services for payment terms within normal business practice and custom"[41].

[40] For example, in *Administrative Process No. 08012.007285/1999-78, ruled by CADE in 2004*, Reporting Commissioner Thompson Almeida Andrade expressly recognized that the exclusivity clause foreseen in an investment agreement entered into by Mineração Trindade (Samitri) and Companhia Vale do Rio Doce (CVRD) was justified as to protect mutual investments made by Samitri and CVRD in specific assets related to transport of iron ore. Furthermore, in *Administrative Process No. 08012.002841/2001-13, ruled on by CADE in 2005,* Reporting Commissioner Roberto Pfeiffer acknowledged that "*exclusivity dealing is justifiable while protecting investments against undue appropriation by third parties [without proper compensation for the use]–known as the free riding effect" (vote, item* 33).

[41] According to the general definition provided in Article 36, Paragraph 3, item XI, of the Brazilian Antitrust Law.

Brazil's general unilateral conduct rules and policies are applicable to refusal-to-deal, which includes the practices involving termination of contractual relationship (with customers, intermediaries or competitors). The Brazilian Antitrust Law and CADE's regulation do not establish specific rules or standards governing legal assessment of such practices.

The general provision regarding refusal-to-deal within normal business practices does not impose an a priori duty to contract in general. When addressing cases involving refusals-to-deal by a dominant player or even a monopolist, CADE's case law has adopted the so-called 'essential facility' doctrine as a parameter. In the case of an essential facility, CADE has required four elements to establish a refusal-to-deal claim (i) the existence of an essential input held by a monopolist, (ii) economic or legal infeasibility of its duplication, (iii) the refusal to grant access to the input to a competitor in the target-market, and (iv) the practical ability of the monopolist providing the access to the infrastructure without compromising the previously granted access.[42] CADE has imposed fines and duties to contract upon the holders of intellectual property[43] who have been found to violate the antitrust laws.

For instance, in Administrative Process No. 08012.000172/1998-42, ruled on in 2003, CADE imposed fines after having found that Matec had monopoly power because it used its exclusive patents, technical data, industrial secrets, manufacturing technology, and system maintenance to leverage and expand its monopoly power into a secondary market of services.[44] This was possible precisely because some parts were available only through Matec and Matec denied access to such inputs to its competitors in the services market.

Possible defenses in refusal-to-deal cases are (i) the existence of alternatives sources of supply for the product or service whose essentiality is in question, (ii) the economic and legal possibility of its duplication, and (iii) the impossibility of the dominant player or monopolist providing the access to the infrastructure without compromising the previously granted access.

j. Settlements

Introduction

The Brazilian Antitrust Law (Law 12,529/11, Article 85) and CADE's regulation (Resolution No. 1/2012, Articles 179 to 196) allow legal entities or natural persons to enter into Cease and Desist Agreements (hereinafter "TCCs" or "settlements") with CADE regarding any type of antitrust offense. This subsection focuses on settlements in the context of unilateral conduct investigations.

42. The major precedents in which CADE imposed obligations of contract based on the essential facility doctrine are: *Administrative Process No. 53500.000359/1999, Administrative Process No. 08700.001291/2003-29, Administrative Process No. 08012.007443/1999-17, Administrative Process No. 08012.001315/2007-21, ruled on by CADE in 2001, 2004, 2005 and 2009, respectively.*

43. Administrative Process No. 08012.003048/2001-31, ruled on by CADE in 2006.

44. "In addition, by holding monopoly power over parts, the Defendant leverages and enhances its power in the secondary market for services (because certain parts are available only through Matec). Two facts confirm this: (a) the near complete absence of intra-brand competition (the Defendant would be the sole exception); (b) the difference in prices charged by Power-Tech and Defendant, up to 69%, noted in the report of Secretariat of Economic Law and admitted indirectly by the Defendant (item 3.33 of the most recent brief), were attributed to the opportunistic behavior of Defendant. Price increases and exclusion from competition are indications of market power—monopolistic—of Matec." (Reporting Commissioner Celso Campilongo'

There are clear incentives for CADE and the defendants to settle. Parties save time and the settlements have, in most cases, the benefit of adjusting specific obligations in a better manner than through an imposition by CADE. The fact that CADE will closely monitor the fulfillment of the obligations during a few years allows fine-tuning of the commitments if necessary. A relevant aspect for applicants is that settlements related to unilateral conducts have not historically involved particularly high pecuniary contributions. The settlement constitutes a judicially executable instrument.

Since 2012, CADE signed at least 161 TCCs, as depicted in the table below:

Year	Cartel	Uniform conduct (influence)	Unilateral conduct, dominance and exclusivity (*unimilitância)*
2012	3	0	2
2013	6	6	43
2014	24	10	5
2015	44	14	4

The following topics provide a few comments on (i) legal and practical issues concerning the proposal of a settlement; (ii) the negotiation process; (iii) the main obligations; and (iv) issues of interest.

Legal and practical issues concerning the proposal of a settlement

(i) ***Who can propose a settlement and when?*** A defendant may file – only once – a proposal at any time before the end of the fact-finding phase of the proceeding. The GS can also initiate negotiations. In this case, if the settlement is not successful, the investigated party may file a proposal later on.

(ii) ***To whom must the proposal be directed?*** Depending on the stage of the ongoing investigation, the proposal must be directed to the GS or to the Reporting Commissioner.[45]

(iii) ***Is the proposal confidential?*** Yes – it may be confidential.

(iv) ***What is the minimum mandatory content of the settlement proposal?*** The TCC will contain a commitment to stop engaging in the investigated activities as well as

[45] The investigations carried out by CADE follow a specific formal procedure. According to the Brazilian Antitrust Law, the GS is in charge of the investigation and may conduct Preliminary Investigations. After the conclusion of Preliminary Investigations, the GS may order the opening of an Administrative Process or its dismissal (Article 67). Once an Administrative Process is initiated, all defendants shall be summoned to present their individual defense and specify the evidence to be produced. After the conclusion of the fact finding phase, the GS shall notify the defendants to present new arguments (Article 73). Subsequently, the GS issues a reasoned report recommending either the dismissal of the Administrative Process or reaffirming it believes a violation existed (Article 74). The case files, along with the opinion issued by the GS, are then sent to CADE's Tribunal. Next, the Tribunal, by means of a Reporting Commissioner, (i) may require an opinion of the Attorney General's Office (Article 75); and (ii) may determine new finding of facts (Article 76). Upon conclusion of discovery, defendants will be notified to present final arguments, after which the case will be decided (Articles 76 and 77). In this context, the draft TCC needs to be filed either to the GS or to the Tribunal's Reporting Commissioner, depending on the stage of the ongoing investigation.

other applicable negotiated obligations, such as detailed sanctions in case of non-compliance.

(v) ***Is it necessary to offer a pecuniary contribution to authorities?*** In cases involving unilateral conducts, it is not mandatory to offer a pecuniary contribution to the Fund of Diffuse Rights.

(vi) ***Can two or more parties submit a joint TCC?*** No – each investigated party must submit its own draft.

(vii) ***Can third parties interfere in the negotiation?*** If the proposal is made public, third parties can oppose/intervene in the negotiations, along with other common public figures that intervene in judicial procedures.

(viii) ***What if CADE rejects the proposal?*** CADE may reject a proposal if an agreement is not reached regarding the settlement terms. The rejection does not result in an assumption of guilt by the investigated entity.

(ix) ***When is the investigation suspended and closed due to the settlement?*** The filing of a proposal does not suspend the ongoing investigation. Signature suspends the investigation while the agreement is being performed. The TCC only ends the investigation regarding the signing party once the agreement is fully implemented and CADE understands that the obligations were adequately fulfilled.

The negotiation process

CADE's Resolution No. 1/2012 details the steps to be taken regarding the negotiations of settlements.

Once a TCC Proposal is filed, the GS or the Reporting Commissioner have to appoint at least three CADE staff members to be part of an independent Negotiating Commission. It is subordinate to its appointer's review and issues only non-binding decisions.[46] The Tribunal has to approve or reject the final draft (without any modifications) during a public session.

The specific negotiating procedure depends on the stage of the investigation in the moment of filing. If the case is still under review by the GS, this entity will define the rhythm of

[46] In fact, the Commission works as a buffer and this distance helps to relieve the pressure over the Commissioners and the General-Superintendent. The Commission plays a key role on reaching common grounds between the authorities' and the parties' expectations on the negotiation. It also gives the government decision-maker (General-Superintendent or Reporting Commissioner) the necessary distance from the negotiation table, since depending upon the time that the negotiation period lasts, all players on the table can develop an unwelcomed closeness to each other or an eagerness to reach the final terms of the agreement. Therefore, the interaction between the Negotiation Commission and the General-Superintendent and/or the Reporting Commissioner helps the authorities' requirements to be fulfilled, with the necessary distance from the applicants of the TCC. From the company's or individuals' perspective, sometimes the lack of contact with the decision-making authority slows down the speed of negotiation, each and every provision, wording, and language of the TCC must be validated. In such context, developing a good working relationship with the Commission is a key factor for reaching proper results in a timely manner.

the negotiations. In this situation, the GS establishes the period of negotiation (there is no preset period in CADE's Resolution No. 1/2012). The period may be suspended if further measures are needed. By the end of the period, the applicant must present a final draft within 10 days. Failure to comply results in the rejection of the proposal and the applicant will not be allowed to submit a new proposal. The GS then examines the final draft and issues an opinion for acceptance or rejection of the proposal, which is submitted to the Tribunal for a final decision.

If the case is already being analyzed by a Reporting Commissioner, CADE's Resolution No. 1/2012 sets a cap for the time period: 30 days, extendable for another 30 days. If further measures are needed, however, the period can be suspended. It is very common for several suspensions to occur, and some negotiations may last years. At the end such period, the applicant presents a final draft within 10 days. The Reporting Commissioner then submits the draft to the Tribunal in order for it to make a final decision concerning the execution of the agreement.

What are the main obligations/subjects of a settlement?

(i) **Recitals:** The Recitals set the context and perspective in which the negotiation occurred. Given that the agents that monitor the fulfillment of the obligations do not necessarily participate in the negotiation, conflicts or doubts may arise during execution and monitoring. Recitals assure the parties that future interpretation of the agreement will not deviate from its original goals and context.

(ii) **Object**: The object may be narrower than the object of the initial investigation and may include incidental proceedings.[47]

(iii) **Absence of CADE judgment regarding the merits:** This is a standard – but key – clause in unilateral conduct settlements. Having the assurance that engaging into the TCC will not lead to conclusions regarding the conducts is very important for the parties, especially considering future possible civil and criminal actions and cases involving several defendants, in which the investigation will go on against the ones not covered by the settlement.[48]

(iv) **Admission of facts:** The filing of a settlement proposal does not implicate in an admission of the facts nor of the wrongfulness of the investigated conduct. In cartel investigations, in contrast, there is mandatory admission of the facts involved.[49]

[47] Incidental proceedings related to the main procedure can also be a part of the agreement. For example, when AmBev engaged into an agreement with CADE regarding the introduction of proprietary non-interchangeable returnable 630ml beer bottles in the market – being accused of increasing rivals' costs, given that the market operated by means of returnable and interchangeable 600ml beer bottles – , the TCC signed suspended not only the administrative procedure but also the voluntary appeal related to it *(*Administrative Process No. 08012.002474/2008-24, settled in 2010).

[48] See TCCs executed with CADE in Administrative Process No. 08012.002474/2008-24 (2010), clause 3.1, and Administrative Process No. 08012.003921/2005-10 (2012), clause 3.1.

[49] For example, see Administrative Process No. 08012.008506/1998-90 (2010), clause 1.1.

(v) **Provisions:** Some mandatory provisions include (i) sanctions for non-compliance in full or in part; and (ii) a monetary contribution to the Fund for Diffuse Rights, whenever applicable.[50] Several other non-mandatory obligations are usually included, such as publicity (publication of the agreement in newspapers and/or the applicant's website), implementation of a compliance program, collaboration with authorities, an open-door policy towards authorities, and a commitment to abstain from judicially challenging search and seizures operations.[51] The TCC must also contain the party's commitment to suspend the investigated activities, as well as other applicable obligations. The duration of such clauses may be undetermined, as the authorities expect that the signatory party of a TCC shall never reengage on the investigated activities.[52]

(vi) **Financial contribution:** The vast majority of TCCs regarding unilateral conducts establish a monetary contribution to the Fund for Diffuse Rights[53]-[54].

(vii) **Sanctions:** The TCC can establish different sanctions and fines depending on the relevance of the specific non-complied obligation.[55] If the TCC is considered null, the administrative process will resume its normal course.[56]

[50] As previously mentioned, TCCs in cartel investigations will necessarily involve the payment of a monetary contribution.

[51] A few examples of positive obligations can be found in the TCCs executed in Administrative Process No. 08012.003921/2005-10 (2012), clauses 4.4.2 and 4.5.1, Administrative Process No. 08012.007199/2011-31, 08012.004551/2005-38 and 08012.004552/2005-82 (2012), clause 8 (i) and (ii).

[52] Some obligations translate into negative provisions to refrain from performing an act or a few acts. For example, see Administrative Process No. 08012.003921/2005-10 (2012), clause 4.1.1, and Administrative Process No. 08012.008506/1998-90 (2010), clause 3.1.

[53] Authorities usually set a starting value for negotiation based upon the expected fine that would be applicable if the case was tried and the defendant convicted. Fines applicable as determined by legally-defined range from 0,1% to 20% over the gross sales of the company, group or conglomerate in the last fiscal year before the beginning of the administrative proceeding. The gross sales are updated to current present values by means of an inflation index. Fines cannot be less that the economic advantage obtained from the alleged violation. It is very important to limit the gross sale market to the field of activity in which the violation occurred. This is especially important for conglomerates. **Two issues are key for the value negotiation**: the calculation base and the existence of mitigating circumstances. Some mitigating circumstances can be: (i) how early the defendant requested the TCC; (ii) good faith; (iii) how much the investments of complying with the TCC will cost, (iv) other circumstances that are related specific to the case. For each of those mitigating circumstances a percentage reduction will be applied to the initial base value.

[54] It is not so common to have more than one defendant of different economic groups in unilateral conduct cases, but it is worth mentioning that the monetary contribution might be reduced according to the order in which the TCC applicant came forward and its degree of willing to collaborate with CADE on the investigation. The rule is that, if the case is yet under analysis by the GS, (a) first applicant will receive a discount that may amount from 30% to 50%; (b) second applicant, 25% to 40%; (c) third and other applicants, up to 25%. CADE's Resolution No. 1/2012 also provides that if the investigations are concluded by the GS and the case is thus under analysis by a Reporting Commissioner of the Tribunal, the maximum amount of reduction in the monetary contribution is of 15%.

[55] See examples of such clauses in the TCCs related to the Administrative Process No. 08012.008506/1998-90 (2010), clauses 7.1 and 7.2, and 08012.007199/2011-31, 08012.004551/2005-38 and 08012.004552/2005-82 (2012), clause 9.

[56] See an example of this clause in the TCC related to the Administrative Process No. 08012.003921/2005-10 (2012), clauses 7.8 and 7.9.

Issues of interest

(i) **Confidentiality:** In several cases the core aspects of the agreement are kept confidential. This makes it difficult for interested third parties to monitor the fulfillment of the agreement.

(ii) **Monitoring:** The CADE General Attorney is responsible for monitoring the TCCs, but the GS can also issue opinions on the subject. If the signatory party fails to comply with any provision of the TCC, a Notice of Violation can be issued. This causes the initiation of a new and independent procedure, subject to due process. CADE has recently been accepting that independent auditors verify and issue non-binding opinions about execution.

(II) COLLUSIVE CONDUCTS

a. Introduction

Here we do not intend to give the readers a general idea of how the cases are taken care of in Brazil. Nor we want to explain the way lawyers do their job. Due to space restrains, we understood that examples of each type of conduct would better explain it, although the antitrust cases in Brazil seldom are limited to one conduct alone. We must also understand that any report on antitrust cases in Brazil must take into account the Judiciary. In fact, the system is administrative but any party can go to Court against the antitrust authority and start the case again, with indefinite time frame (see chapter 1, mainly subsection "B" above).

b. Horizontal price fixing

Fixing prices among competitors is one of the most common strategies used in cartel practices, being present in about half of the cases convicted by CADE since the Brazilian Antitrust Law came into force in 2012.

The intolerance of the authority regarding this practice has been made clear in the so called "solar panels case",[57] in which CADE recognized that the companies entered into agreements regarding prices and commercial conditions that resulted in the rigging of two public bids. This conviction caused some stir in the legal community, as it was based entirely on indirect evidence. Regarding this issue, CADE remarked that this has been internationally accepted and that cartels are secret arrangements, which increases the difficulty of obtaining direct proof.

Nevertheless, convictions of cartels of gas stations have become almost traditional and in these cases there has been always direct evidence, usually tapped phone calls;[58] in other cases in the same market, search and seizure raids uncover pricing schemes. It is interesting to remark

[57] Administrative Process No. 08012.001273/2010-24, ruled on by CADE in 2015.

[58] Administrative Process No. 08012.008847/2006-17, ruled on by CADE in 2015.

that in this market prices are mandatorily made public in billboards in every gas station; so, equal prices do not mean necessarily that there is a cartel.

c. Horizontal agreements to allocate customers or territories

Perhaps one of the most famous cartel investigations in recent years, the case involving cement companies comprised agreements among competitors to fix prices and allocate the market.[59] According to CADE, the involved companies (which are large and famous industries in Brazil) acted in a concerted manner by dividing the cement and concrete market by clients and regions and assigning them to members of the cartel. The notoriety of the case is also due to the record fine applied by CADE, roughly BRL 3.1 billion (which is under judicial discussion) and other imposed penalties, such as the never-seen determination to "divest", meaning the order to sell certain factories and prohibition of entering into mergers and transactions in the concrete market. Historically, there were rumors and adamant complaints against the cement industry but this is the first time an investigation goes all the way. The severe conduct adopted by CADE could be explained by a series of factors, such as the fact that the authority saw the case as a clear example of hardcore cartel (the most serious conduct under the Brazilian law), the time length of the conduct, the size of the companies and the effects the collusion had on the market and on consumers (the whole construction chain).

The "gases case"[60] was, in its time, also a landmark decision, although the case is trapped in the Judiciary. Before the cement case, it was the highest fine ever (roughly BRL 2 billion).

d. Agreements not to compete

There have been no remarkable administrative proceedings regarding this specific conduct alone, as this concept manifests itself mainly in merger control cases as non-compete clauses (which are allowed under certain standards established by CADE).

This conduct is almost always mentioned by CADE in bid rigging cases (although not by itself), reflecting OECD's guidelines regarding bid proceedings that mention cover proposals, decisions by the proponents as to who must win, bid suppression and other conducts as the main strategies adopted by cartels in public procurements. A very recent example is the administrative proceeding involving pharmaceutical companies which, according to CADE's decision, used the said strategies to fraud the result of public bid proceedings.[61]

Also, there has been a number of recent cases under investigation by the GS regarding auto parts manufacturers, in which the main focus is an alleged "gentlemen's agreement", by which the companies agreed not interfere with each other's businesses. Often the auto parts manufacturers understand that they are supposed to sell to the same car plants that are their customers in their countries of origin, even because there is cultural identity and world models of cars. It is important to mention that said proceedings are still under investigation and there has been no conviction by CADE regarding this matter.

[59] Administrative Process No. 08012.011142/2006-79, ruled on by CADE in 2014.

[60] Administrative Process No. 08012.009888/2003-70, ruled on by CADE in 2010.

[61] Administrative Process No. 08012.008821/2008-22, ruled on by CADE in 2016.

e. Horizontal boycotts

The most famous case in horizontal boycotts is the so called "generics case",[62] in which 20 pharmaceutical industries were accused of having colluded to boycott distributors that also distributed or would distribute generic drugs, which would soon enter the market. In fact there was a meeting which the authorities found to be a violation of the law. The case started in 1999, CADE convicted the companies in 2005, all of them went to Court, the first instance decision was issued in 2012 – based mainly on the lack of evidence – and the Appellate Court confirmed it. A second appeal, now to the highest Court, is still waiting for admittance; it may be accepted or not.

There has also been a rather recent case involving Law bookstores in Brasília.[63] Despite the alleged conduct having happened in 2000, CADE only issued a decision in 2013. In this case, the Brazilian Bar Association of Brasília (OAB/DF) decided to open a new Law bookstore given the high prices charged by other stores. CADE understood that the following acts of said stores jointly marked the horizontal boycott: (i) petitioning before the antitrust authority claiming OAB/DF was selling books under predatory pricing (the proceeding was shelved); (ii) agreement to pressure book editors to lower or withdraw discounts offered to OAB/DF and (iii) meeting with OAB/DF to impose commercial conditions to its bookstore. Class associations also supported the boycott. Interesting to mention that, given the small status of the defendants and the difficulty in obtaining accurate information regarding revenues, CADE imposed a fine based on fixed values.

f. Joint ventures and other competitive collaborations

Article 90, item III, of the Brazilian Antitrust Lawstates that, the other requirements established in the law being complied with, when two or more companies enter into association, consortium or joint venture agreements, they must present the transaction to CADE in advance for approval. Consortium agreements to participate in calls for bids made directly or indirectly by the government and agreements resulting from them are not included among the agreements that must be submitted for approval.

The definition of an association agreement for CADE was established in Resolution No. 10/2014 (see chapter 2 above).

Contractual terms typical of joint venture agreements that can result in restrictions on competition are: (i) shared management of the company formed; (ii) exclusivity; (iii) control of the assets belonging to the parties and to the joint venture; (iv) rights over intellectual property resulting from the efforts of the joint venture; and (v) expiration of the contractual relationship. We give examples of some of the situations ruled on by CADE below.

Varig and TAM united in a joint venture agreement[64] aiming to create an operating company for an e-commerce website called "PLATA." This website was intended to sell services connected with tourism over the Internet. Examples of the services include: distribution of airline

[62] Administrative Process No. 08012.009088/1999-48, ruled on by CADE in 2005.

[63] Administrative Process No. 08012.012420/1999-61, ruled on by CADE in 2013.

[64] Concentration Act No. 08012.002335/2000-43, ruled on by CADE in 2001.

tickets, car rental, hotel reservations and the sale of package tours. According to information provided by the Parties, the company to be formed would be independent. It would also be open so that other domestic and international airlines, hotel chains, car rental companies and other companies focused on travel and tourism could participate in it and it would operate in a neutral way in relation to the other companies intending to participate in the website. The transaction was approved with restrictions that prohibited the company being created from having managers, officers or directors that were the same as those of the parties. This was done to avoid the communication of operating data and information between competing companies.[65]

Intellectual property rights in a joint venture also result in sensitive issues in regard to antitrust law. This is so essentially in regard to rights to intellectual property prior to the joint venture and to innovations created as a result of the joint venture and from the end of the contractual relationship among the parties. Clauses that limit the right to use this property in terms of time or scope can illuminate the type of cooperative structure existing among the companies since greater access to the intellectual property of one of the participants certainly indicates greater cooperation among them. This decreases their ability to compete while the joint venture is in effect.

The end of the joint venture itself can cause concerns from a competition perspective.[66] In regard to the duration of a joint venture, one of the most important cases concerns cooperation between Companhia e Cervejaria Brahma and Miller Brewing Company.[67] This was an agreement involving the creation of a company for the purpose of, among other things: licensing production, importing, distribution and sale; technology transfer; and the production of Miller beers in Brazil. The intended duration of the joint venture was approximately 15 years. The greatest concern for CADE was that, while an association between two major companies, one domestic and the other international, to sell a new brand on the domestic market would, on the one hand, lead to efficiencies and technology transfer, on the other it would make it impossible for these independent beer brands to compete for an unknown and possibly quite long time. CADE therefore approved the transaction with restrictions that prohibited the parties from suggesting sales prices for their merchandise and, principally, reducing the effective term of the agreements establishing the joint venture to just 24 months.

g. Trade Association

Introduction

Trade Associations are not illegal under Brazilian law. On the contrary, the Brazilian Federal Constitution provides for the right of association[68] and puts it in the privileged list of

[65] In Concentration Act No. 08012.005832/2000-01, ruled on by CADE in 2005, the association model was similar, with the goal of creating a website to sell goods related to the mining and metallurgy industries, as well as to provide related services. The restriction for approval was milder than in the PLATA case, to the effect that the joint venture shareholders must hire an independent company to publicly attest annually to the security of the e-commerce system that was the purpose of the association.

[66] See, for example, Concentration Act No. 08012.000787/2005-03. The transaction was approved without restrictions in 2005, but the mere fact that there was a dissolution of the joint venture led the parties to submit the transaction to CADE.

[67] Concentration Act No. 58/1995, ruled on by CADE in 1997.

[68] Article 5, item XVII.

unnegotiable rights. It means that nobody, neither an authority, should limit the legitimate exercise of such right, even if the owner of the right is willing to accept such restriction.

The limits of the right of association are the other rights that the Brazilian Federal Constitution provides, such as the right of no discrimination[69] would limit the possibility of a trade association to impose unfair entry rules, for instance. Along the same logic, the Brazilian Federal Constitution also provides for the right of free competition as one of the principles that should guide our market economy[70].

Therefore, trade associations are protected under the Brazilian Federal Constitution, to the extent that they are not misused to achieve anticompetitive goals.

From a competition standpoint, trade associations raise various points of concern. It means a concrete possibility of meetings among competitors, reduction of market uncertainty and other negative outcomes. However, none of the activities developed through a trade association should be considered per se illegal.

The trade association may be incorporated in many different legal formats. It may be a civil organization, an union of employers, a non-profit entity or even a de facto legal entity. For the enforcement of the Brazilian Antitrust Law, it is not relevant the type of legal entity, but the conduct that such entity is performing and whether it is legal or illegal from a competition law perspective.

Possible violations

A trade association may promote several different kinds of violations to the Brazilian Antitrust Law, such as: (i) exchange of sensitive information among competitors; (ii) hardcore cartels; (iii) market foreclosure, and (iv) bid rigging.

In virtually all cartel cases ruled on by CADE, there was at least one trade association accused of being part of the illegal arrangement.

However, it seems very important to bear in mind that trade associations are not players in the market. They are not competitors, clients or suppliers. Therefore, the typical conduct of a trade association would be to facilitate the violation by its members.

Penalties

The Brazilian Antitrust Law provides that trade associations would be subject to fines that range between BRL 50,000 and BRL 2,000,000,000.

Case law

In the 1990's, CADE ruled on several cases involving trade association and most of them referred to the issuance of a standard and even non-binding fee value of certain types of services, mainly medical services.[71] The trade associations were fined and obliged to avoid

[69] Article 5, caput.

[70] Article 170, item IV.

[71] See Administrative Process No. 08000.008994/1994-96 and No. 08000.009797/1996-26, ruled on by CADE in 1998 and 2005, respectively.

adopting such parameter for the fees that its member should charge their clients. Some of these cases were ruled on in 2014 and the total of fines applied by CADE reach to BRL 2,4 million to the trade associations.[72]

The toy industry association (Abrinq) was convicted by attempting to form a cartel in the toy sector.[73] The decision was based in a wiretapping file of a meeting in which the chairman of such association was allegedly asking for competitors to openly discuss prices and quotas, as well as some possible foreclosure strategies.

However, not always trade associations are convicted. For instance, the solar energy panels' case (see subsection "B" above), CADE convicted the companies, but concluded that the trade association was not part of any illegal arrangement.

Best practices

In view of the important exposure, several trade associations are adopting some actions to avoid any violation to the competition law.

Among the various actions, the adoption of a clear and effective compliance program is the first step. The programs held by members should not enough. Ideally, the trade association must have and enforce its own compliance program (see chapter 1 above).

It is important to pay special attention for flow of information within the trade association. It is very common that trade association will lead some actions on behalf of its member and for that purpose, it is necessary to gather some information. For instance, in international trade measures (e.g. antidumping proceedings), it is required to submit a detailed information about cost of production. Preferably, such information should be handled by a third independent part.

It is also recommended that the trade associations have a defined agenda previously of each meeting and a minute of the meeting after its end. This is important to create a "good file" and to try to avoid misinterpretation of the activities that happen at the trade association. The presence of a compliance officer from the trade association or an external advisor is also positive.

h. Bid rigging

In 2007, as part of the Brazilian Anti-Cartel Enforcement Program, a new unit responsible for investigating bid rigging cases was created. It aimed to increase public awareness and strengthen cooperation with governmental authorities from Federal and State Prosecutors' Offices, Audit Courts and the Federal Police.

At that time, CADE had sanctioned only two bid rigging cases. Since then, it sanctioned more than eleven, which are summarized in the table below:

[72] Please refer to Administrative Process No. 08012.005374/2002-64, No. 08012.008477/2004-48, No. 08012.004020/2004-64, No. 08012.005135/2005-57, No. 08012.006552/2005-17, No. 08012.007833/2006-78 and No. 08012.002866/2011-99, all ruled on by CADE in 2014.

[73] Please refer to Administrative Process No. 08012.009462/2006-69, ruled on by CADE in 2015.

Case	Commencement of the investigation-Adjudication	Fines (USD74 million)	Prohibition to participate in public bids
Repair services in oil rig75	1998-2001	Amounts were not disclosed (1% of turnover in 1997)	
Bus lines-State of Rio de Janeiro76	2001-2005	4,2	
Security services-State of Rio Grande do Sul77	2003-2007	10,4	X
Air freight78	2007-2014	21,1	
Garbage collection services-State of Rio Grande do Sul79	2009-2014	0,29	
Painting and plumbing materials-City of Lages80	2012-2014	0,19	X
Orthopedic orthotics and prosthesis products-State of São Paulo81	2011-2014	0,5	X
Metal detector security doors82	2011-2014	3,2	X
Traffic radar-City of Jau83	2012-2015	3,7	

[74] Exchange rate of USD 1.000 USD = BRL 3.94 on February 10, 2016.

[75] Administrative Process No. 08012.009118/1998-26.

[76] Administrative Process No. 08012.006989/1997-43.

[77] Administrative Process No. 08012.001826/2003-10.

[78] Administrative Process No. 08012.010362/2007-66.

[79] Administrative Process No. 08012.011853/2008-13.

[80] Administrative Process No. 08012.006199/2009-07.

[81] Administrative Process No. 08012.008507/2004-16.

[82] Administrative Process No. 08012.009611/2008-51.

[83] Administrative Process No 08012.008184/2011-90.

Case	Commencement of the investigation-Adjudication	Fines (USD74 million)	Prohibition to participate in public bids
Sanitation- São Paulo84	2010-2015	4,9	
Solar heaters-State of São Paulo85	2012-2015	1,6	
Components for HIV drugs86	2008-2016	1,5	X
Public hospital laundry services-State of Rio de Janeiro87	2008-2016	6,9	X (only the leader of the cartel)

The review of these cases allows us to discuss relevant topics regarding bid rigging persecution in Brazil.

Commencement of the investigations

Most of the cases were commenced due to cooperation with Prosecutors' Offices and the Federal Police. They refer mostly to local schemes (in contrast to national ones) and rely on the use of borrowed evidence. Only one case was triggered by a leniency application.

Penalties

The level of fines imposed in bid rigging cases is the same applied in other cartels: the average percentage applied is 15% of the annual gross sales in the business sector involved in the practice in the year before the opening of the administrative process. CADE usually imposes ancillary penalties, such as the publication of the decision in newspapers.

At this point, it is worth noting that CADE has been increasingly imposing the penalty of prohibiting companies and individuals from participating in public procurement procedures.

[84] Administrative Process No. 08012.009885/2009-21.

[85] Administrative Process No. 08012.001273/2010-24.

[86] Administrative Process No. 08012.008821/2008-22.

[87] Administrative Process No. 08012.008850/2008-94.

In 2007, CADE applied it to all the defendants in the so-called "security services" case, which was the first case triggered by a leniency application. After CADE's decision, the defendants challenged CADE's decision before Courts and later on, entered into a settlement agreement with CADE by which this penalty was removed. 88

Only seven years later, CADE started applying this penalty again in other three bid rigging cases.

Very recently, in the "public hospital laundry services" case, CADE has faced a discussion about the impacts of this penalty in the market. After investigating the defendants' allegations that the penalty would restrict the level of rivalry in the public bids, CADE decided to apply this penalty only to the company that was considered the leader of the cartel.

Settlement agreements

Under the new rules regarding settlements issued in 2013, parties applying for a settlement in a cartel case: (i) must pay a monetary contribution; (ii) must acknowledge participation in the infringement; and (iii) may be obliged to cooperate with the investigation.

In bid rigging cases, the main advantage of settling may be eliminating the possibility of being blacklisted by CADE. However, acknowledging participation in the investigated infringement may impact (i) criminal investigations; (ii) damage compensation claims; (iii) claims of lack of good standing in public bids; and (iv) investigations for infringements of the Clean Company Law (Law No. 12,846/2013).

Since the enactment of new rules, settlement agreements were executed in the following bid rigging investigations: the public hospital laundry services; in the ambulance acquisition; and HIV components.

i. Interlocking directorates

The Brazilian Antitrust Law does not specifically address this subject. This means that the analysis of each specific case will indicate whether the appointment of members to a company's management bodies by competitors could be a risk to free competition. If it is, it will be subject to restrictions imposed by CADE.

j. Facilitating Practices

Facilitating practices refer to conducts such as exchange of information among competitors, as well as vertical arrangements that may facilitate coordination among suppliers, such as certain minimum advertised price programs[89] and pricing systems that facilitate collusive outcomes.[90]

[88] [Case No. 2007.71.04.006953-8/RS, 2007.71.00.040156-0/RS and 2007.71.00.040825-5/RS, settlements executed with CADE in 2010.

[89] Administrative Process N.º 08012.003805/2004-10, ruled on by CADE in 2009.

[90] Administrative Processes N. 08012.002028/2002-24 and No. 08012.011027/2006-02, ruled on by CADE in 2005 and 2013, respectively.

The Brazilian Antitrust Law sets forth in Article 36, Paragraph 3, items I and II, general conducts which are interpreted and characterized as facilitating practices and, hence, could result in the violation of the economic order.

There are a considerable numbers of cases involving facilitating practices in Brazil, whether related to cartel investigation or to merger analysis[91]. Those cases mostly concern about arrangements among competitors to exchange information, participate in biddings, agreements upon prices to be offered and also information about future strategic conduct, including definition upon relevant competition-related variables, such as prices, quantity, and territory allocation.

Facilitating practices may be procompetitive, depending on the circumstances in which they occur, their effects, as well as the reasons and purposes that motivated the competitors. All aspects are mandatory to determine whether a given practice can be considered an efficient one, with positive effects to the market - or an unlawful one, regardless of its effects.

k. Exchange of Information

Exchange of information is not expressly mentioned in the list of potential anticompetitive conducts contained in the Brazilian Antitrust Law, Article 36, Paragraph 3. Nevertheless, and considering that such list is only exemplificative with regards to the conducts that may cause anticompetitive impacts, one cannot interpret that the exchange of information is a practice that will not be subject to investigation by CADE.

The practice of exchange of information may restrict competition, in particular when the information exchanged concerns future prices or strategic conduct between competitors. On the other hand, it can also have a wide range of benefits on the market.[92]

For suppliers, exchange of information can provide better understanding of the market and demand structure, allowing the suppliers to prepare an accurate strategy of sales, as well as the comparison of performances and costs attributed to the chain of manufacture, enabling the adoption of increased efficiency initiatives, which shall directly affect in reducing price for the final customers.

From the point of view of consumers, the increased transparency in a certain market due to exchange of information between competitors can also be positive, resulting in lower prices of products/services, reduction of price discrepancy for products/services within a certain territory. It also may result in an increased competition environment among vendors, as well as the proper prevention of collusive conducts, once competitors could reduce their ability to act harmfully against consumers and the general market.

[91] See Concentration Acts No. 08012.010195/2004-19 and No. 08012.011196/2005-53, ruled on by CADE in 2007 and 2008, respectively; Precautionary Measure in the Concentration Act N. 08700.000628/2010-18, not yet ruled by CADE.

[92] See OECD (http://www.oecd.org/competition/cartels/48379006.pdf).

l. Leniency Program

Overview

Over recent years, Brazil has become one of the most active jurisdictions in respect to anti-cartel investigations. In 2015, ten leniency agreements were signed.

The new Antitrust Leniency Program Guidelines ("Guidelines"), currently under public consultation, summarizes a series of rulings and requirements applied to negotiations of leniency agreements in Brazil during the last years. By means of proper and direct orientation on the matter, the GS intends to be able to launch stronger cases with a high rate of success in terms of conviction before the Tribunal and also in terms of the judicial review of its decisions.

Hence, the fact that the Guidelines were written in a soft language and are aimed at the public as a whole (and not only lawyers) promises to increase the uncertainty among cartelists and, therefore, the deterring effects of the leniency agreements.

This feature is especially relevant not only regarding the fact that the fines applied by CADE on cartel cases have reached very high amounts (see, for instance, the Cement Cartel case, mentioned in subsection "C" above), but also that Brazil is one of the few jurisdictions where there is criminal liability for individuals involved.

Requirements

To be eligible for full leniency (see other hypothesis below), the applicant must be the first in and must confess to the violation, and bring sufficient information before CADE has any knowledge about it.

The former prohibition for "ringleaders" to apply for leniency was dropped by in 2012, even though the requirement that all individuals (employees and former employees) should execute the agreement simultaneously with the corporate entity to be protected was maintained.

The applicant is obliged to cease its participation in the conduct by the time of the application and to continue to collaborate and to bring additional information throughout the investigation.

In case the material presented to the GS is considered insufficient to prove the infraction, it may be rejected. In these cases, CADE has been issuing comfort letters to the applicants confirming that the evidence provided was deemed insufficient.

Such documents can neither be used by the authority to launch a new investigation nor as a confession by the applicant.

Benefits

The punitive action will be extinguished in regards to those that completely fulfill all the above-mentioned requirements; the applicant will be immune to all administrative and criminal penalties that may be imposed against the other defendants of the cartel investigation.

In case the applicant is the first one to seek leniency, but CADE already has information about the conduct, he will be granted with a reduction of the fine from one to two-thirds (partial leniency)[93].

Under the 'leniency plus' provision, any co-participant in a cartel who presents evidence regarding another conduct still unknown to the CADE will be granted a reduction of one-third on the penalties imposed in the original investigation. Additionally, he also enjoys full amnesty for the second practice.

m. Settlements

Overview

The number of cartel investigations has increased significantly over the last years. CADE is not only becoming more active, but also, stricter, as the leniency agreements and dawn raids have raised the bar on quality and standards of evidence expected. Following such movement, the value of the fines applied is steadily increasing.

Since 2007, another possibility has appeared for those that wish to suspend the proceeding or to reduce the amount of the penalties applied but were not fast enough to qualify for leniency: the settlements agreements.

Leniency is relevant at an earlier stage, before the competition agency is aware of the cartel or before it has sufficient evidence. By contrast, the settlement is an agreement between the parties after the agency has concluded its investigation but before the adjudicating body has reached a decision.

Unlike leniency, the settlement agreement does not prevent the signatories of facing the criminal consequences of the cartel but is aimed at reducing the costs and delays of adjudication.

Requirements

In January 2016, CADE published a draft Guidelines (still under public consultation) that, following the existing regulation on the matter, help to clarify the requirements and proceedings on how to negotiate a settlement agreement.

The first step is to ask for a marker that proves the proponent has been the first one to reach the authorities for settlement regarding the investigated conduct.[94] The negotiation period is of 60 days in case the proceeding is still under analysis of the GS, or of 30 days in case the proceeding is already with CADE's Tribunal. Such periods are extendable, under the authorities' discretion.

The requirements for a settlement proposal are: (i) to collaborate and present new/complementary information; (ii) to pay a pecuniary contribution; (iii) to confess; and (iv) to cease the participation in the conduct.

The pecuniary contribution is based on the fine that would be applied to the signatory by the end of the proceeding. The reduction of the fine varies with the amount and quality of

[93] All other terms and conditions will continue to apply, including full criminal immunity for the individuals.

[94] This is relevant, once the order directly infers the amount of the contribution to be paid.

information provided by the signatory and the moment he/she/it reaches the authority since the settlement is supposed to reduce the administrative expenses of the investigation.

The first proponent to reach the GS may be granted with a reduction from 30% to 50% of the fine applied; the discount for the second one varies from 25% to 40%. All other proponents may be granted with a discount from up to 25%. If settlement is negotiated when the case is already at the Tribunal, then the maximum reduction of the fine will be limited to 15%. Notwithstanding the growing percentages of discount available, the amount of the contribution to be paid shall not be lower than the alleged advantage gained with the cartel, whenever possible to calculate it.

Unlike leniency, the confession of participation in the conduct leaves the signatory of the settlement agreement vulnerable to criminal prosecution – including imprisonment - not to mention the augmented risks of civil liability.

In 2015, CADE signed 58 settlement agreements in the total value of approximately BRL R$ 464,633,904.74.

OVERVIEW OF COMPETITION LAW IN CHILE

Claudio LIZANA AND Fabián Piedra (I and II)

Jaime Barahona Urzúa and Tomás Kubick Orrego (III)

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

Decree Law no. 211 of 1973 and its subsequent amendments ("DL 211") establish the main legal framework for antitrust matters in Chile.

Additionally, there are several other –more or less relevant in terms of competition laws and regulations– DL 211-related regulations, such as Law no. 20,169 of 2007 (unfair competition), DFL no. 323 of 1931 (gas services), DFL no. 1,122 of 1981(water code), Law no. 18,168 of 1982 (telecommunications), DFL no. 70 of 1988 and DFL no. 382 of 1989 (both sanitary services), Law no. 18,840 of 1989 (Chilean Central Bank), Law no. 19,039 of 1991 (industrial property), Law no. 19,342 of 1994 (new plant variety protection), DS no. 900 of 1996 (public works concessions), Law no. 19,496 of (consumer protection), Law no. 19,518 of 1997 (training and employment), Law no. 19,542 of 1997 and DS no. 104 of 1998 (both state port sector), Law no. 19,545 of 1998 (exports), Law no. 19,733 of 2011 (freedom of opinion), DLF no. 1 of 2003 (labor code) and DLF no. 4 of 2007 (electrical services).

b. Theories of harm present in the law

Article 3 of DL 211 states, generically, that whoever carries out or enters into, individually or collectively, any conduct, act or agreement that "impedes, restricts or hinders free competition or that tends to produce such effects", will be sanctioned with the measures contemplated therein.

In that sense, any conduct with horizontal or vertical effects, both unilateral and coordinated, that lessen free competition may be sanctioned. There is no definition of free competition in DL 211.

c. Authority in charge of enforcement of antitrust law and regulations

The Antitrust Court (Tribunal de Defensa de la Libre Competencia, "TDLC") and the National Economic Prosecutor's Office (Fiscalía Nacional Económica, "FNE") are responsible for enforcing Chilean antitrust laws within their own scope of authorities.

On one hand, the TDLC is a special and independent court of law, composed of 3 lawyers and 2 economists, and subject to the supervision of the Supreme Court. Its role is to prevent, correct and sanction anti-competitive conducts, to decide all cases the FNE or private

persons may submit to its consideration. The TDLC is also in charge of issuing general guidelines for the enforcement of competition law.

On the other, the FNE is an independent administrative entity in charge of investigating conducts that may constitute antitrust infringements, representing the public interest before the TDLC and seeking enforcement of resolutions, decisions and instructions issued and passed by such Court.

d. Nature of antitrust enforcement

Chilean antitrust enforcement has a hybrid nature. In terms of the nature of the Prosecutor (i.e. the FNE) and of the sanctions we could say that Chilean antitrust enforcement is administrative. However, it is worth noticing that the sanctions are subject to the decision of a court of law (i.e. the TDLC and eventually the Supreme Court).

Since the amendment of 2003, which created the TDLC, criminal sanctions were eliminated to focus on administrative ones. They include:

(i) the modification or termination of the acts or agreements against free competition;

(ii) order the modification or dissolution of the companies involved in the violations;

(iii) fines up to approximately USD 15 million or USD 22 million in cartel cases; and

(iv) other preventive, corrective or prohibitive measures the TDLC may find relevant.

However, after the pharmacies case initiated in 2008, the Criminal Prosecutor opened a criminal investigation arguing that cartel behaviour affecting prices may qualify as a criminal offence as well pursuant to Article 285 of the Criminal Code, which contemplated imprisonment from 61 days to three years for "fraudulent natural price adulteration". Nevertheless, in December, 2015 the Court of Appeals upheld the Criminal Court's ruling that acquitted the accused executives, weakening this criminal enforcement attempt. In this regard, one of the most important topics of the currently ongoing antitrust bill of law (Bulletin no. 9950-03, the "Bill") is the establishment of hardcore cartels as a criminal offense. The conduct would be punishable by imprisonment between 5 years and one day and 10 years.

Finally, there is also a civil scope in the antitrust enforcement (see letter l.).

e. Investigational powers of authority

The FNE may request collaboration and information necessary to its investigation from any officer of public services or entities, municipalities, and the companies in which the government –and its companies, entities or municipalities– have representation or participation.

In addition, the FNE may request private persons and companies –investigated or third parties– to provide any information and records that it may consider necessary for the ongoing investigation. However, individuals and representatives of legal entities from whom the FNE requests information that may damage their own interests may request the TDLC to annul or amend such request. The FNE may also summon private persons –investigated or third parties– to intervene.

Finally, the 2009 amendment of the DL 211 granted new powers to the FNE in order to strengthen anti cartel enforcement. Pursuant to article 39 (n), the FNE assisted by the police may:

(i) access to private or public premises and, if necessary, unlock or break in;

(ii) register and seize any kind of objects or documents that may be useful to prove the existence of an infringement;

(iii) intercept any kind of communications; and

(iv) order to any company that renders communication services to give access to copies or registers of transmitted or received communications. Such measures shall be authorized by a Judge from the Court of Appeals, based on a well-founded request pre-approved by the TDLC. The authorization, only to be given in serious and qualified cases in regard to cartel investigations, shall precisely mention the measures allowed, the term and the individuals that may be affected.

f. Attorney-client privilege

Pursuant to Article 220 of the Criminal Procedure Code, applicable to DL 211, the following information, which could be considered as "privileged", cannot be seized:

(i) communications between the accused and individuals that are not obliged to declare as witnesses, considering its family relationship or their duty of secrecy (e.g. external legal counsels);

(ii) notes taken by the people previously mentioned in relation to said communications; and

(iii) any other objects or documents to which the non-declaration faculty naturally extends to.

Such Article states that the prohibition shall rule only in regard to the communications, notes, objects and/or documents that are under the control of the individuals that are entitled to this non-declaration guaranty (i.e. the attorney). A contrario sensu, when said information is under the control of the client, although arguably, we believe it could be taken away since the client, as such, does not have such non-declaration guaranty. Nevertheless, the affected party would be able to request such evidence not be used in trial. We acknowledge that the law is not clear on this respect and this matter may be subject to debate in the future.

In addition, both the Criminal Procedure Code and DL 211 state that communications between the investigated party and its attorney cannot be wire tapped.

g. Interactions with other regulators

As stated in letter e., the FNE may ask for collaboration and information necessary to its investigation from any officer of public services or entities. In such case, the officers are obliged to comply with the request.

The FNE may also enter into agreements with public bodies for mutual collaboration and in order to agree on electronic transfer of information. In this regard, the FNE has signed with the National Consumer Service (SERNAC), the Criminal Prosecutor, the General

Comptroller Office, the Ministry of Public Works, the Ministry of Agriculture, the Department of Public Procurement (ChileCompra), the National Institute of Industrial Property (INAPI), the Administrative Corporation of the Judicial Power (CAPJ), the Internal Revenue Service (SII), the Production Development Corporation (CORFO), the National Commission of Energy (CNE) and the National Public Health Procurement Office (CENABAST).

h. Treaties in place

Several treaties signed by Chile contain antitrust provisions. For instance, Free Trade Agreements with Canada, Central America (Costa Rica, El Salvador, Honduras, Nicaragua and Guatemala), the United States of America, Mexico, Peru, EFTA (Iceland, Liechtenstein, Norway and Switzerland), Republic of Korea and Australia; the Economic Complementation Agreement with Mercosur (Argentina, Brazil, Paraguay and Uruguay); the Economic Partnership Agreements with the European Union and Japan; and the Trans-Pacific Partnership Agreement P4 with New Zealand, Brunei and Singapore.

i. Standards of evidence

DL 211 provides a rather open frame in regard to the admissible evidence and its assessment by the TDLC. Apart from the ones applicable to civil procedures –documents, parties and third parties depositions, court's own inspection and assumptions– shall be admissible "all evidence or information which is, as per the TDLC, suitable to establish the relevant facts". The TDLC may also, at any time and when essential to clarify still obscure facts, decree evidentiary procedures it deems convenient. The TDLC shall assess the evidence according to the rules of "reasoned opinion" ("sana crítica").

Notwithstanding the above, the standard of evidence is not established in the DL 211. However, there would be a common understanding that the antitrust standard should be situated in between the "preponderance of the evidence" (civil matters) and "beyond all reasonable doubt" (criminal matters) standards. To which one is closer have changed depending on the unlawful conduct, the origin of the ruling (issued by the TDLC or the Supreme Court) and the year it was issued. Nowadays, taking into account the difficulty to gather direct evidence (even with the FNE's intrusive investigative powers), the standard tends to be more flexible.

j. Methods of engagement with authority

DL 211 procedures impose a formal engagement through briefs which become part of the public record of the procedure.

On the contrary, the investigation procedures before the FNE tend to be flexible (more or less, depending on the kind of investigation and the quality of the party). Although formal engagements are the main ones –offices and request of meetings and depositions– phone calls or emails would be permitted if necessary.

k. Judicial review of decisions

The TDLC's final judgment is subject to a remedy of complaint before the Supreme Court. Such remedy has to be well-founded and may be filed by any of the parties before the TDLC, within 10 days of the respective service.

The filing of the remedy does not suspend the enforcement of the judgment issued by the TDLC except for payment of the fines. However, at the request of a party, and upon a well-founded resolution, the Supreme Court may suspend the effects of the judgment in whole or in part.

l. Private litigation

Along with the FNE, privates are also entitled to directly file a claim before the TDLC. However, contrary to the FNE, which represents the "general interest of the collective economic order", the TDLC has stated that a private party requires being an "immediate passive subject" of a conduct that may violate DL 211 in order to file a claim. Furthermore, the TDLC has understood that for an agent to be considered as a direct victim of a free competition violation, it must currently or potentially participate in the market which is directly affected by the alleged anticompetitive activity or in other related markets that can reasonably be indirectly affected by the alleged unlawful activity.

Currently, private actions for civil damages caused by cartels may also be brought before the competent civil court in a summary proceeding once the TDLC has declared the existence of antitrust violation and has imposed sanctions. The only subject that may be analyzed after an administrative cartel decision is if there is a direct relation (cause-effect) between the antitrust infringement and the damage. Also, the amount and nature of the damages require to be proved.

II – MERGER CONTROL

a. Types of transactions

As mentioned in chapter I, letter a., DL 211 states that whoever carries out or enters into, individually or collectively, any conduct, act or agreement that impedes, restricts or hinders free competition or that tends to produce such effects will be sanctioned; that is to say, regardless of the legal nature of the act or agreement. In that sense, any concentration operation is subject to DL 211 to the extent it could impede, restrict or hinder free competition or tend to produce such effects.

The FNE's Guidelines on Concentration Operations (the "Guidelines"), which established an alternative voluntary consultation procedure with the FNE, states that concentration operations are directed towards the change in incentives that occurs when two independent economic entities, through some contractual or factual arrangement, align their incentives in order to maximize their joint profits. The FNE's definition is grounded on economic concepts and therefore, it may comprise a broad and varied range of legal phenomena, such as

mergers, assets and stock acquisitions, partnerships and even joint ventures, acquisition of minority shareholdings and interlocking directorates.

Finally, the Bill would include a wide scope as well, defining concentration operation as "any action, act or convention, or group of these, having for effect that two or more economic agents, previously independent between them, lose such independence, in any area of their activities." This would include:

(i) mergers, regardless of the corporate organization of the merging entities or the resulting one;

(ii) direct or indirect acquisitions of rights that allow, individually or jointly, decisively influence in the management of other;

(iii) associations in any form to create a separate and independent economic agent which perform its functions permanently; and

(iv) acquisitions of control over the assets of another.

b. Notification of foreign-to-foreign mergers

There is no special regulation in this regard. Both local and foreign-to-foreign mergers may be reviewed if they affect the domestic market, irrespective of the execution place and the nationality of the companies.

c. Definition of "control"

Control is not defined in DL 211. However, Law Act no. 18,045 –Securities Market Act– defines control as "any person or group of persons acting together, which, directly or through other persons or companies, controls at least 25% of the shares of a company", provided certain conditions are met.

The TDLC has taken into account such definition, and has also provided its own concept of control as "the capacity of a natural or legal person of excerpting a decisive influence in competitive decision-making of other natural or legal persons" (ruling no. 117/2011).

d. Jurisdictional thresholds

There are no mandatory jurisdictional thresholds in Chile. Although not mandatory, the Guidelines states that the FNE would rule out further analysis:

(i) if the HHI after the merger is below 1500;

(ii) if $1500 < HHI < 2500$ (the value of this index shows a mildly concentrated market) and $\Delta HHI < 200$; and

(iii) if $HHI > 2500$ (the value of this index represents a highly concentrated market) and $\Delta HHI < 100$.

On the contrary, the FNE would thoroughly analyze mergers that exceed those thresholds.

The Bill is proposing a mandatory pre-merger notification if both of the following thresholds are met:

(i) if the sum of the sales within Chile of the economic agents planning to concentrate, reaches, in the previous exercise to the one in which the notification takes place, an amount equal or higher to the threshold set by the Regulation issued by the Ministry of Economy; and

(ii) if at least two of the economic agents planning to concentrate, have separately generated sales in Chile, during the previous exercise to the one in which the notification takes place, for an amount equal or higher to the threshold set by Regulation issued by the Ministry of Economy.

However, these thresholds have not been defined yet as they are to be set by Regulation issued by the Ministry of Economy.

According to the Bill, operations falling below such thresholds may be nevertheless investigated by the FNE within a year, if the latter believes that the operation may have infringed DL 211.

e. Triggering event for filing and deadlines

According to the DL 211 there is no legal obligation to previously notify a concentration operation or to make any filing seeking its approval. Thus, if the parties have closed the transaction without clearance, they should not be subject to sanctions if there are no competition concerns derived from the transaction. However, this may be challenged by the FNE and fines may be sought anyway. Notwithstanding the above, the parties to such operation may voluntarily request its approval to the TDLC or notify the transaction to the FNE before its execution. Taking this into account, there are no triggering events for filing.

The Guidelines do not establish triggering events either, but the notification shall be filed before the consummation of the concentration operation. In that regard "the FNE will consider that a merger has been consummated when two or more economically independent companies become one single company, become part of the same corporate group or when a non-transitory change in the control of the entity takes place. The materialization or conclusion of a merger transaction includes, but is not limited to, the conclusion of the legal acts that convey it."

f. Exemptions

Taking into account the non-mandatory merger control in DL 211, there would be no exceptions. However, see letter d. for the exemptions given by the Guidelines and the Bill due to falling below the thresholds.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

Foreign investment is regulated by Decree Law no. 600, and chapter XIV of the International Exchange Regulation of the Chilean Central Bank. Nonetheless, these do not regulate concentration transactions but the entrance of foreign capital to Chile.

There are special regulations and relevant approvals for the following matters, regarding:

(i) securities markets: in general, any takeover entailing a change of control of an open-stock corporation must be conducted through a tender offer (an OPA). The OPA is a public offer for acquiring shares through the procedure described in the Securities Market Act. Such process ensures equal opportunity and fair dealing among all shareholder of the OPA target company;

(ii) banks and financial institutions: Banking Law provides that no one may acquire, directly, through third parties or indirectly, shares of a bank which, by themselves or added to those previously held by the same person, amount to more than 10% of bank capital, without the prior consent of the Bank Superintendence;

(iii) insurers: according to Insurance Companies Law, insurance companies must report to the Securities and Insurances Superintendence any change to their shareholding structure entailing the acquisition of a 10% or greater share of their capital by a shareholder. In turn, the shareholder who acquires this interest must report to the SVS on the identity of its controlling partners and provide evidence that they have not been declared guilty of certain crimes, or declared bankruptcy or been penalized by the SVS;

(iv) mass medias: Freedom of Opinion and Information and Journalism Law requires that any relevant event or act in connection with the modification or change of ownership or control in a media company must be reported to the Antitrust Court within 30 days from its consummation. However, in the case of media companies subject to the State-sponsored licensing system, this relevant event or act must be the subject of a previous report prepared by the TLDC assessing its impact on the media market. This report must be issued within 30 days from the filing of this application, otherwise is to be deemed as not meriting any objection; and

(v) sanitary services: Sanitary Services Law establishes certain restrictions to entry into the water utilities sector for controlling shareholders of electric distribution utilities, local telephone companies and pipe gas utilities that are natural monopolies, with customers in excess of 50% of all users of one or more of these utilities in the areas under concession to any given water utility in those same geographical areas.

h. Information requested for the filing

In 2009, considering the lack of clear regulation, the TDLC issued an internal decree – Auto Acordado no. 12– establishing its criteria regarding preventive control in concentration transactions made subject to a consultation before the TDLC. It provides that a voluntary consultation before the TDLC must include the following information:

(i) parties to the transaction and its related parties;

(ii) full description of the proposed transaction, including its nature, related documents and exhibits that reveal the seriousness of the operation and precedent conditions, resulting structure of ownership and control after the execution of the

transaction, schedule, the existence of ancillary restraints clauses and countries where the transaction shall produce effects;

(iii) the relevant market, including a description of the goods and services provided by each party, its substitutes, market size and market share of each party, structure and characteristics of the actual and potential supply and demand of the goods and services, costs, description of distribution and commercialisation systems, prices and existence of exclusivity and cooperation agreements;

(iv) objectives pursued;

(v) expected effects in the market; and

(vi) mitigation measures proposed. If such information is not filed along with the consultation, the TDLC may request all listed information ex-officio.

Similar information is required in the Guidelines procedure. In this regard, if the FNE considers that there is missing or incomplete information, it will not initiate the proceeding and will ask the parties for the relevant information. Notwithstanding this, additional information may be requested during the procedure as well.

The Bill establishes that the information requested would be the necessary backgrounds to identify the operation and the parties, as well as the risks of it and exhibits that reveal the seriousness of the operation. However, the details would be left to another Regulation.

i. Sanctions applied for late or no filing

As stated in letter e., there is no legal obligation to previously notify a concentration operation and, therefore, not notifying parties should not be subject, in principle, to sanctions if there are no competition concerns derived from the transaction.

However, if a concentration transaction is not consulted before the TDLC by the parties, the FNE is able to file a consultation before the TDLC initiating a non-adversarial proceeding, prior the completion of the relevant transaction, if it considers it poses antitrust's concerns. The FNE may also open an investigation prior the filing. Additionally, after the completion of a non consulted relevant transaction, any third party or the FNE may file an antitrust claim before the TDLC initiating an adversarial proceeding if they consider it violates antitrust law. According to Chilean jurisprudence, there has been only one claim filed after the transaction has been conducted. In such case the FNE and the parties of the transaction entered into a settlement before the TDLC[1].

The Bill would propose a fine of up to approximately USD 15,000 per day of delay since the execution of the concentration operation. In addition, not notifying an operation, executing it after the notification and while suspended, executing it without considering the measures imposed or notifying it giving false information may as well be sanctioned. In this case, the TDLC may apply the proposed general sanctions (e.g. fines up to an amount equivalent to the double of the economic benefit obtained due to the infraction. If such amount cannot be clearly

[1] Case: FNE v Hoyts Cinemas Chile Holding Limited and others, June 2012. The FNE requested the "reversion" and "disinvestment" of the transaction. Finally, the parties ended the conflict through a settlement approved by the TDLC.

determined by the tribunal, then the highest fine shall be the 30% of the sales of the offender that had taken place during the infraction period).

j. Parties responsible for filing

Any of the parties to the operation may file a consultation proceeding before the TDLC. On the contrary, when following the Guidelines procedure, all of the parties to the operation shall make the filing. The Bill is proposing in the same sense.

k. Filing fees

There are no filing fees in the voluntary proceeding before the TDLC or in the one before the FNE.

l. Effects of notification

Once a notification is filed before the TDLC such court shall issue a resolution admitting or rejecting it. Article 31 of DL 211 fixes the procedure to be followed once a consultation is admitted. In regard to the suspensory effect on the proposed transaction of the notification, there are no specific provisions. Taking that into account, the TDLC issued the Auto Acordado no. 5, which states that since the date of initiation of the consultation proceeding, the consulted transaction cannot be closed by the consultant parties without the prior approval of the TDLC. However, the legality of such Auto Acordado is an arguable topic. Notwithstanding this, when the FNE files the consultation it may expressly request the suspension and the TDLC may also declare it ex-officio.

The Guidelines fixes its own especial procedure. Once a notification is filed before the FNE it shall asses it in order to review the completeness of the information. As stated in letter h., if the FNE considers that there is missing or incomplete information along with the notification, it will not initiate the proceeding. If, during the procedure, the parties execute the transaction, the FNE will close the procedure and initiate a confrontational investigation.

Finally, the Bill establishes that after the notification the FNE shall asses its completeness in order to initiate the procedure. Once filed, the transaction is expressly under suspensory effect until the final resolution.

m. Gun jumping and closing – sanctions

Gun jumping is not specifically regulated neither in the DL 211 nor in the Guidelines or in the Bill. In that sense, rules governing general exchange of sensitive information are applicable.

n. Type of remedies and their negotiation

Remedies to be imposed by the TDLC are applicable to its sole discretion and not negotiable by the parties. On the contrary, remedies in the Guidelines' procedure are negotiable

by the parties due to the collaborative nature of such procedure. In both cases, there are no fixed types of remedies, so the TDLC or the FNE and the parties may freely impose the most suitable remedies (e.g. divestment, modification or maintenance of agreements, obligations toward third parties, etc.).

o. Timetable for clearance

There are no significant fixed terms in the DL 211 procedure. According to official data, the procedure lasts nearly 8 months on average. This could last longer if a remedy of complaint is filed before the Supreme Court (see Chapter I, letter k.), up to 18 months in total.

The timetable for clearance in the procedure established in the FNE Guidelines is the following:

(i) within 5 business days, the FNE should issue a resolution opening the investigation, which shall be notified to the parties and published on the website. However, if the parties notify the transaction under confidentiality, the investigation shall not be opened until the transaction becomes public;

(ii) the proceeding should not take more than 60 business days after the beginning of the investigation. This term may be extended by mutual agreement of the parties and the FNE; and

(iii) before the expiration of the 60 day term (or its extension), the FNE should issue its resolution (see letter q.). If the FNE decides to enter into a settlement agreement, it shall schedule a timetable for the negotiations. If there is no agreement within such timetable, the FNE shall initiate a consultation before the Antitrust Court. If the settlement agreement is reached, the Antitrust Court must approve or reject it within 15 business days.

p. Involvement by third parties

According to Article 31 of DL 211, the resolution initiating a consultation procedure shall be published in the Official Gazette and on the TDLC's website. Also, the TDLC shall inform by official letter to the FNE, the authorities directly concerned and the economic agents that, in the TDLC's exclusive judgment, are related to the matter. Within not less than 15 business days, the notified parties, and those having a legitimate interest in the matter (e.g. customers and competitors) may provide information to the TDLC.

q. Types of resolutions that may be issued

In the procedure followed before the TDLC, it may finally:

(i) reject the transaction;

(ii) approve it; or

(iii) approve it with some measures or conditions to be complied by the parties. In the last two cases, DL 211 creates a safe harbor by providing that the acts or agreements executed in accordance to the ruling of the TDLC would not cause any liability unless new facts prove the contrary.

In the procedure followed before the FNE, it may conclude with any one of the following resolutions:

(i) the FNE decides not to review or investigate any further as it deems that the transaction has no anticompetitive effects;

(ii) the FNE requests mitigation measures to the parties and enters into a settlement with the parties (which must be approved by the TDLC); or

(iii) the FNE files a voluntary consultation procedure before the TDLC as described above. In this case, the FNE should previously grant the option to the parties involved in the transaction to make the filing before the TDLC.

r. Review of ancillary restraints

To the extent that the related agreements (e.g. non-competition, cooperation, exclusivity and licensing) may impede, restricts or hinder free competition or that could tend to produce such effects –and, therefore, raise the risks derived by the proposed transaction– the TDLC may review ancillary restraints. As stated in letter h., related agreements are part of the information required by the TDCL and FNE.

III. ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

Anticompetitive conducts in Chilean law are described in Decree Law 211 ("DL 211") which is the Chilean competition statute. DL 211 was enacted in 1973 to replace Law 13.305 (1959), and has been subject to different modifications. Currently the Congress is discussing a bill to amend DL 211 which in substance will increase the fines for competition infringements, establish a criminal punishment for cartel conduct and assess hardcore cartels under a per se rule.

The general rule is set in the preface of Article 3 of DL 211 and determines that any person that executes or agrees to execute, individually or jointly with others, any act or agreement that impedes, restricts or hinders free competition, or that tends to cause such effects, will be punished.

Unilateral conducts that constitute a competition violation, are treated as an abuse of dominant position. Letter c) of Article 3 determines as illicit predatory practices, or unfair competition, carried out with the purpose of reaching, maintaining or increasing a dominant position.

The basic requirement to assert a unilateral conduct as a competition violation is that the agent that engages in such conduct has a dominant position in a market. The law does not determine what "dominant position" means, but that position has been linked to market power.

Therefore, to determine the existence of a dominant position an examination of how an economic agent or a conglomerate performs its activities in the market has to be conducted.

Dominant position may be determined analyzing market shares, entry barriers, elasticity of demand, how the agent determines its prices, the revenues of the company, its supply chain, etc.

It is not illegal to have a dominant position nor constitutes a violation to the competition law. To breach DL 211 there has to be an abuse of that dominant position. As to the first requisite, there is no catalogue or list of conducts considered abusive. Again, an analysis of past opinions of the TDLC and the criteria applied by FNE is important to determine which conducts will be considered infringements.

The TDLC may impose the following sanctions against parties (individuals and legal entities) that engaged in competition violations:

- order to modify or terminate the acts, agreements or systems that are against the law;
- order the modification or dissolution of companies or other legal persons, including trade associations, and
- impose fines up to 20.000 UTA[2] (approximately US$15.5MM) and in case of collusion fines may be increased up to 30.000 UTA (approximately US$23.2MM).

Fines may be imposed against economic agents and natural persons that were involved in the anticompetitive conduct.

Currently, there is a bill in the Congress that proposes fines to be increased up to the double of the economic benefit obtained by the infringement, or up to 30% of the sales of the line of products or services which were engaged in the offense, during all the period of the infringement.

As in other jurisdictions, there are two main conducts with specific infringements that constitute competition violations: abuse of dominant position and collusive conducts.

According to Article 20, the statute of limitations is three years running from the execution of the offense and of five years for actions that pursue conducts described in Article 3.a (collusion). In collusion cases, the calculation of the term will not begin while the effects attributable to the conduct continue in the marketplace.

b. Exploitative offenses

Exploitative conducts are those in which an economic agent uses its dominant position to extract rent from consumers or its customers, by means of imposing or fixing prices, or other commercial conditions. Under this type of infringement the economic agent has to acquire additional rent due its dominant position. Even though there are some opinions of the TDLC which recognize exploitative conducts as a competition offense[3], it has set a high standard in order to assert an infringement after stating that the mere fact of charging excessive prices is not punishable.[4] In the words of the TDLC: "the fact that a company charges prices that exceed their relevant costs, including a normal revenue to provide the service, is an indicator of market power … [t]herefore, if the cause that allows the accused company to charge these prices, higher than

[2] *Unidad Tributaria Anual*, Chilean tax unit.

[3] TDCL Decisions 85/2009 (Constructora e Inmobiliaria Independencia v. Aguas Nuevo Sur Maule) and 100/2010 (Nutripro v. Puerto Terreste Los Andes).

[4] TDLC Decision 93/2008 (FNE v. Emelat).

those that would prevail in a competitive market, consists in the existence of facts, acts or agreements contrary to free competition of the company´s responsibility, that company may and must be punished for those conducts".[5]

The TDLC has determined that the acquisition of products in a situation where a buyer has a dominant position may be an exploitative conduct if the purchase price is set exercising its buyer power. In these cases, it was found that a price set for the purchase of goods and services by a buyer with a dominant position should be based on objective criteria and a non-discriminatory basis.

c. Predatory pricing

Predatory practices including predatory pricing are explicitly considered as an infringement. These conducts may be punished if they are aimed to achieve, maintain or increase a dominant position. Therefore, preliminarily it is not necessary to demonstrate that the economic agent that engages in a predatory pricing strategy has a dominant position. Nonetheless, the TDLC has ruled that the economic agent has to possess enough market power to have a reasonable expectation to recoup in the future the losses suffered in the short term, and, if so, there has to be substantive indicia that prices were set bellow relevant costs.[6]

d. Price Discrimination

Price discrimination is a conduct that will not be analyzed under a per se rule. There is price discrimination if different prices are charged to clients that are in the same situation.

Price discrimination may be affirmed if four requisites are fulfilled:

(i) that the price difference is not due to supply, distribution or other relevant factors;

(ii) that the transactions with different prices are equivalent;

(iii) the conduct shall be performed by an economic agent that has a dominant position, and

(iv) that there is no objective reason for that discrimination.[7]

On this regard, the TDLC has ruled that it is possible to charge different prices to customers based on different economic realities among them.[8]

e. Resale price maintenance

Resale price maintenance, as other vertical restraints, is not per se forbidden. In Chile upstream commerce would typically suggest or recommend and not impose a retail price to its

[5] TDLC Decision 93/2008 (FNE v. Emelat).

[6] FNE decision to close the complaint against Volcán/Romeral/Knauf , docket No. 2342-15 (includes analysis of TDLC opinions); and FNE in decision to file a case against Carozzi, FNE docket No. 2235-13.

[7] FNE report and decision to file a claim against Compañía Industrial Volcán S.A. *et al.*, Docket No. 2342-15.

[8] TDLC Decision 107/2010 (Verde Sur v. Petróleos Trasandino).

downstream distributors, who tend to use this resale price. This practice has been long applied by the Chilean retail industry with some variations.

Notwithstanding, the FNE filed a complaint against the major Chilean retail supermarkets based on a hub-and-spoke collusion (2016). The theory of the agency is that retail supermarkets coordinated themselves using suggested prices of their wholesalers. To this date the complaint has not been resolved by the TDLC and the decision will possibly determine how the competition authorities will look at this type of restrictions in the future.

Alongside, the FNE issued in June 2014 its "Guidelines for the Analysis of Vertical Restrains". This document clarifies the analytical frame under which the agency analyses vertical restrains. For the FNE, "fixing minimum resale prices" is potentially the most harmful vertical restrain and it can lead to collusive arrangements.

f. Tying arrangements

The selling of tied products by an economic agent that has a dominant position in a market is not forbidden unless there is an anticompetitive effect. Tying arrangements could lead to some undesired effects such as the impossibility of purchasing the offered goods or services alone, thus leveraging one product with another in which the seller has a dominant position (enabling an exclusionary strategy[9]), or the creation of a product that is not possible to replicate by competitors. Also, tying arrangements may be used by one economic agent to extract rents from its customers.

This conduct may also be considered a specific form of breach to consumer protection law.

g. Bundling

The rationale for bundling is the same as for tying arrangements, but it is analyzed less strictly since the products are also sold separately. According to the FNE and the jurisprudence of the courts, there will be an anticompetitive bundling if the following four requisites are fulfilled:

- the economic agent that incurs in bundling has to have a dominant position in the market of the main product;
- the two bundled products must be different;
- there must be a potential risk or consequence that the bundling excludes or inhibits third parties to enter the market of the bundled product; and
- that there is no justification or alternative explication for the conduct.[10]

[9] TDLC Decision 97/2010 (Voissnet v. Compañía de Telecomunicaciones de Chile S.A.)

[10] FNE report and decision to file a claim against Compañía Industrial Volcán S.A. *et al*., FNE docket No. 2342-15.

h. Exclusive dealing

According to the FNE, there is exclusive dealing when the supplier sells its goods and services through a sole distributor or by a group of them that have certain characteristics. If this arrangement imposes some sort of exclusivity upon the distributor, it may be potentially harmful for competition if this action delays or hinders the entrance of new players or their expansion.[11]

In several findings agreements that establish exclusivity with respect to distributors have been found to be a serious competition infringement if proven that this conduct is used as a strategy by a dominant player with exclusionary effects in the product markets involved.[12]

i. Refusal to deal

The TDLC has determined that refusal to deal has to be understood in a broad sense, stating that it is a "*competitive restriction if it impairs an agent to freely enter the market and in the same conditions as its competitors*".[13]

In the court's opinions, three requisites have been established to assert an abuse of dominant position under a refusal to deal conduct:

(i) that the party has been substantially impaired in its capacity to perform or continue to perform its business because of the impossibility to obtain the necessary inputs to develop its business;

(ii) that the abusing party has been able to impede access to those inputs due to an insufficient degree of competition in the upstream market, and

(iii) that the impaired party would have accepted the commercial conditions set by the abusing party to other third parties to obtain those inputs.[14]

j. Essential facilities

The essential facilities doctrine has not been recently analyzed by the TDLC. In 2009, the TDLC stated that an input is essential because "it is indispensable to participate in the market … and because there is no substitute at a reasonable price to provide this service". Therefore, we can find two requisites in order to characterize a facility as essential:

(i) that the facility is essential to participate in the market; and

(ii) that there are no substitutes at a reasonable price.[15]

[11] "*Guidelines for the Analysis of Vertical Restrains*" (2014).

[12] TDLC Decisions 26/2005 2011 (Philip Morris v. Cía. Chilena de Tabacos) and 115/2011 (FNE v. Cía. Chilena de Tabacos); and Decision 90/2009 (FNE v. Cía. Chilena de Fósforos).

[13] TDLC Decision 16/2005 (Sound Color v. Andes Film *et al.*).

[14] TDLC Decision 88/2009 (OPS v. Telefónica).

[15] TDLC Decision 88/2009 (OPS v. Telefónica). See Chile´s contribution to the OECD Latin America Competition Forum on essential facilities, September, 2010.

k. Customer termination

Economic agents are free to terminate their relationship with customers, unless there is a breach to the statute or a contractual clause.

Customer termination can have effects from a competition law standpoint if it can be assimilated to an exclusionary or exploitative conduct. An example of the above would be if the termination is because of a new price policy, potentially be regarded as exploitative or discriminatory.

l. Termination of intermediaries

In Chile there is no special law regarding the termination of intermediaries. Therefore, if a supplier wishes to terminate its relationship with an intermediary it may do so freely according to the terms of the agreement which regulates the relationship.

Nevertheless, the above mentioned with respect to Costumer Termination can be restated here in the sense that if the termination has exclusionary effects or is considered to be an exploitative conduct, it can lead to competition concerns.

m. Termination of relationship with competitors

There are no rulings or decisions that provide guidance on this regard. The assessments done by the authorities have not imposed safeguards applicable to the termination of agreements or joint ventures between competitors.

Nonetheless, it is important to consider the risks associated with information exchange between competing firms, as described in section k. below. Accordingly, it is recommended that after termination any exchange of information between the former counterparts be discontinued.

n. Settlements

There are no relevant cases regarding settlements in Chile that have anticompetitive effects (such as "pay for delay" patent agreements). If a settlement case arises, it is likely that the TDLC and the FNE will base their opinion on foreign doctrine, especially of the United States and Europe.

(II) COLLUSIVE CONDUCTS

a. Introduction

Anticompetitive conducts in Chilean law are described in Decree Law 211 ("DL 211") which is the Chilean competition statute. DL 211 was enacted in 1973 to replace Law 13.305 (1959), and has been subject to different modifications. Currently the Congress is discussing a bill to amend DL 211 which in substance will increase the fines for competition infringements, establish a criminal punishment for cartel conduct and assess hardcore cartels under a per se rule.

The general rule is set in the preface of Article 3 of DL 211 and determines that any person that executes or agrees to execute, individually or jointly with others, any act or agreement that impedes, restricts or hinders free competition, or that tends to cause such effects, will be punished.

Collusion has been considered unlawful since the enactment of the first competition statute in 1959, which included both price fixing and the allocation or restriction of output as core anticompetitive illegal behavior. In 2009, amendments to DL 211 incorporated boycotts and bid rigging as illegal horizontal agreements.

The 2009 reforms provided the FNE with new powers to detect and investigate collusive conducts: leniency as a tool to put incentives on firms and individuals to self-report cartel activity, powers to conduct dawn raids and wiretapping. The FNE has exercised these tools and brought relevant cases before the TDLC. Two landmark cases must be highlighted: the retail pharmacy price fixing case[16] and the output restriction in the poultry (chicken-meat) industry case.[17]

Horizontal agreements are assessed under standards commonly used in the US and EU systems. Letter a) of Article 3 regards as anticompetitive horizontal conduct by competitors that impedes, restricts or hinders competition and confers them market power. Conduct that tends to produce such effects is also expressly covered. This has been interpreted as requiring the demonstration of the effects of the conduct in the market, a standard that deviates from a per se approach and that falls near to the assessment of effect restrictions of Article 101 (1) of the Treaty on the Functioning of the European Union.

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

It has to be considered that criminal prosecutors intended applying an unused infringement to investigate and bring to court individuals that have intervened in cartel cases (Article 265 of the Criminal Code). This strategy has not been successful so far, being acquitted in 2015 all company executives involved in the retail pharmacy cartel.

The TDLC may impose the following sanctions against parties (individuals and legal entities) that engaged in competition violations:

(i) order to modify or terminate the acts, agreements or systems that are against the law;

(ii) order the modification or dissolution of companies or other legal persons, including trade associations, and

(iii) impose fines up to 20.000 UTA[18] (approximately US$15.5MM) and in case of collusion fines may be increased up to 30.000 UTA (approximately US$23.2MM).

Fines may be imposed against economic agents and natural persons that were involved in the anticompetitive conduct.

[16] TDLC Decision No. 119/2012 FNE v. Farmacias Ahumada *et al*.

[17] TDLC Decision No. 139/2014 FNE v. Agrícola Agrosuper *et al*.

[18] *Unidad Tributaria Anual*, Chilean tax unit.

Currently, there is a bill in the Congress that proposes fines to be increased up to the double of the economic benefit obtained by the infringement, or up to 30% of the sales of the line of products or services which were engaged in the offense, during all the period of the infringement.

As in other jurisdictions, there are two main conducts with specific infringements that constitute competition violations: abuse of dominant position and collusive conducts.

According to Article 20, the statute of limitations is three years running from the execution of the offense and of five years for actions that pursue conducts described in Article 3.a (collusion). In collusion cases, the calculation of the term will not begin while the effects attributable to the conduct continue in the marketplace.

b. Horizontal price fixing

Letter a) of Article 3 forbids anticompetitive fixing of sale or purchasing prices. And also includes agreements to fix other marketing conditions.

c. Horizontal agreements to allocate customers or territories

The infringement in letter a) of Article 3 includes illegal agreements that allow competitors to assign market zones. Customers are not expressly included in the wording, nonetheless the aforementioned Article 3 does not limit the type of behavior to be subsumed in the general infringement encompassed in paragraphs 1 and 2. Hence, customer and market allocation is considered by the FNE and the TDLC as a form of collusion (including allocation of contracts or other elements, such as construction works[19]).

Letter a) of Article 3 also includes agreements or concerted practices to limit production, or that allow them to assign quotas.

d. Agreements not to compete

These agreements are mostly examined in merger reviews. Non-compete clauses are not considered per se illegal and are analyzed case by case in order to foresee its effects in the relevant markets. According to the FNE they may be justified in order to protect costumers, know-how or sensible and relevant data or information. They can also prevent any immediate competition by the seller using the firm´s assets -including data- that would result in a failure of the prospective business.

Nonetheless, these terms must abide certain restrictions in order to conform to the law. They must be necessary for the transaction to go ahead and proportionate to its results, in terms of duration, content and territory[20]:

(i) material scope of the clause: it must not extend its effects beyond the business purpose of the company concerned;

[19] TDLC Decision No. 148/2015 (FNE v. Asfaltos Chilenos *et al*).

[20] FNE report and decision in Maicao/Socofar transaction, docket No. 2043-12.

(ii) territorial scope: it must not exceed the territory in which the principal transaction has effects; and

(iii) duration: the clause must not exceed the period necessary to allow the principal transaction to produce its effects, which include assurances of continuous provision of the company's services or products, loyalty of the new costumers and, eventually, the protection of the transferred know-how.

The FNE, preliminarily, states that non-compete clauses that exceed two years restrict competition unnecessarily, unless they include in their scope of protection the know-how of a company, in which case they can prolong for an additional year.

The agency's criterion is in line with TDLC precedents that have set two-year periods for non-compete clauses.

e. Horizontal boycotts

The 2009 amendments expressly introduced boycotts as a form of collusion, referring letter a) of Article 3 to those agreements to exclude competitors.

A specific examination of this conduct can be found in TDLC Decision No. 128/2013[21], which refers to collective boycott (in reference to EU doctrine). This conduct would consist of:

(i) a concerted refusal of a group of competitors to deal (contract) with one or more of its clients or with a competitor who is not part of the "club"; and

(ii) usually, the objective is to punish a troublesome client, provider or competitor, because of the way it conducts business (defensive boycott), or to force a business to perform or adopt a course of conduct (predatory boycott).

f. Joint ventures and other competitive collaborations

Collaboration agreements between competitors are assessed mainly through merger review standards and proceedings. Chile does not have a mandatory merger control regime, hence the FNE acting ex officio and as policy decision has consistently opened enquiries of transactions or agreements that have been announced publicly.

These agreements must attain efficiencies so as to override the negative effects (coordinated) detected by the agency. Joint venture standards have been a matter of analysis by the TDLC in the electricity market.[22]

g. Trade associations

The right to form trade associations and its autonomy are constitutionally protected.[23] Nonetheless, in the field of competition law the FNE and the TDLC have warned of the negative

[21] FNE vs. Achap *et al*.

[22] TDLC Resolution No. 22/2007 (Consultation by Endesa and Colbún).

effects of coordinated behavior within associations as a result of close contact and information exchange between members.

The 2011 FNE Guideline on Trade Associations and Free Competition[24] sets the standards that mirror those in force, or under consultation at the time, in jurisdictions such as Canada, United Kingdom, Spain and Japan. Business review letters of the US Department of Justice were also considered.

The 2011 Guideline takes a stance with respect to competitor collaboration, information exchange, meetings with competitors and boycotts. Also, it provides basic standards for issues such as: membership, services rendered to affiliates, self-regulation, standard setting, advertising and model contracts set by the associations.

The relevance of this particular aspect of competition enforcement in Chile is reflected in the position of the Supreme Court of Justice which upheld the TDLC ruling that fined the Poultry Producers Association and its members for output restrictions of fresh chicken-meat.[25] The court not only affirmed the fines imposed, furthermore it upheld the FNE's request to unwind the association, a measure rejected by the TDLC.

h. Bid rigging

Bid rigging is explicitly prohibited since 2009. Letter a) of Article 3 forbids express or tacit agreements, or concerted practices, among competitors that affect the result of bidding processes. Two recent cases have dealt with collusive tendering in the private sector.[26] This jurisprudence points out that this conduct may be examined jointly with a boycott or a market allocation scheme.

There have been considerable advocacy efforts by the FNE in the field of bid rigging in the public sector (public procurement), in line with OECD activities in this field. Reference is to be made to the agency´s document Procurement and Free Competition (2011)[27], which reports different behavior that bidders may incur in order to alter the result of a procurement process proposes tools for detection and describes preventive measures to adopt.

i. Interlocking directorates

No legislation has been enacted to regulate from a competition law perspective the position of a common officer, director or board member serving in two competing companies. Nevertheless, there are specific cases in which sharing common directors between companies has

[23] Article 1 of the Constitution of the Republic of Chile.

[24] *"Asociaciones Gremiales y Libre Competencia"*, FNE 2011. See for materials in English http://www.fne.gob.cl/english/competition-advocacy/advocacy-material/.

[25] Supreme Court ruling, 29/10/2015, procedure No. 27.181-2015.

[26] TDLC Decision No. 128/2013 (FNE v. Achap *et al*), and Decision 112/2011 (FNE v. Corporación Radio Valparaíso Limitada *et al*).

[27] http://www.fne.gob.cl/english/competition-advocacy/advocacy-material/.

been forbidden.[28] Decisions have also been rendered in particular cases or on request by sector regulators, imposing restrictions to minority shareholding.[29]

It must be considered that the amendments discussed in Congress include an explicit prohibition of interlocking directorates.

Additionally, specific sector regulations prohibit interlocking directorates based on public interest considerations and not exclusively from a competitive perspective: Article 15 of the Sports Corporations Law (20.019) and Article 49 n° 7 of the General Banking Law.

j. Facilitating practices

These practices have been examined as indicative or plus factors in cartel case assessments by the agency and the TDLC.

The FNE, in the report on Trade Associations and Free Competition (2011) and Guidelines for the Analysis of Vertical Restraints (2014) illustrates its approach towards the exchange of information between competitors and facilitating practices.

Companies can request a review by the TDLC of the conformity of a practice, act or arrangement between competitors (through a consultation or non-contentious procedure). The FNE does not issue review letters to companies but many of these arrangements have been examined in formal investigatory proceedings.

A ruling that examines at length the relevance of these practices for determining the existence of collusive behavior, is TDLC Decision No. 157/2007 in FNE v. Isapre ING S.A. et al[30], and detailed consideration was given to practices in the health insurance industry, such as: information exchange, frequent monitoring of health plan conditions, public information of different insurance plans, reimbursement caps agreed in trade association committees and intervention of executives in those committees.

k. Information exchange

Same considerations apply as regards the previous section.

l. Leniency program

In 2009 leniency was introduced (in Law 20.361), in line with international best practices applied in the cartel enforcement arena. Article 39 bis of DL 211 establishes the possibility in favor of an economic agent to be granted an exemption (immunity) or reduction from fines when said agent cooperates with the FNE and provides sufficient background to prove the collusive conduct and the responsible parties.

[28] Competition Resolutory Commission decision No. 667/2002 (generation/distribution in the electricity market).

[29] Competition Central Preventive Commission decision No. 1045/1998 (port terminals), Nos. 1004/1997 and 1014/1997 (airport terminals) and TDLC Resolution No. 1/2004 (cable/satellite providers).

[30] The ruling rejected the FNE´s complaint against the health insurance industry for collusive behavior.

The FNE also published the Guide on the Benefits of Leniency and Fine Reduction in Collusion Cases[31] (2009), which covers the requirements and stages to be fulfilled in order to obtain leniency.

Applications (forms) are received via the FNE website under strict confidentiality protected by statute. After a Planning Meeting with officers in charge of the program, a Marker will be provided. This Marker informs the applicant its position relative to other applications made in the case, in order to determine the available benefits.

A Dismissal Decision of the application may be taken if:

(i) the applicant fails to attend the Planning Meeting set in the Guide or is unable to establish his/her authority to act;

(ii) if, at the time of the Planning Meeting, the FNE has already filed suit before the TDLC in connection with the same parties and conduct; and

(iii) should the applicant fail to attend the Meeting for Submission of Evidence, even after reschedule.

Natural persons, legal entities or their representatives can apply for benefits. In case of a legal entity, all the executives, employees and consultants identified in the application will be considered as beneficiaries so long as, during the period in which the conduct (infringement) takes place, they are not independent economic agents in the same market, and regardless of whether or not they are employed or working with that legal entity at the time the Application is sent.

If the applicant is a natural person, the application will not cover other natural persons or legal entities.

In order to obtain the benefits of total exemption or a reduction of fines, the following requisites must be satisfied:

(i) that the applicant has acknowledged the execution of conduct described in letter a) of Article 3;

(ii) that the applicant has delivered accurate, truthful and verifiable evidence that effectively contributes to the verification of the collusive conduct and the identification of the other responsible parties;

(iii) that the applicant has committed to not disclosing the application for these benefits until the FNE has brought the case before the TDLC or has closed the matter;

(iv) that the applicant has ended its involvement in the conduct immediately after having formally applied for the benefits; and

(v) that the applicant has declared that it neither organized the collusive conduct nor coerced others into entering it.

[31] See http://www.fne.gob.cl/english/wp-content/uploads/2012/03/Guide_benefits.pdf. This Guide is being subject to a revision by the FNE; the public consultation period is closed but may be reopened if new amendments to DL 211 are approved by Congress.

Benefits may be requested regardless of whether the FNE is already investigating the affected market for conduct described in the Application, or has requested authorization to use, or is using, the powers provided under Article 39 bis (dawn raids and wiretapping). On the other hand, the benefits will not be afforded if the FNE has already submitted a complaint to the TDLC by the time of the Application.

The FNE will consider evidence such as:

(i) a written or oral statement admitting to participation in the collusive conduct, identifying other economic agents involved or natural persons who participated directly; including a description of the conduct involved (level of production, price, market allocation or bid rigging); the product or service at issue; timeframe and geographic area in which the cartel conduct took place; and market volumes and/or overcharges agreed upon. Also, other details of the collusive arrangements, such as dates and means of communication, places of meetings, monitoring mechanisms of the compliance strategy, and relevant changes to the strategy; documents revealing the existence of, or participation in, the collusive conduct (negotiations or mechanisms of coordination). Any document that may directly or indirectly uncover a cartel or concerted action infringement; the destruction or concealment of evidence; board of directors' minutes, travel documents, commercial instruments, internal commands, electronic mails, minutes or transcripts of negotiations or meetings, agendas; phonograph and/or audiovisual recordings, will be considered as documents, among others;

(ii) documents revealing the existence of, or participation in, the collusive conduct (negotiations or mechanisms of coordination). Any document that may directly or indirectly uncover a cartel or concerted action infringement; the destruction or concealment of evidence; board of directors' minutes, travel documents, commercial instruments, internal commands, electronic mails, minutes or transcripts of negotiations or meetings, agendas; phonograph and/or audiovisual recordings, will be considered as documents, among others; and

(iii) research studies, reports, statistics, databases; any indicia or evidence useful to establish the existence of the collusive conduct or that may justify the exercise of any of the FNE's powers.

For someone to attain immunity from a fine, the FNE shall verify that, besides the fulfillment of the requirements set forth in the Guide, the applicant was the first to obtain the Marker in the case.

For someone to benefit from a fine reduction, the FNE shall verify that, besides the fulfillment of the requirements set forth in the Guide, the applicant provided additional evidence to the supplied by the beneficiary of the immunity.

The fine reduction requested by the FNE in the complaint will not exceed 50% of the highest fine requested for the participants not benefitting from leniency.

After agency approval of the request for exemption (immunity) or reduction of the fines, the TDLC cannot impose a fine to the beneficiary of the exemption (first applicant), nor can apply a fine higher than the level requested in favor of the subsequent applicant, unless its proven

that the applicant has organized the collusive conduct and having coerced the other defendants to participate.

m. Settlements

DL 211 provides parties two ways to settle with the FNE or other counterparts. During an investigatory proceeding led by the FNE, companies involved can reach an extrajudicial agreement with the agency in order to close the enquiry by offering or negotiating commitments. They can include behavioral measures, such as modifying contracting policies, stipulations to voluntary cease and desist, to waive certain clauses or restrictions in contracts (e.g. limiting periods of non-compete clauses). Settlements may include structural measures such as the commitment to waive intellectual property rights or adopting voluntary licensing in favor of third parties.

These agreements must be approved by the TDLC. The tribunal has never rejected an agreement of this kind although some modifications have been made by the parties after considering the tribunal´s specific concerns.

A second settlement procedure is available for parties in the contentious process before the TDLC (infringement cases). After the party´s suit or claim lodged by the FNE is responded, the TDLC may call upon the parties to settle the matter (including fines and corrective measures), or otherwise open a discovery phase. Parties can request to be called for settlement hearing. The TDLC´s judges may personally intervene in the settlement negotiation. Its approval can be appealed by other parties in the process through recourse before the Supreme Court of Justice. These settlements can include agreements to expedite the discovery phase.

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OVERVIEW OF COMPETITION LAW IN COLOMBIA

Alejandro García de Brigard

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

Article 333 of the Colombian Constitution establishes the principles of free enterprise, economic freedom and free competition as collective rights of all citizens, subject to the limits established in the law in order to guarantee common welfare. Such article states: *"[…] The State, following the law, will impede the limitation or obstruction of the economic freedom and will prevent or control any abuse that individuals or companies exercise through dominant positions in the national market. The law will determine the scope of the economic freedom when necessary for the protection of social interests, the environment and the country's cultural heritage."*

Antitrust and competition laws and regulations are contained mainly in Law 155 of 1959, Decree 2153 of 1992 and Law 1340 of 2009. These regulations forbid all behaviors that entail restrictions or limitations to the constitutional right of free competition, and determine the applicable procedures and corresponding sanctions, as well as rules and procedures for merger control. Acts of unfair competition are regulated by Law 256 of 1996. It must be noted that Colombian competition laws are of a national scope and applicability; there are no State or local laws on the matter.

Mergers in the financial and insurance sectors are governed by the Organic Statute of the Financial System ("Decree 663**"**, 1993). Legislation for mergers between airlines is contained in article 1866 of the Commerce Code and article 3.6.3.7.3 of the Colombian Aeronautic Regulation ("RAC").

b. Theories of harm present in the law

Law 155 of 1959 establishes a general prohibition of agreements or contracts that directly or indirectly aim to restrict the production, supply, distribution or consumption of raw materials, products, goods or services and, in general, all kinds of practices, procedures or systems with the objective of limiting competition or setting or protecting unfair prices to the detriment of consumers and producers of raw materials.

Decree 2153 of 1992 contains a non-exhaustive list of agreements deemed to be anticompetitive. This list contains price-fixing, bid rigging, market allocation, and tying and bundling, among other conducts. Due to the non-exhaustive nature of the list, other agreements that have the purpose or effect of restraining competition will also be deemed illegal.

Two forms of unilateral conduct are prohibited by Colombian competition law: (i) anticompetitive acts and (ii) abuse of dominance. The former are conducts that are deemed illegal

notwithstanding the market share or size of the company/individual that executes them, while the latter require the perpetrator to hold a dominant position in the market.

Colombian law defines dominance as the ability to determine, either directly or indirectly, the conditions of the market. There is no market share threshold above which dominance is presumed, rather, the authority will analyze on a case-by-case basis to determine if a company holds a dominant position on the market. Whenever such position is held, conducts such as (i) tying and bundling, (ii) predatory pricing, (iii) price discrimination, among others, are deemed illegal.

According to Decree 2153 of 1992, anticompetitive acts are (i) the violation of advertising rules contained in the consumer protection statute, (ii) influencing a company to raise its prices or to desist from lowering them, and (iii) refusing to engage in business with, or discriminate against, a company as retaliation to its pricing policies.

As per article 3 of Law 1340 of 2009, a merger tends to restrict competition if it affects: (i) the free participation of companies in the market; (ii) consumers' welfare; (iii) economic efficiency. Likewise, a merger tends to produce an undue restriction on competition when: (i) the merging parties engaged in anti-competitive activity prior to the transaction; (ii) the merged entity would acquire the capacity to impose unfair prices on consumers as a result of the transaction.

c. Authority in charge of enforcement of antitrust law and regulations

Law 1340 of 2009 appointed the Superintendence of Industry and Commerce (the "SIC") as the National Competition Authority. Before that, the SIC acted as general and residual competition authority, applying Decree 2153 of 1992 in cases related to anti-competitive agreements, unilateral anti-competitive conduct, abuse of dominance, and merger control.

The SIC is a technical organization, ascribed to the Ministry of Commerce, Industry and Tourism, with financial and budgetary autonomy. It is in charge of: (i) protecting and promoting competition, controlling anti-competitive and unfair trade practices; (ii) applying consumer protection laws; (iii) administrating the trademarks and patents' registry; (iv) ensuring the right of habeas data and the protection of personal data; (v) controlling and monitoring the Chambers of Commerce; and (vi) establishing, controlling and monitoring technical regulations and legal metrology. In addition, the SIC has been given judicial authority to decide unfair competition and consumer protection cases.

It is important to understand that SIC is not a judicial authority, but an administrative entity controlled by the government. The president of Colombia is in charge of appointing, at his discretion after an open call for candidates, the Superintendent that will lead the entity during the presidential term.

The SIC also acts as a consultant for the government, exercising a duty denominated "Competition Advocacy", with the purpose of promoting competition, producing market studies, and socializing competition laws. As per Law 1340 of 2009, the SIC must review all of the regulatory projects that may have incidence in competition and render its opinion, which will not be enforceable.

d. Nature of antitrust enforcement

"*Actions of the SIC in matters of free competition and anti-competitive practices are eminently administrative and not jurisdictional. They are denominated by doctrine and case law as duties of "administrative police" that emerge from the police power and give rise to sanctioning administrative authority of the administration*."[1] Therefore, SIC's decisions are deemed administrative decisions with a sanctioning nature and not judgements.

Nonetheless, regarding unfair competition the SIC has a dual nature, as in 1996 the authority was given judicial powers. Two types of claims may be brought before the SIC under its judicial powers:

(i) declarative action, which is used by a party affected by an act of unfair competition seeking (1) the conduct be declared illegal, (2) the order to cease the conduct and, (3) to be compensated for damages.

(ii) preventive action, which is used by a party that could potentially be damaged by an act of unfair competition seeking (1) the potential conduct to be recognized as illegal and, (2) to order not to commit the conduct or to cease the conduct if it has begun.

As a general rule, there are no criminal penalties related to competition violations in Colombia. Nevertheless, since 2011, bid-rigging agreements in government procurement are considered a criminal offense that can result in imprisonment for a period of 6 to 12 years and the imposition of fines. However, the criminal action is not initiated nor promoted by the competition authority, but rather by the general Colombian criminal system.

e. Investigational powers of the authority

Decree 2153 of 1992 and Law 1340 of 2009 set forth the procedure for an investigation in connection with anticompetitive conduct. Investigations have three main stages: (i) the preliminary inquiry; (ii) the formal investigation; and (iii) a ruling on the merits by the Superintendent.

The preliminary inquiry may be initiated ex-officio or upon request of any party. The inquiry is undertaken by the Office of the Deputy Superintendent for Competition Protection and ends with the decision either to cease the proceeding or to open a formal investigation. The Deputy should only initiate a formal investigation if the behavior has a significant impact on the relevant market.

Formal investigations are also undertaken by the Deputy Superintendent for Competition Protection. A formal investigation is launched via a resolution ordering its initiation. The investigated parties must receive service of the decision for them to be able to exercise their defense rights during the investigation. The main purpose of the investigation is to collect evidence relevant to determine whether an anticompetitive conduct actually took place. The investigation will conclude when (i) the Deputy Superintendent decides to cease the investigation or (ii) when the Deputy Superintendent issues a "Motivated Report" with its assessment of the investigation. In this Motivated Report, the Deputy Superintendent will recommend to the Superintendent either to sanction the investigated parties or to clear the investigated parties from all charges.

[1] Decision C-537 of 2010, Constitutional Court.

It is worth noting that, throughout the formal investigation stage, the SIC may terminate the investigation if, in its judgment, the investigated party provides sufficient remedies or guarantees that it will cease and desist the investigated conduct. Any such guarantees may be agreed between the investigated party and SIC at any time during the formal investigation, i.e., before the Office of the Deputy Superintendent issues the Report.

The SIC has the following investigative powers:

(i) order the production of specific documents or information;

(ii) carry out compulsory interviews with individuals;

(iii) carry out an unannounced dawn raids;

(iv) right to 'image' computer hard drives using forensic IT tools;

(v) right to require an explanation of documents or information supplied.

It is worth noting that the SIC's authority to conduct dawn raids is limited by the fact that the SIC may not actually force its entry into the premises. Its enforcement authority in this regard is limited to initiating a separate investigation against the relevant company for obstructing the SIC's investigative authority and imposing the relevant fines.

The statute of limitations for antitrust investigations is 5 years.

f. Attorney-client privilege

Attorney-client privilege is protected at a constitutional level as a form of professional secret and further regulated by the laws governing professional ethics for lawyers. While officers working with SIC have on occasion argued that in-house legal advice is not protected by privilege, there is no precedent supporting such restriction of attorney-client privilege.

g. Interactions with other regulators

The SIC has not entered into formal cooperation agreements with foreign agencies, nor has it published guidelines applicable to international cooperation. At this stage, any cooperation between the SIC and foreign agencies is informal in nature and has no binding power.

h. Treaties in place

Agreements in force include:

(i) Free Trade Agreements: USA-Colombia; Mexico-Colombia; Chile-Colombia; Canada-Colombia; Colombia-European Free Trade Association (EFTA); Colombia-European Union; Colombia-Northern Triangle.

(ii) Preferential Trade Agreements: CARICOM-Colombia; Colombia-Costa Rica; Colombia-Nicaragua; Colombia-Panama; Colombia-Venezuela; Colombia-Ecuador-Venezuela-MERCOSUR.

(iii) Customs Unions: Andean Community; Caribbean Community (CARICOM).

(iv) Treaties adopted: Paris Convention for the Protection of Industrial Property - Article 10bis regarding unfair competition; CAN Decision 608 - Rules for the promotion and protection of free competition in the Andean Community.

i. Standards of evidence

In Colombia, legislation in the past provided for the 'legal rate' mechanism, which required a minimum number of requisites to be satisfied in proving certain situations. Nowadays, Colombian law provides flexibility on the type of evidence that may be presented, enabling the reviewer to rule freely according to the rules of sound criticism (that is, rules of logic, science and experience).

Therefore, according to Article 176 of the General Procedural Code, "evidence shall be valued altogether, in accordance with the rules of sound criticism, notwithstanding the formalities required in the law for the existence or validity of certain acts, having the judge to explain reasonably the merit assigned to each evidence". In civil matters, the ultimate threshold is whether the judge is persuaded.

However, in criminal law the standard is 'beyond reasonable doubt', as per Article 381 of the Criminal Procedural Code.

j. Methods of engagement with authority

Law provides no specific or regulated method of engagement with authority. The SIC generally is an 'open doors entity' and the parties can easily approach the authority by means of informal meetings.

As a matter of fact, merger control regulations establish that, if the parties require it, they can schedule a meeting with the SIC for the preliminary review of the conditions of the transaction and the documents required for the filing, with the objective of providing guidance to the parties. Such meeting will be coordinated by the Merger Control Division, five business days after the parties' request.

k. Judicial review of decisions

Parties are entitled to file a request for reconsideration before the SIC within five working days after notification of the decision. If the SIC confirms its initial decision, the parties are entitled to request a judicial review of the decision of the SIC at the trial court level. The judicial review process allows the parties to have one ordinary appeal at the appellate court level and, in extraordinary and very limited circumstances, an additional instance of review at the level of the highest administrative court, i.e. the Council of State.

Judicial review of decisions issued by the SIC, as well as by any public entity with administrative authority is conducted by the Administrative Jurisdiction within the Judicial branch. The Administrative Jurisdiction is a special branch of the judiciary that adjudicates claims against the government and its agencies. The parties must file their claim, an action requesting "nullity and restoration of rights" at the trial court level. However, when the amount of the claim (e.g. the amount of a fine) exceeds a certain level, the proceeding will start at the appellate court level, which will then act as a trial court. An action requesting the nullity and restoration of rights is intended to nullify the relevant administrative decision and to have those rights that were affected by it duly restored and reinstated. The plaintiff may also request the payment of damages.

If the decision at the trial court level is still not favorable, the plaintiff has the right to appeal, and the claim will be moved to the appellate court level. The appeal is not intended to be an opportunity to bring new evidence or new facts into the proceedings, but rather to have the initial decision reviewed at a higher level, for the purposes of correcting mistakes made by the trial court.

In very limited circumstances, the parties may be entitled to an additional level of review whenever the decision at the appellate level results in egregious mistakes or significant misconduct by the relevant judge or justices. In such event, the case will be reviewed by a panel of justices of the Council of State.

l. Private litigation

Private litigation does not apply regarding competition regulations before the SIC, as this is an administrative procedure.

However, there is the possibility of presenting a "Class Action" sort of claim before Civil Courts whenever a group of people believes has suffered damages because of an anticompetitive conduct. In order to file such action, there is no need to have a decision by the SIC declaring the existence of an anticompetitive conduct.

II – MERGER CONTROL

a. Types of transactions

Under Colombian law, a transaction is deemed an economic integration whenever a formerly independent entity comes under the control of a different controller. Therefore, whenever a transaction results in a formerly independent company coming under the control of a different individual, group of individuals, company or group of companies, such transaction will be regarded as an economic integration.

For the case of joint ventures ("JV"), the SIC has also established criteria to determine if such JV is considered or not an economic integration. These criteria are:

(i) the JV should have some degree of permanence in time;

(ii) it must be a full functioning JV, independent from the parties to the transaction; and

(iii) it must create a market agent that effectively competes in a relevant market.

b. Notification of foreign-to-foreign mergers

All mergers, independently of whether both parties, one of them or neither are foreign entities, are subject to the same review by the authority, as long as all criteria of the Colombian merger control test are met. The conclusion is that the same legislation governs both domestic and foreign mergers, whenever these produce effects in the Colombian market.

c. Definition of "control"

Colombian merger control regulations apply to transactions that result in a change of control. Article 45 of Decree 2153/1992 defines "control" as "*the ability to directly or indirectly influence the business policies or the initiation or termination of business activities by a given legal entity, the variation of its core business activity or the decision to dispose of assets that are essential for its business*". The authority has determined that the mere ability to influence any of the aforementioned qualifies as control, regardless of whether such ability has been or will be used.

The broad scope of the legal definition of control has led the SIC to conclude that the existence of control must be analyzed broadly and on a case-by-case basis. However, prior SIC decisions have identified situations in which control may arise, such as:

(i) majority shareholding: this is the most common form of acquisition of control. Nevertheless, the SIC has stated that a majority stake does not necessarily amount to control if the majority shareholder does not have the ability to exercise the influence required by the legal definition of control;

(ii) minority shareholding: the acquisition of a minority shareholding in a company triggers the notion of concentration whenever the minority shareholders acquire the ability to influence the business activities of the target; e.g. veto rights exercised over corporate policies or business activities; or

(iii) minority representation at the Board of Directors: the SIC has recognized that the right to appoint the majority of the members of the Board of Directors is an indication of the existence of control, but has also specifically indicated that it does not per se entail control, since the existence of the capacity to influence the company's business must also be present.

d. Jurisdictional thresholds

Under Colombian merger control regulations, a merger control filing is required when the following conditions are met: (i) the transaction is an economic integration as defined by Colombian merger control regulation, (ii) the activities of the parties overlap in Colombia, and (iii) the parties meet the applicable thresholds in income/assets.

(i) The transaction qualifies as an "economic integration". As per Colombian law, any mechanism used to acquire control over one or more companies -which results in the combination of one or more economic activities- and as a result competition among the parties ceases, is deemed as an economic integration.

(ii) Local Overlap. Any transaction where the parties are active in any Colombian market, either directly, via local subsidiaries or branches or indirectly, through a commercial agent, reseller or distributor, is relevant for purposes of local merger control regulations. Local overlap prong of the test is met whenever the parties either (i) undertake the same economic activity (horizontal overlap) or (ii) are active in the same value chain (vertical link).

(iii) Economic thresholds. Combined annual operating income or total assets (including those of all other related companies in Colombia which undertake the same economic activity or are active in the same value chain), as of December 31 of the

year immediately preceding the transaction, equal to or exceeding 100,000 minimum monthly wages (c. US$22 million).

(iv) Combined Market Shares. Finally, whenever the interested parties to the transaction meet conditions 1 to 3 above, a filing is required. However, if the combined market share in the relevant market is below 20%, only a short-form filing is required. Otherwise, if the combined market shares are above 20%, a full-fledged filing, with a waiting period, is required.

e. Triggering event for filing and deadlines

Triggering event for filing and deadlines depend on the applicable merger control procedure, as seen below:

(i) short-form procedure: it is recommended that the parties file 10 business days before closing of the transaction; however, they can also file on closing date. Once the parties have filed, the SIC has 10 business days to confirm if it deems the filing complete.

(ii) full-fledged procedure: the long-form procedure is divided in two potential phases. Phase 1 is designed to clear transactions that, albeit generating a combined market share above 20%, on their face, do not give rise to competitive concerns. When further analysis is required, the SIC moves to a Phase 2 inquiry, were a more thorough review is conducted. It is worth noting however that most transactions are moved to a Phase 2 inquiry, not because of the merits of the case, but as a result of the inability of the authority to review the transaction within the deadline.

Phase I consists in a 30 day period, while Phase II consists in a 3 month period. In practice, a full-filing procedure has an estimated waiting period of 4 to 6 months. Therefore, the parties must submit the filing and its annexes in advance, with due anticipation.

The transaction will be deemed to be cleared if the 30 day period for Phase I lapses and the SIC does not issue a Phase II information request, or if the 3 month period for Phase II lapses without a formal decision by the SIC.

f. Exemptions

(i) Article 9 of Law 1340/2009 indicates that when the parties to a transaction are part of a group of companies, as defined in article 28 of Law 222/1995[2], they are exempt from their obligation to inform the SIC and therefore, clearance is not required.

(ii) efficiency exemption: in the event that a preliminary analysis of the merger gives rise to concerns, the SIC analyzes the evidence presented by the parties regarding the potential efficiencies obtained from the transaction. The analysis of the SIC in this matter seeks to determine whether the merger will create efficiencies of such a nature, that the positive impact of the transaction on the consumers will be greater than the negative impact on

[2] Pursuant to Colombian Law, a group of companies exists whenever two or more companies (i) have a subordination relationship (i.e. majority shareholding or control of the decisions at the Board of Directors) among them and (ii) operate with unified purpose and direction.

competition, and that such effects cannot be obtained otherwise. When the parties argue the efficiencies exception and the SIC accepts it, the parties must commit to pass on the efficiencies to the consumers and may be required to provide access to the SIC to information that would allow it to monitor the achievement of efficiencies and the transfer to consumers.

(iii) failing industry defense: using this mechanism, SIC authorized mergers in order to save companies that were facing imminent bankruptcy. The criteria to determine the applicability of this mechanism are: (1) the company in crisis must be destined, due to its economic problems, to abandon the market in the near future; (2) there is no other alternative or project that results less anticompetitive; (3) the damage to competition caused by the transaction is comparable with the one caused by the exit from the market of the company in crisis.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

Even though the SIC holds the general jurisdiction over all antitrust and merger control procedures, some are granted to a specific authority as is the AEROCIVIL (National Aviation Authority) or the Superintendence of Finance ("SF").

Mergers in the financial and insurance sectors are governed by the Organic Statute of the Financial System (Decree 663, 1993). In its review, the SF must hear the opinion of SIC and apply the conditions that SIC recommends. The Statute sets forth that any person seeking to acquire 10% or more of the stock of a financial entity, including insurance companies, must be cleared by the SF prior to consummating the acquisition. Failure to obtain the authorization of the SF, as required by article 88 of the Statute, before perfecting the transfer of shares will result in (i) the nullity ab initio of such transaction (which means that no judicial decision is required to that effect), (ii) the financial entity may be sanctioned by the SF, and (iii) the acquiring party, if incorporated outside of Colombia, may not register its foreign investment with the Colombian Central Bank and, therefore, will not have the right to transfer from Colombia profits and other funds related to such investments.

Legislation for mergers between airlines is contained in Article 1866 of the Commerce Code and article 3.6.3.7.3 of the Colombian Aeronautic Regulation (RAC).

h. Information requested for the filing

Information requested for the filing depends on the applicable merger control procedure, as evidenced below:

(i) the short-form filing must include basic information on the parties, the structure and timeline of the transaction, the relevant market and the market shares of the parties and their competitors. The parties also need to (1) file copies of their Balance Sheet and P&L as of December 31 of the year preceding the transaction, (2) file original copies of their Certificates of good standing and incumbency, and (3) attach the PoAs;

(ii) documents that must be submitted with the full-fledged filing include: (1) copies of the parties' Balance Sheet and P&L as of December 31 of the year preceding the transaction; (2) copies of the parties' Management Reports of the year

preceding the transaction; (3) Certificates of good standing and incumbency; and (4) PoAs.

The full-fledged filing has a long standard RFI that includes a substantial amount of information on the structure and timeline of the transaction, parties, relevant market, overlapping products, the geographic scope of the transaction, competitors, market shares, distribution channels, imports and exports, barriers to entry and inputs. The specific requirements are listed below:

(i) description of the transaction: structure, timeline, competition authorities where the parties will file for clearance.

(ii) filing entities: parties' business activities, shareholding structure, parent entities, investments of companies controlled by the parties, group of companies in Colombia.

(iii) product market: parties' services/products lineup, description, available presentations, main uses, trademarks, targeted consumers, substitutes, manufacturing process, and monthly sales (for the 3 years immediately preceding the filing) of the affected products, parties' top 10 clients and their purchases in the prior year, market studies.

(iv) geographic market: precise location of parties' factories, distribution centers or offices, transport cost as a percentage of the affected product's price, parties' expansion plans within the 3 years following the filing.

(v) competitors: market shares for the 3 years immediately preceding the filing, competitors' contact information, products, trademarks and customs sub-heading.

(vi) distributors: parties' distributors along with contact information and geographic area served distribution channels (including terms and conditions).

(vii) market structure: monthly prices (for the 3 years immediately preceding the filing) of the affected products, cost structure, parties' patents registered in Colombia, annual exports and imports of affected products during the 3 years preceding the filing.

(viii) conditions of entry: legal barriers of entry, total production capacity and total effective production for the prior year, companies that entered or left the market during the past 3 years, necessary investment to enter the market, companies that could adapt their production to enter the market.

(ix) inputs: inputs used in the production process and list of suppliers.

It must be noted that SIC will not initiate its review until the information-gathering process is complete.

i. Sanctions applied for late or no filing

The implications of a failure to notify, or doing so after the transaction has been closed, include fines as a stand-alone antitrust violation and a further review of the transaction's antitrust concerns.

The SIC has the power to initiate an investigation to determine if an economic integration was not reported, or if the parties closed the transaction before securing clearance.

Under Colombian antitrust law, the penalties for companies failing to file for pre-merger control when required or closing the transaction before clearance are capped at 100,000 minimum monthly wages (i.e. US$22 million). Alternatively, if the profit resulting from failing to file for approval exceeds such figure, the penalty may be 150% of the profit. In the case of individuals, including officers and employees of the relevant companies that were in a position to determine whether or not a filing was required, fines are capped at 2,000 minimum monthly wages (i.e. US$430,000). Please note that should an individual be fined, the company could not legally cover the amount of the relevant fine.

Although it cannot be guaranteed, fines in merger control cases usually stay below US$250,000. Maximum fines have been reserved for cartel cases and abuse of dominance.

Furthermore, if after an investigation the SIC concludes that (i) the parties had an obligation to inform or (ii) the parties closed the transaction before it was cleared and the transaction raises antitrust concerns and has o may have anticompetitive effects, it can order the transaction "reversed", including divestitures of shares or assets.

j. Parties responsible for filing

In principle, both Parties are responsible for the filing. Nonetheless, the term party ("empresa interviniente") is very broadly defined by the merger control regulation as any entity that is part of a transaction that may have effects in the Colombian market. This definition does not clearly determine the specific corporate entity considered as such. In practice, that means the parties have a wide degree of latitude in choosing the specific filing entity, i.e. the entity that will be reported as "empresa interviniente". Therefore, the filing entities may be either the parties to the transaction, the parent entities (if other than the parties to the transaction), or the Colombian subsidiaries of the parties.

It must be noted that a recent regulation by the authority allows only one of the parties to submit the filing. This means information is provided for both parties but they do not have to jointly sign the document. In this case, the filing party must indicate that all information from the party that does not sign was obtained and is submitted with its consent.

Finally, in the case of hostile takeover scenarios, Colombian regulations allow acquirers to file for clearance even if they do not have all the required information on the target's side. The authority will then obtain the information directly from the target.

k. Filing fees

No filing fees apply in Colombia regarding merger control procedures and their submission before the authority.

l. Effects of notification

When the applicable merger control procedure is the short-form filing, if within a 10-day period the authority responds with a letter acknowledging receipt of the notification, the transaction will be deemed cleared as of the date of filling. Within the 10 day period the authority could also (i) determine whether they feel the filing is incomplete (which will result in SIC asking the parties to file the missing information) or (ii) determine whether the short-form

procedure does not apply (which results in the parties being instructed to file an application for a full review).

When the applicable merger control procedure is the full-fledged filing, the transaction will not be deemed cleared until the SIC issues its final decision:

(i) unconditionally clearing the transaction;

(ii) conditionally clearing the transaction; or

(iii) blocking the transaction.

m. Gun jumping and closing – sanctions

The established sanctions for gun jumping in Colombia are the same as those explained in section i. above. In Colombia, premerger coordination between the parties, e.g. coordinating the parties' competitive conduct or sharing confidential information, before the transaction has been cleared by the SIC, is subject to fines as a stand-alone antitrust violation and entails a further review of the transaction's antitrust concerns..

n. Type of remedies and their negotiation

When analyzing a proposal of remedies, the authority's main objective is to offset any negative effect on competition. The SIC seeks a balance between consumer welfare, economic efficiency and free market. The Colombian Merger Guidelines establish that even though structural remedies may be the best choice when facing a horizontal merger (since they directly diminish market power) and behavioral remedies are a better fit in vertical mergers (since they tend to disincentive negative effects), some cases may require a combination of different types of conditions. Therefore, the SIC has enough flexibility to impose the specific remedies that fit each situation.

Even though both structural and behavioral remedies are accepted, the Colombian authority certainly prefers structural remedies. A structural remedy is set up taking into account the following elements:

(i) the timeframe within which the incumbent should comply with the obligation;

(ii) the remedies must be specific and verifiable obligations;

(iii) any assets involved in the remedy (e.g. equipment to be divested) should be properly and sufficiently identified; and

(iv) the incumbents should provide objective criteria about the suitability of the remedy (e.g. an expert opinion about the suitability of the equipment to be divested).

The main structural remedies used by the SIC include divestment of tangible or intangible assets or a combination of both and divestment of business units. On the other hand, behavioral remedies may include firewalls, nondiscrimination, mandatory licensing, transparency, and anti-retaliation provisions, as well as prohibitions on certain contracting practices.

In terms of procedure, a final set of remedies is usually the result of a negotiation between the SIC and the parties. While the parties are free to submit a proposal on remedies at

any time during the review process (during Phase I, once the case is moved to Phase II, and up until the reconsideration remedy is filed), in a typical procedure, the SIC will inform the parties of the competition concerns it has identified prior to reaching a final decision, and the parties will then be allowed to submit a proposal. Before the parties submit a formal proposal, they will most likely have engaged in discussions with the authority to increase the chances they are accepted. The proposed remedies must include, at a minimum, the timetable in which the commitments will be enforced and the responsible party. The proposal will then be evaluated by the SIC within the merger control proceeding and a final decision will be reached. While the SIC may allow for a level of negotiation, the final set of remedies is unilaterally decided by the authority.

In cases in which neither behavioral nor structural commitments, nor a combination of the two, would effectively preserve competition, the SIC will block the transaction. Since the acceptance of merger control remedies is an administrative decision issued by the SIC, the parties may challenge the decision before the administrative courts. However, there is neither specific, nor a mandatory judicial proceeding to review or challenge remedies.

o. Timetable for clearance

Regarding timing for a merger control procedure submitted before the SIC, each applicable procedure has an established timing. In the case of short-form filings, an acknowledgement of receipt will be issued by the authority within a 10-day period.

In the case of full-fledged filings, Phase I consists in a 30 working day period, while Phase II consists in a 3 month period. However, in practice, a full-filing procedure has an estimated waiting period of 4 to 8 months. Please note that during a Phase II review, only the first information request issued by the SIC will reset the clock. Any subsequent requests will not reset/stop the clock.

p. Involvement by third parties

Within 3 days following the filing, the SIC will publish a notice in its website, and may order the parties to make a publication in a newspaper with nationwide circulation, in order to report to third parties the information and allow them to make comments and objections. After the website publication, such third parties have 10 business days to file before the SIC the information they consider relevant. Information provided by third parties during this term will be available for the parties' review – unless it is subject to confidentiality, in which case they can only access non-confidential versions – and may be disputed by means of a written response, which may include the request to order evidence.

Once the 10 days period for third parties to voluntarily present information before the SIC is over, the authority may also send information requests to competitors, or any other third parties, to request any information it deems necessary for the analysis of the transaction.

Whenever deemed relevant, the SIC may also request the opinion of third parties to determine whether a proposed remedy sufficiently addresses the concern raised by a transaction. Even though there is little guidance about how market tests of remedies are to be conducted, the SIC will probably send RFIs to customers, suppliers and competitors identified by the parties in the merger filing, asking among others, if the projected transaction raises any competition concerns and if the proposed remedies are effective to offset such effects. Since applicable regulation only states that third party market test should be conducted "when considered

appropriate", it is understood that the SIC will reach out to third parties who may have an interest in the outcome of the transaction. In addition, resorting to third party market tests is purely discretional.

Law 1340/2009 also provides a procedure to accept third parties in antitrust investigations. A recent decision by the SIC has used this procedure to accept third parties in a merger control procedure, which gives such third parties other prerogatives such as receiving formal notice of all decisions, being able to file additional documents in the procedure with no limitations, and even being able to request the discovery of evidence within the procedure.

q. Types of resolutions that may be issued

Regarding its merger control procedure, SIC issues a resolution with its final decision, which may be:

(i) unconditional clearance;

(ii) conditional clearance; or

(iii) rejection.

Nonetheless, although the procedure does not expressly allow this, the authority may also issue resolutions ordering the discovery of evidence.

r. Review of ancillary restraints

Although not included in the mandatory RFI to be presented to the authority, the SIC may ask the parties to submit information on ancillary restraints in the agreement and may review such restraints in its final decision.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

Pursuant to Colombian competition law, all conducts that affect free competition are prohibited.[3] Unilateral conducts, collusive conducts, and abuses of dominance are all considered restrictive commercial practices, proscribed under Colombian regulation.

Article 48 of Decree 2153 of 1993 includes a non-exhaustive list of unilateral conducts deemed to contravene competition law. Violating advertising rules contained in the consumer protection statute, influencing a company to increase or abstain from reducing its prices, and refusing to sell or to provide services to a company, or discriminating a company as retaliation for its pricing policies are all considered illegal unilateral conducts. On the other hand, article 50 of Decree 2153 of 1993 provides that predatory pricing, price discrimination, tying and bundling,

[3] Article 1, Law 155 of 1959; Article 46, Decree 2153 of 1992.

blocking market entry, and blocking access to trade channels are all conducts constituting an abuse of dominance.

Under Colombian antitrust law, the penalties for antitrust violations are capped at 100,000 minimum monthly wages (c. US$22 million). Alternatively, if the profit resulting from conduct exceeds such figure, the penalty may be of up to 150% of the profit. In the case of individuals, including officers and employees of the relevant companies involved in the conducts, fines are capped at 2,000 minimum monthly wages (i.e. US$430,000). Please note that should an individual be fined, the company may not legally cover the amount of the relevant fine.

b. Exploitative offenses

The Colombian competition authority acknowledges the distinction between two types of abuses of dominance: exclusionary abuses and exploitative abuses.[4] Exclusionary abuses are conducts where a dominant agent limits competition by forcing its competitors to leave the market, blocks the entrance of new competitors, force competitors to exercise a weak competition, or prevent them from expanding.

Exploitative abuses are conducts where a dominant agent takes advantage of its market power to get a hold of part of the income of its customers. This may be achieved either by raising prices, reducing product quality, or establishing discriminatory prices among its customers. Notwithstanding the above, there are no precedents of any investigations regarding exploitative offenses in Colombia.

c. Predatory pricing

Predatory pricing is the conduct by which a dominant agent in the market fixes its prices below its costs, with the purpose of eliminating one or more of its competitors or to prevent their entry or expansion in the market.[5]

Three requirements must be met for a conduct to be catalogued as predatory pricing in Colombia[6]: first, the agent must hold a dominant position in the affected relevant market; second, the conduct of the agent must involve the reduction of its prices below its average costs; third, the conduct must be aimed at eliminating competition or preventing the entrance or expansion of competitors in the market. In case one of these elements is not met, the conduct will not fall under the scope of predatory pricing, and thus will not be deemed illegal.[7]

It is important to point out that Colombian regulations do not reprehend the conduct in and on itself, but rather, its purpose of eliminating competition. If this were not the case, certain legitimate market behaviors, like price promotions, end-of-season sales, and inventory turnovers, would be prohibited, as they necessarily involve fixing prices under the average cost level.

[4] Superintendence of Industry and Commerce. Decision 53403 of 2013.

[5] Article 50.1, Decree 2153 of 1992.

[6] Superintendence of Industry and Commerce, Decision 22624 of 2005.

[7] Superintendence of Industry and Commerce, Decision 39825 of 2004.

To evaluate if an agent incurred in predatory pricing, the authority will compare the agent's sale prices against its average costs[8], which are calculated by dividing all costs (fixed and variable costs) by the number of units produced. This will allow the authority to conclude if the income received by the agent offsets its expenses.

d. Price discrimination

Discriminating between customers or suppliers that stand in equal conditions is considered an act of abuse of dominance, as per Colombian regulations.

In the course of an investigation, the authority will have to prove two main elements: first, that the investigated agent has a dominant position in the relevant market; and second, that the agent executed a unilateral conduct aimed at discriminating consumers or suppliers standing in equal conditions.

This second element additionally requires the SIC to prove that the operations executed by the different customers or suppliers are equivalent, that the dominant agent gave a differential treatment to these analogous operations, and that the differential conditions placed one of the customers or suppliers in an underprivileged condition against the other customers or suppliers.[9] It is important to note that proving the existence of analogous operations does not exempt the SIC from proving that the suppliers or customers were in equal conditions.

e. Resale price maintenance

Resale price maintenance is deemed illegal as both an anticompetitive agreement and a unilateral conduct. As a unilateral conduct, Article 48 numeral 2 of Decree 2153/1992 deems as illegal any action by a principal to influence a company to increase its prices or to discourage them from lowering their prices. The SIC has stated that any sort of suggestion, or inspiration by the principle of an idea in its distributors for them to change their prices could be considered anticompetitive.

Furthermore, a different expression of vertical resale price maintenance is that included in numeral 3 of the aforementioned article 48 of Decree 2153/1992 that deems as illegal to retaliate against a company because of its pricing policy. A recent decision by the authority under this conduct sanctioned a principle for ending contracts to its distributors for not following "suggested prices".

f. Tying arrangements

Tying arrangements are only considered unlawful whenever the seller has a dominant position in the relevant market, and conditions the sale of its product on the buyer's agreement on additional obligations, different in nature from the main agreement.[10]

The SIC has identified two main requirements for a conduct to be considered a tying arrangement:

[8] Superintendence of Industry and Commerce, Decision 39825 of 2004.

[9] Superintendence of Industry and Commerce, Decision 40912 of 2012.

[10] Article 50.3, Decree 2153 of 1992.

(i) the seller must have a dominant position in the market of the tying product or service; and

(ii) the buyer must be forced to agree on a secondary product or service ("tied product") in order to acquire the tying product or service.

The buyer will be considered to be "forced" to buying the tied product whenever:

(i) the buyer cannot acquire the tying product without the tied product,

(ii) there is a financial incentive involving the purchase of the tied product; or

(iii) the purchase of the tying product is designed so that it is not possible to acquire the tying product without the tied product.[11]

The SIC has indicated, however, that in certain scenarios tying arrangements are not anticompetitive. This is the case, for instance, of arrangements that generate economic efficiencies, and promote customer welfare or increase competition.

It is important to note that under Colombian regulations, a tying arrangement may be considered either as a conduct constituting abuse of dominance, or as a violation of the Consumer Protection Statute, which determines that "*the acquisition of a product cannot be conditioned upon the acquisition of other products*".[12]

g. Bundling (including loyalty and market share discounts)

Although not explicitly listed as an anticompetitive unilateral conduct, bundling may be considered as an abuse of dominance, whenever the agent has a dominant position in the market and uses his market power to block market access, block the access to marketing channels, or discriminate between customers or suppliers. However, there are no precedents in Colombia on bundling.

h. Exclusive dealing

An exclusive dealing arrangement may constitute a collusive conduct, a unilateral conduct or a conduct of unfair competition[13] under Colombian regulations.

As a unilateral conduct, exclusive dealing is not considered a standalone violation, but rather a type of abuse of a dominant position. An exclusive dealing arrangement will only be considered as an illegal unilateral conduct, whenever it forecloses the access to a given market or marketing channel, only if the agent displaying the conduct has a dominant position in the relevant market.

The SIC has stated that exclusive dealing is not illegal per se. This means that proving that a conduct may eventually restrict the access to competitors does not result in the conduct being deemed anticompetitive. For the conduct to be illegal, the authority must evaluate the particularities of each case and determine if the conduct may exclude competitors from the market or from a given marketing channel, based on its magnitude and scale, and the characteristics of the relevant market.[14]

[11] Superintendence of Industry and Commerce, Decision 33361 of 2011.

[12] Article 36, Law 1480 of 2011.

[13] Article 19, Law 256 of 1996.

[14] Superintendence of Industry and Commerce, Decision 33361 of 2011.

For instance, the SIC has determined that a commercial strategy pursuant to which an agent with a dominant position executes exclusive dealing arrangements with certain distributors is not illegal, if the distributors do not hold sufficient market power as to cause foreclosure.[15]

i. Refusal to deal

There are no specific provisions under Colombian law according to which refusing to deal is an anticompetitive conduct. However, the SIC may consider a refusal to deal illegal if (i) the agent acting has a dominant position in the relevant market, and (ii) his conduct is aimed at blocking market access or discriminating between customers or suppliers in equal conditions.

j. Essential facilities

Under Colombian regulation, an essential facility is any input (either a good or a service) that is necessary in order to compete in a given relevant market. An input will be an essential facility whenever it provides a market agent with a competitive advantage over its competitors, and whenever it is not reasonable for competitors to replicate this input in the near future (given that, the input may not be replicated at a reasonable cost).[16]

The SIC has determined that the study of essential facilities must be done on a case-by-case basis. To determine if an input is an essential facility, the authority will evaluate if there are any current or potential substitutes to the product or service.[17] An input will not be considered an essential facility if the benefits it provides can be sourced elsewhere.

k. Customer termination

Although there are no specific regulations that provide that customer termination is illegal, the authority may regard this conduct as an abuse of dominance, if the investigated agent has a dominant position in the relevant market and if his conduct falls under the scope of any of the conducts listed in article 50 of Decree 2153 of 1992 as acts of abuse of dominance.

The authority may also sanction this conduct as a unilateral act, if the customer termination is the result of the customers pricing policies.

l. Termination of intermediaries

Pursuant to article 48 of Decree 2153 of 1992, refusing to sell or provide services to a company or discriminating against a company as retaliation for its pricing policies is considered anticompetitive. According to the article's wording, the conduct will only be deemed anticompetitive whenever it comes as retaliation against the intermediary's pricing policies.[18] Therefore, if termination is not aimed at retaliating against the intermediary, the conduct will not be considered illegal. For instance, if a company terminates one of its intermediaries as a result of a default in payments, the conduct will not be anticompetitive.[19]

[15] Superintendence of Industry and Commerce, Decision 33361 of 2011.

[16] Superintendence of Industry and Commerce, Decision 56488 of 2013.

[17] Superintendence of Industry and Commerce, Decision 56488 of 2013.

[18] Superintendence of Industry and Commerce, Decision 8310 of 2003.

[19] Superintendence of Industry and Commerce, Decision 26325 of 2003.

Additionally, the market agent executing the conduct must have the sufficient market power for the conduct to affect supply and demand. If this is not the case, the conduct will not be anticompetitive, as it does not have the entity to affect the market.

Competition law condemns these types of practices given that they restrict the possibility for a market agent to fix its prices freely, according to its cost structure and expected revenue. These restrictions, therefore, affect the agent's possibility to freely participate in the market.

m. Termination of relationship with competitors

There is no Colombian regulation under which termination of relationships with competitors is illegal. However, the authority may determine that these types of conducts are anticompetitive, if the agent has a dominant position in the market and executes his conduct with the purpose of blocking market access or blocking the access to marketing channels to any of its competitors.

n. Settlements

There are no Colombian regulations that allow investigated companies to reach a settlement with the authority. Nonetheless, the offering of remedies or guarantees to terminate the investigation is available.

The Superintendent must evaluate the offer presented by the party and decide to close the case or continue with the investigation. If the authority determines that the remedies or guarantees offered by the party are sufficient to cease or modify the anticompetitive conduct, it will issue an administrative act closing the investigation and establishing the terms of the settlement.

The authority will determine the necessary mechanisms for the party to comply with the arrangement, and will establish a follow up procedure to verify that the party is complying with the agreement. Any violation of the agreement is considered a stand-alone violation of antitrust laws, and will lead to a new investigation.

It is important to note that the Superintendent of Industry and Commerce, head of the SIC, reserves the right to accept or decline any settlement with the investigated party. Therefore, reaching a settlement is not at the disposal of the investigated parties, but rather at the discretion of the authority.

Finally, it is fundamental to point out that reaching a settlement with the authority does not require an admission of guilt from the investigated party. The decision that closes the investigation does not rule on the legality or illegality of the conduct, but rather just decides to close the investigation and sets the terms of the agreement. In light of this, a "settlement" in Colombia does not match the definition of an antitrust settlement in other jurisdictions (for instance, the European Commission), and instead would be closer to the concept of an antitrust "commitment".

(II) COLLUSIVE CONDUCTS

a. Introduction

Under Colombian regulations, collusive conducts may take the form of contracts, conventions, concerted practices or parallel practices between two or more companies.

It is therefore not necessary for competitors to explicitly agree to coordinate their behavior in the market for a conduct to be deemed collusive. On the contrary, even tacit agreements may be considered collusive conducts and be deemed anticompetitive if they have the purpose or effect of eliminating competition in the relevant market.

As is the case of unilateral conducts, Colombian regulation (article 47 of Decree 2153/1992) provides a non-exhaustive list of agreements deemed to be collusive conducts. This is the case, for instance, of price fixing agreements, agreements to allocate customers or territories, horizontal boycotts, agreements assigning production quotas, and bid rigging.

Under Colombian antitrust law, the penalties for antitrust violations are capped at 100,000 minimum monthly wages (c. US$22 million). Alternatively, if the profit resulting from conduct exceeds such figure, the penalty may be of up to 150% of the profit. In the case of individuals, including officers and employees of the relevant companies involved in the conducts, fines are capped at 2,000 minimum monthly wages (i.e. US$430,000). Please note that should an individual be fined, the company may not legally cover the amount of the relevant fine.

b. Horizontal price fixing

Pursuant to article 47 of Decree 2153 of 1997, whenever an agreement between two or more companies has the purpose or effect of fixing prices, it will be deemed anticompetitive.

It is important to note that this provision does not distinguish between vertical and horizontal price fixing. Therefore, the absence of distinction has led the Colombian competition authority to regard both types of price fixing as illegal (with certain exceptions, as provided earlier).

Horizontal price fixing has two main elements. First, it requires the existence of an agreement (explicit or tacit) between two or more companies; second, the agreement must have the purpose or effect of fixing prices. If the conduct has the purpose of fixing prices, it will be deemed anticompetitive even if it has no effect in the market. Conversely, if the conduct has the effect of fixing prices in the market, it will be deemed anticompetitive even if this was not the purpose of the parties to the agreement. In fact, a price fixing agreement will be deemed illegal even if the fixed price is beneficial.[20] His led to a strong per-se illegal rule for both horizontal and vertical price filing.

However in 2014, the SIC changed its long standing position and determined that not all vertical price fixing is illegal.[21] The SIC determined that fixing maximum prices is not considered illegal, insofar as maximum resale prices do not prevent competing distributors from setting their own prices below the maximum threshold, and thus, it does not restrict intra-brand competition. On the other hand, even though the authority determined that setting fixed or minimum prices is considered illegal, the investigated party can override the illegality presumption by proving (i) that the pro-competitive effects of the conduct surpass its non-competitive effects; (ii) that the fixed or minimum price is necessary to obtain those pro-competitive effects, and (iii) the benefits resulting from the conduct outweigh any potential harm.

a. c. Horizontal agreements to allocate customers or territories

Any agreement between companies participating in the same level of the value chain (i.e. between producers or between distributors), with the purpose or effect of allocating customers or territories is considered anticompetitive.

[20] Superintendence of Industry and Commerce, Decision No. 2830 of 2004.

[21] Superintendence of Industry and Commerce, Decision No. 40598 of 2014.

Unlike vertical agreements, which are not always deemed anticompetitive, horizontal agreements for the allocation of customers or territories are per se illegal. This means that whenever an agreement has the effect or purpose of allocating customers or territories, it will automatically be deemed anticompetitive, without regard to its impact on the market.

d. Agreements not to compete

Non-compete agreements may be anticompetitive, when evaluated in the abstract, as they prevent a market agent from competing freely in the market. However, the only precedent by the Colombian competition authority on non-compete agreements.[22] states that these are valid only whenever they are ancillary restrictions aimed at keeping the value of a main agreement from which they stem.

It is important to note that non-compete agreements are only justified under the grounds of keeping the value of an agreement, and thus must be reasonable and proportional in both in geographic scope and timeframe. Even though the SIC did not determine what is meant by a proportionate geographic scope and timeframe, it did determine in that specific case that a 5-year restriction with a geographic scope of Colombia was proportional and lawful.

It is important to note that although non-compete agreements that comply with the aforementioned criteria would be considered lawful when executed between two companies, if one of the executing parties is a natural person, the agreement would not be enforceable in Colombia, as a judge would favor Constitutional rights such as the right to freely choose a profession, or the right to free labor, over the non-compete agreement.

e. Horizontal boycotts

Horizontal boycotts are considered anticompetitive as per numeral 10 of Article 47 of Decree 2153/1992, which prohibits agreements among competitors to restrict entry into the market or distribution channels. There are few precedents of horizontal boycotts in Colombia, most of which have been investigated as price-fixing agreements.

For instance, in 2005 the SIC fined five rice mills for price fixing. The rice mills fixed the price at which they would purchase rice from farmers, and given their market power, the farmers were faced with accepting the purchase price or losing their harvest.[23]

f. Joint ventures and other competitive collaborations

The Colombian competition authority has recently determined that joint ventures and other competitive collaborations may be considered as economic integrations.[24] According to the SIC, a collaboration agreement will be deemed an economic integration if it follows three main criteria:

(i) the agreement must permanently eliminate competition between the parties;

(ii) the business resulting from the agreement must develop an economic activity, and

(iii) the business must be a full-function undertaking.

[22] Superintendence of Industry and Commerce, Decision 46325 of 2010.

[23] Superintendence of Industry and Commerce, Decision 22625 of 2005.

[24] Superintendence of Industry and Commerce, Decision 4851 of 2013, Decision 42296 of 2013, Decision 53400 of 2013, and 93346 of 2013

As regards the first element, the parties to the agreement must stop competing among them; if the agreement does not eliminate competition between the parties, this element will not be met (this is, for instance, the case of R&D agreements). The second element requires the business resulting from the agreement to develop an economic activity and not just a complementary activity that used to be developed by the parties and was transferred to the business. Finally, the business resulting from the agreement must be independent from the parties and must develop its economic activity as an autonomous market agent.

g. Trade associations

Trade associations serve a fundamental role in most industries, as they set product standards, develop and design market policies, promote good market practices, and pursue the best interests of their members. However, trade associations may also be used as a forum for competitors to exchange trade secret information, set prices, allocate customers or territories, or promote other types of collusive conducts.

Additionally, trade associations may be subject to antitrust investigations in case they undertake any type of anticompetitive conduct. Article 2 of Law 1340 of 2009 explicitly provides that competition regulations apply to anyone that conducts an economic activity or that affects or may affect an economic activity, regardless of its legal form. Therefore, trade associations may be subject to investigations and penalties for violating antitrust laws, as well as their members. The Colombian competition authority has investigated and imposed penalties to trade associations in the past.[25] In fact, the SIC recently imposed a fine against the sugar producers' trade association for its alleged involvement in a cartel.[26]

h. Bid rigging

Any agreement executed with the purpose of colluding in public tenders, or that has the effect of distributing contract awards, distributing public tenders or determining the terms of reference of a proposal is considered per se anticompetitive[27].

It is important to note that even if the contract is not awarded to the parties to the agreement or even if the conduct results in a benefit to every other bidder, it will still be deemed anticompetitive given that the law condemns the interruption of competition between bidders, regardless of the outcome of the case.[28]

The SIC has indicated that any of the following conducts may constitute bid rigging, whenever agreed upon by competitors:

(i) exchanging commercially sensitive information regarding the offer that will be submitted in the tender;

(ii) refusing to submit an offer during the tender;

(iii) withdrawing the offer once it has been submitted;

(iv) submitting artificial offers; and

[25] Superintendence of Industry and Commerce, Decision No. 41687 of 2011, Decision No. 33141 of 2011.

[26] Superintendence of Industry and Commerce, Decision No. 80847 of 2015.

[27] Article 47.9, Decree 2153 of 1992.

[28] Superintendence of Industry and Commerce, Decision No. 53914 of 2013.

(v) taking turns to participate in tenders.[29]

The SIC has also stated that bid rigging affects (i) every other bidder participating in the process; (ii) the State; (iii) the market; and (iv) the community.[30]

Finally, it is fundamental to note that under Colombian law, bid rigging is the only illegal agreement among competitors that is also considered a criminal offense sanctioned with a maximum prison time of 12 years, when the bid concerns public procurement.

i. Interlocking directorates

Since 1947[31], bank board members and managers in Colombia are not allowed to simultaneously participate in the board of any other credit institution or stock exchange. In 1955[32], this prohibition was extended from the financial sector to all other sectors. According to article 7 of Law 155 of 1959, presidents, CEOs, directors, legal representatives, managers or board members of a given company are not allowed to simultaneously participate in competing companies dedicated to the production, supply, or distribution of the same products or the provision of the same services.

j. Facilitating practices

Facilitating practices are not considered stand-alone violations under Colombian law. Even though a facilitating practice may enable competitors to coordinate their behavior, they are not inherently anticompetitive. On the contrary, facilitating practices constitute valuable pieces of evidence for the authority to investigate and penalize collusive conducts.[33]

k. Information exchange

Certain information exchange may be regarded by the Colombian competition authority as anticompetitive and may result in investigations for alleged collusive conducts. The SIC has classified three types of information exchanges as especially sensitive:

(i) exchanging information on current or future prices;

(ii) exchanging information on current or future production capacity; and

(iii) exchanging information on current or future investment or competition strategies.

These types of information exchanges will be further scrutinized by the authority if the information exchanged is disaggregated.

Conversely, the SIC will normally not investigate any exchange of information that is[34]:

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[29] Superintendence of Industry and Commerce, Decision No. 40875 of 2013.

[30] Superintendence of Industry and Commerce, Decision No. 40875 of 2013.

[31] Article 7, Law 5 of 1947.

[32] Article 5, Law 155 of 1959.

[33] Superintendence of Industry and Commerce, Decision No. 51694 of 2008.

[34] Superintendence of Industry and Commerce, "*Cartilla Sobre la Aplicación de las Normas de Competencia Frente a las Asociaciones de Empresas y Asociaciones o Colegios de Profesionales*." Available at: http://www.sic.gov.co/drupal/sites/default/files/files/cartilla_sobre_asociaciones_de_empresas_y_asociaciones_de_profesionales2.pdf.

(i) historical;

(ii) aggregated,

(iii) anonymous, or

(iv) available from public sources.

In order to determine whether an information exchange has negative effects on competition, the SIC will generally evaluate:

(i) the structure of the market where the information exchange is taking place (a higher market concentration results in a greater chance for the information exchange to cause competitive concerns);

(ii) the nature of the product concerning the information (competitors are susceptible to coordinate their behavior if the product is homogenous),

(iii) the nature of the information being exchanged (information regarding prices, commercial strategies, or production capacity may affect competition);

(iv) the level of detail of the information (the higher level of detail of the information may result in a greater impact to competition);

(v) the timeframe when the information was gathered (information on current strategies or prices is more sensitive than past data); and

(vi) the frequency of the information exchange.

l. Leniency program

Any natural person or company that participates in an anticompetitive agreement may apply for the leniency program before the Colombian competition authority in order to receive exemption or reduction of any applicable penalty resulting from an antitrust violation.[35] In the application, the petitioner must admit its participation in the conduct and submit information on the existence of the cartel, its form of operation, its participants, and the affected product.

The first leniency applicant may receive full exemption of any applicable penalties, while the second petitioner may receive a fine reduction anywhere between 30% and 50%; any subsequent applicants receive a fine reduction of up to 25%. Under current regulation (Decree 1523 of 2015), the competition authority may grant an additional 15% fine reduction to applicants who are first in line to obtain benefits in separate cartel investigations.

Leniency applications may be filed at any point in time. If the authority has initiated an investigation, the application must be filed during the 20 business days following the formal launching of the investigation. The leniency application must be filed before the competent official, either in writing, email, or in-person.

Once the leniency application is admitted, the following step is executing the leniency agreement with the authority. For this purpose, the applicant must admit its participation in the cartel and submit useful information and evidence on its existence and form of operation. Once the leniency agreement is executed, the authority will launch the investigation, which will conclude with the SIC's final decision, either imposing fines or closing the investigation. The

[35] Article 14, Law 1340 of 2009.

SIC's final decision will determine the imposable fine on the leniency applicant and the leniency benefits granted.

m. Settlements

As previously determined in Section III, there is no possibility of settlements with the authority. Nonetheless, the investigated parties may offer the authority to cease the conduct that gave way to the investigation in exchange for remedies or guarantees. It is important to note, that this type of early termination agreements does not require an admission of guilt from the investigated parties; additionally, it is discretionary for the authority to accept the guarantees and close the investigation, or to continue with the investigation.

* *

OVERVIEW OF COMPETITION LAW IN HONDURAS

Julio Alejandro Pohl

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

Honduras competition law is contained in the principles of the National Constitution. Monopoly, monopsony, oligopolies, hoarding of merchandise and any similar practice in industrial and commercial activity is prohibited according to Article 339 of the Constitution.

Applicable law is the Law for the Defense and Promotion of Competition (hereinafter "the Law"), it was published by Decree 357-2005 and is in force since February 6, 2006. The Regulations of the Law for the Defense and Promotion of Competition (hereinafter "the Regulations") were published by Executive Agreement 01-2007 and are in force since July 25, 2007.

Other relevant sources of Law are the Resolutions of the Commission for the Defense and Promotion of Competition (hereinafter "the Competition Commission") and economic studies of relevant sectors.

b. Theories of harm present in the law

The Law states that a merger, acquisition or any type of economic concentration is to be notified and approved by the Competition Commission if it exceeds the threshold that from to time to time is defined by the Competition Commission. Nevertheless, the Competition Commission carries an economic analysis of such concentration regarding the theory of harm of such operation.

For instance, Article 12 of the Law grants that "concentrations which effects are to restrict, diminish, damage, or impede the free competition are prohibited." But "concentrations that generate increases on the economic efficiency and the welfare of the consumer under the terms of Article 9 herein and compensate the negative effect of the free competition process are compatible with the law and do not restrict, diminish, damage or impede free competition."

Finally, in order to analyze the possible harm or benefit of a particular concentration, Article 16 of the Law states that "to determine whether the concentration is in agreement to the law herein, an economic analysis is begun in which the following must be considered:

> *1) The market quota of the participating economic agents and their effects related to the other competitors and buyers of goods and services, and related to other markets and economic agents directly related;*
>
> *2) When it is possible that the concentration allows, promotes or realizes practices or conducts prohibited or the imposition of entry barriers to new economic agents;*

3) When it is possible that the concentration facilitates the unilateral elevation of prices, without making it possible for the competing agents to act or potentially counteract this power; and,

4) The necessity of the concentration as an only option to avoid the exit of the market of productive assets of one of the participating economic agents in the concentration involved."

Finally, the same Article states that *"the Commission can, by means of regulations or resolutions, determine and develop the other criteria for the analysis of economic concentrations."*

c. Authority in charge of enforcement of antitrust law and regulations

The authority in charge of antitrust enforcement is the Competition Commission.

d. Nature of antitrust enforcement

Antitrust enforcement in Honduras is mainly administrative. Nevertheless, courts have the power to revise (and revoke, modify or confirm) decisions of the Competition Commission.

e. Investigational powers of authority

The Law establishes that "when a concentration has not been submitted to the previous verification and it is presumed that it restricts, diminishes, damages or impedes the free competition, during a term no longer than three (3) months after the beginning of the concentration or after the date of the acknowledge of its existence, the Commission shall begin ex-officio or by request of parts, an investigation during in which it shall demand the relevant information for the referred investigation.

Also, in a bigger scope the Competition Commission has sufficient powers of investigation regarding any type of antitrust activities.

Article 46 of the Law states that "the Commission can solicit the necessary written documents and information with the purpose to investigate the behavior of economic agents. The petition of information will be done by means of any available way of communication, addressed to the involved person or persons. The owner and legal representative of the economic agents involved in the investigation are obliged to provide the requested information."

In case an economic agent does not provide the solicited information on the term fixed by the Competition Commission or if the information provided is incomplete, the Competition Commission will enforce its petition by means of a formal resolution, which shall specify a fixed term to hand in the documents and information, as well as the sanction in case of contravention.

"In case the information is not provided or it is incomplete or inexact the Commission can impose a fine up to Fifty Thousand Lempiras (L. 50,000.00)."[1]

Also, the Competition Commission is entitled with the faculty to make investigations in the establishments of the economic agents without previous notification. Information obtained

[1] Approx. US$ 2,500.

from this investigation will have full validity and probative strength.

f. Attorney-client privilege

In Honduras, Attorney-client privilege is not directly formulated in Competition Law but in the Ethics Code for Law Profession. Article 23 of such Code states that *"the lawyer must keep the strictest secrecy, even after he has stopped providing legal services to his client. Lawyers have the right to refuse to testify against his client and may decline to answer any questions involving the disclosure of secret or violation of confidences that doeth his client."*

g. Interactions with other regulators

The Law states that the Competition Commission in view of a correct and complete "performance of its functions, will count with the help of the Public Attorney, of the Secretary of Public Security, of the municipalities and of any other public and private institutions."

The Regulations grant the Competition Commission the authority to implement and monitor agreements for cooperation and coordination with various institutions in order to get information necessary for economic analysis. It expressly states that "the Commission may require the support and establish mechanisms of inter-agency collaboration with the relevant regulators, to conduct studies, research and sector-specific proposals."

Currently, the Competition Commission has inter-agency collaboration agreements with: Dirección Ejecutiva de Ingresos (Tax Authority); Colegio de Abogados de Honduras (Honduran Bar Association), Banco Central de Honduras (Honduras Central Bank), Comisión Nacional de Banca y Seguros (National Banking and Insurance Commission), Consejo Nacional Anticorrupción (National Anticorruption Council), Comisión Nacional de Telecoumnicaciones (National Telecom Commission), Instituto Nacional de Estadística (National Statistics Institute), Instituto de Acceso a Información Pública (Institute for the Access to Public Information), Secretaría de Desarrollo Económico (Secretary of Economic Development), among others.

h. Treaties in place

No international treaties for the exchange of information have been subscribed by the Honduras Government. Nevertheless, the Competition Commission has in place various international collaboration agreements related to implement the best practices in competition regulation and to exchange experiences with other regulators in Latin America as well as globally (OECD, UNCTAD, IADB).

i. Standards of evidence

Competition matters follow the same standards as in general administrative procedure regarding to evidence. Documents, written and oral information, witness testimonies, factual data, market studies, financial statements, etc., constitute evidence types.

j. Methods of engagement with authority

Honduras Law doesn't provide clear methods of engagement between the Competition Commission and the economic agents. Nevertheless, the Law grants discretional powers to the

Competition Commission to develop mechanisms that may prevent anticompetitive conducts and promote free competition.

k. Judicial review of decisions

The judicial review of the decisions of the Competition Commission is carried by the Court of Administrative Disputes. In this stage the process follows a normal litigation procedure, where the Supreme Court has always the possibility to revise the decision of the lower court judges.

l. Private litigation

Private litigation is possible in both administrative and judicial level.

II – MERGER CONTROL

a. Types of transactions

The Law regulates economic concentrations. According to Article 11, "a concentration shall be understood as the taking or changing of control in one or more corporations by means of shareholder participation, administration control, merger, acquisitions or any other right on the shares or capital participation or debt titles that causes any type of influence in the shareholder decisions or any other act in virtue of which shares are grouped, social parts, trusts realized by suppliers, clients or any other economic agent.

Associations formed for a determined duration of time in order to develop a determined project are not considered to be concentrations."

In this order of ideas, only concentrations with anticompetitive effects are forbidden. It is said in the same Article 11 that "concentrations which effects are to restrict, diminish, damage, or impede the free competition are prohibited."

On the other hand, "concentrations that generate increases on the economic efficiency and the welfare of the consumer under the terms of Article 9 herein and compensate the negative effect of the free competition process are compatible with the law and do not restrict, diminish, damage or impede free competition."

"Concentrations must be notified to the Competition Commission by the involved economic agents before the effects take place, to be verified by the Competition Commission."

As said in Article 37 of the Law, the omission by any of the economic agents involved related to the previous notification shall be sanctioned.

b. Notification of foreign-to-foreign mergers

See Article 4 of the Law: "The provisions of the Law are binding to every economic agent, either physical or juridical person, public administration entities, municipalities, industrial, commercial, professionals, non-profit or for-profit entities or other entities legally constituted or not, that by any means, participate as active subjects on the economic activity inside the Territory of the Republic of Honduras.

Likewise, the Law is binding to those persons (physical or juridical) whose head office is outside the territory of the Republic of Honduras, when their activities, contracts, agreements, practices, acts or businesses cause legal or material effects in Honduras. This is why foreign-to-foreign mergers may be required to be notified locally. It depends on the threshold related to the specific economic activity of the agents."

c. Definition of "control"

The Regulations to the Law define control as "*the capacity of an economic agent to influence in another economic agent through the exercise of ownership rights over shares, or of ownership of the whole or part of the assets of same, or by agreements that permit such economic agent to influence in the decisions, composition or voting of the BOD or legal representatives of the other economic agent"* (Article 2 of the Regulations).

d. Jurisdictional thresholds

According to Article 13 of the Law, the Competition Commission "must define what concentrations shall be verified according to the amount of the actives, participation in the relevant market or the volume of sales."

Thresholds for notification of concentrations have been defined by Competition Commission on resolution number 04-CDPC-2014-Año-IX. According to it, only concentrations that meet at least one of the following criteria are to be notified to the Competition Commission:

(i) when the total amount of assets located in Honduras of the economic agents directly involved in the operation is equal or exceeds 4,000 minimum wages for the corresponding economic sector. The formula is: Total Amount of assets = (Monthly Minimum Wage) x 12 Months x 4,000;

(ii) when the sum of the total sales in Honduras of the economic agents directly involved in the operation exceeds 5,000 minimum wages for the corresponding economic sector. The formula is: Total sales = (Monthly Minimum Wage) x 12 Months x 5,000; and

(iii) when the economic agents directly involved in the operation have a market share that exceeds 25% of the relevant market.

e. Triggering event for filing and deadlines

Concentrations must be notified to the Competition Commission by the economic agents before the effects take place.

Once the file is received, the Competition Commission reviews it and may request for additional documents within 10 working days following the filing.

After the filing date or after the reception of the additional documents requested (if any), the Competition Commission has 45 working days to issue the final resolution. If during such term the Competition Commission does not issues a resolution, the transaction shall be deemed approved.

f. Exemptions

Competition Law is applicable to all the areas of the economic activity, even when these areas are regulated by special laws, regulations or resolutions. Its dispositions are of public order and there cannot be contravened by particulars.

However, for reasons of public order and social interest, the Honduran State may reserve itself the right to exercise some basic industries, exploitations or public interest services and may dictate economic, fiscal and security measures and laws to channel, to stimulate, to orient or to supply the private initiative, based on a rational and planned economic policy.

In other words, all concentrations that have a potential legal o material effect in Honduras have to be notified, except for those that either do not reach the threshold defined by the Competition Commission or that for reasons public order or social interest are expressly reserved to the Honduran State.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

The Law does not consider special rules for foreign investment, special sectors or similar.

h. Information requested for the filing

With the filing, the following documents are required:

(i) general and Legal information of the parties involved;
(ii) financial Statements of the parties involved for the previous year;
(iii) composition of Social capital of the agents involved, with a description of the new composition if the concentration is authorized
(iv) detailed description of the concentration with a copy of the merger or acquisition agreement;
(v) detailed description of the participation of the parties in Honduras market: assets located in Honduras, goods and/or services offered, sales in the country; as well as similar goods and/or services of the relevant competitors; and
(vi) any other relevant information to understand the implications of the concentration.

i. Sanctions applied for late or no filing

Late filing is sanctioned by the Competition Commission with a fine that may go from the minimum of One Thousand Three Hundred Eighty-Eight Lempiras (L. 1,388.00) to the maximum of Sixty-Nine Thousand Four Hundred Seven Lempiras (L. 69,407.00), in a daily basis up to thirty (30) calendar days.

The Competition Commission has always the right to investigate gun jumping, and if such operations are deemed to be harmful or restrictive of competition the Commission may order its reversion or impose corrective measures as:

(i) obligation to divide, sell, or to transfer assets or shares to third parties not related to the parties involved in the concentration;
(ii) obligation to modify, transfer or eliminate a determined line of production; or

(iii) obligation to modify or eliminate clauses from contracts or agreements.

j. Parties responsible for filing

All the economic agents involved in the concentration operation are responsible for the filing.

k. Filing fees

Filing fees are of 0.15% of the total assets involved in the transaction. Nevertheless, such amount shall not exceed an equivalent of 250 minimum monthly wages.

l. Effects of notification

The effects of the previous verification in case of approval are that concentrations which have been approved by the Competition Commission cannot be challenged afterwards on the basis of the verified elements, except when the approval was obtained on the basis of false information provided by the involved economic agents.

m. Gun jumping and closing – sanctions

When a concentration has not been submitted to the previous notification and verification and it is presumed that it restricts, diminishes, damages or impedes the free competition, during a term no longer than three months after the beginning of the concentration or after the date of the acknowledge of its existence, the Competition Commission shall begin ex-officio or by request of third parties, an investigation during in which it shall demand the relevant information for the referred investigation.

Also, when the Commission acknowledges that an operation of concentration is being carried out without being notified or without the final resolution of approval, and it may be presumed that it restricts, diminishes, damages or impedes the free competition, it can order a temporary suspension of the operation until the investigation is concluded.

In any moment of the investigation process, when ever considered necessary the Commission can apply provisional measures for the ceasing of the acts that are violating the Law, to avoid a serious and an irreparable prejudice to the process of free competition or serious damages to the consumers, as long as the proof exists and is documented in the motivated resolution. The provisional measures adopted, must be proportional with the pretended correction.

n. Type of remedies and their negotiation

Remedies applied by the competition commission, among others, may be:

(i) obligation to divide, sell, or to transfer assets or shares to third parties not related to the parties involved in the concentration;
(ii) obligation to modify, transfer or eliminate a determined line of production; or
(iii) obligation to modify or eliminate clauses from contracts or agreements.

o. Timetable for clearance

In case the Competition Commission prohibits an economic concentration and dictates corrective measures by a motivated resolution, the following rules shall apply:

(i) in case the Competition Commission determines the existence of an illicit situation, it must notify it to the economic agents involved within the 45 working days available to issue its resolution. If applicable, the notification will include the corresponding corrective measures. A term of 15 working days will be granted to the economic agents, to file its observations and proposal of corrections;

(ii) when the document containing the observations and proposals is received, the Competition Commission will have 15 working days from the reception of this document, to issue the final resolution; and

(iii) despite what is set forth in (ii) above, the Competition Commission may prohibit the concentration or impose corrective measures by means of resolution, if the investigated concentration was of such a nature that an immediate intervention would be appropriate to avoid an important deterioration to the process of free competition.

p. Involvement by third parties

The Competition Commission may request information to third parties related that may be somehow related to the transaction, without this to be considered that they will be deemed as parties of the notification procedure.

However, third parties with personal, legitimate and direct interest may intervene in the procedure, presenting allegations or any kind of evidence.

q. Types of resolutions that may be issued

The Competition Commission may approve the concentration or reject it. In case of approval it may also request for ex-post or ex-ante remedies.

r. Review of ancillary restraints

The Competition Commission can impose corrective measures or ancillary restraints as:

(i) implement a particular activity or abstain from doing it;

(ii) obligation to divide, sell, or to transfer assets or shares to third parties not related to the parties involved in the concentration;

(iii) obligation to modify, transfer or eliminate a determined line of production;

(iv) obligation to modify or eliminate clauses from the contracts or agreements related to the concentration;

(v) obligation to perform acts tending to foster participation of competitors in the market; or

(vi) any other measure that tends to avoid any harm in competition due to the concentration.

Remedies or corrective measures that are not directly related to the correction of the effects of the concentration shall not be imposed. Remedies have to be proportional to the pretended correction.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

Forbidden anticompetitive unilateral conducts (vertical or conducts known because of its effects) are analyzed by the Competition Commission under the "rule of reason", this means case-by-case it is determined if such conduct is causing harm or restriction on competition.

Such conducts are supposed to be performed by an economic agent with significant market share and may be permitted if they produce economic efficiency and consumer welfare.

Unilateral conducts are prohibited when they restrict, diminish, damage, impede or weaken the exercise of free competition in the production, distribution, supply or commercialization of goods and services.

As said in Article 37, unilateral anticompetitive conducts are sanctioned with a fine equal to 3 times the amount of the economic benefit obtained due to the forbidden conduct. In case it is not possible to determine the amount of the benefit, the Commission will impose a fine that in any case shall not exceed ten percent (10%) of the gross utility in sales of the last fiscal year.

In case it is not possible to determine the amount of the benefit, the Commission will fix a fine that in any case shall not exceed ten percent (10%) of the gross utility in sales of the last fiscal year. In case of recidivism the Commission will impose the double of the previous fine.

Unilateral anticompetitive conducts are listed in the Law in Article 7. Among others:

(i) restrictions concerning territory, volume or clients among non-competitors;
(ii) price discrimination;
(iii) exclusive dealing, especially between the principal and the agent or distributor;
(iv) resale price maintenance.
(v) refusal to deal;
(vi) predatory prices;
(vii) essential facilities;
(viii) horizontal boycotts; and
(ix) any other act that the Commission considers it restricts, diminishes damages, impedes or weakens free competition.

The following criteria are used by the Competition Commission to determine if a unilateral conduct is to be considered anticompetitive and thus forbidden:

(i) if the anticompetitive conduct imposes an exclusion of the market any actual or potential competitor for a period of time longer than it might be justified by any legitimate economic reason;
(ii) if the anticompetitive conduct arises from abuse or improper use by the economic agents of powers granted to them by the authorities or the Law;
(iii) if the anticompetitive conduct consists of granting discounts with the sole purpose of exclusiveness in the distribution or selling of products or services and when such discounts are not justified in terms of economic efficiency;
(iv) if a severe complaint is filed by any actual or potential competitor; and
(v) if there are no other economic agents capable of influencing the behavior of the alleged infringer.

Unilateral conducts will only be declared forbidden if the participation in the relevant market of the alleged infringers is considered a dominant position by the Competition Commission.

The Competition Commission is authorized to establish greater or smaller quotas of participation in the relevant market to respond to the conditions of the market and to the behavior of those involved in it.

However, conducts that increase the economic efficiency and the welfare of the consumer and compensate any possible negative effect on the process of free competition are not prohibited. Improvements in the conditions of production, distribution, supply, sale or consumption of goods and services are considered economic efficiencies. Those invoking the increases of the economic efficiency and the welfare of the consumer as a result of their acts have to prove it.

In order to determine economic efficiencies, the Competition Commission has to consider if such efficiencies help a healthy competition environment, allowing economic agents to integrate their production capacities, foster innovation and are translated in real benefits for consumers.

Are considered as efficiencies:

(i) savings that allow the economic agent in a constant way to produce the same amount of goods in a lower cost or a greater amount at the same cost;
(ii) savings in production costs if two or more goods are produced jointly and not separately;
(iii) considerable reduction of administrative expenses;
(iv) innovation and technology transfer; and
(v) reduction of production costs or sale costs because of a better distribution network or better infrastructure.

b. Exploitative offenses

Exploitative offenses, as the imposition of excessive prices are not expressly regulated in the Law.

A general rule for anticompetitive conducts in Article 7.9 prohibits "any act or negotiation (other than the ones directly defined in the Law) that the Competition Commission

considers it restricts diminishes, damages, impedes or weakens the process of free competition in the production, distribution or commercialization of goods or services."

Regarding the abuse of a dominant company pricing excessively, since the Law does not provides expressly such anticompetitive conduct, any sanction in this sense will require a very profound economic analysis determining a fair market price in normal conditions and to prove how such price weakens competition.

c. Predatory pricing

Predatory pricing is covered in Article 7.2, when it says that due to its effect is prohibited to fix prices under costs to eliminate competitors in a total or partial way.

Predatory pricing is forbidden due to its effect if it forecloses or is likely to foreclose actual or potential competitors.

d. Price discrimination

Price discrimination is not defined expressly in the Law. Nevertheless, some practices related to this kind are understood to be regulated in Article 7.8. It says that an anticompetitive practice prohibited due to its effect is to "grant favorable conditions, from an economical agent to his buyers with the requirement that his purchases represent a determined volume or percentage of its demand."

In other words, this conduct is when a dominant company abuses of its position and offers a better price to some of its buyers discriminating the other agents in the market. This kind of discrimination will only be forbidden when it is proved that restricts, weakens or damages free competition.

e. Resale price maintenance

Fixed or minimum resale price maintenance is forbidden according to Article 7.2 of the Law, which says that is prohibited due to its effect any conduct tending to fix the prices or other conditions that the economic agent such as a distributor or a supplier has to observe when selling goods or providing services.

As it may be noted, not only prices may be influenced by the principal in a distribution activity, but also other commercial conditions that may cause an anticompetitive effect.

f. Tying arrangements

Article 7.4 prohibits subordination of the performance of a contract under the condition that the other part accepts supplementary obligations that have no relation with the object of the contract.

When determining which obligations are related or not with a said contract, the Competition Commission will review which are normal obligations regarding the nature of the contract and/or the commercial costumes and uses.

g. Bundling (including loyalty and market share discounts)

Bundling is not defined as a separate anticompetitive conduct in the Law.

Since tying is a form of bundling, this conduct will be evaluated according to what was said in the paragraph above.

h. Exclusive dealing

Honduras Distribution Law allows exclusiveness in distribution, agency or representation agreements.

Nevertheless, according to the Competition Law, any type of agreement, including distribution, agency or representation contracts, that restricts diminishes, damages, impedes or weakens the process of free competition in the production, distribution or commercialization of goods or services is forbidden.

For instance, the Regulations in Article 5 indicate that one of the criteria to assess unilateral anticompetitive conducts is if, for example, benefits have been granted from producers to buyers in order to obtain exclusiveness in the distribution of goods or services. In other words, exclusive dealing may be considered an anticompetitive conduct.

So, if the Competition Commission considers that any agreement that includes, for example exclusiveness in the dealing of certain goods or services, damages, weakens or restricts free market, such agreement might be declared anticompetitive and thus forbidden.

i. Refusal to deal

Refusal to deal conducts are forbidden according to Article 7.5 of the Law, which prohibits any transaction bounded to the condition of not using, acquiring, selling or providing the goods and services produced, distributed or commercialized by a third party.

In other words, any limit imposed by an economic agent to its customers in its operations related to the purchase, sale, deal, supply or use of goods or services is anticompetitive.

j. Essential facilities

Essential facilities conduct is not regulated per se by the Law, but Article 7.7 states that limiting the production, the distribution, or the technological development from an economic agent in prejudice of the other economic agents or consumers may be prohibited due to its effect.

In the sense that such action might include the limit in the use of determined products, or technologies, it might be considered anticompetitive.

k. Customer termination

Costumer termination is part of the refusal to deal. It is understood that such conduct will be considered anticompetitive if it damages, restricts or weakens free competition, if it does not increase the economic efficiency of the company and welfare of the consumer and if the economic agent that causes it has a significant market share.

l. Termination of intermediaries

Termination of intermediaries is also a type of refusal to deal. The same conditions as in costumer termination are applicable

m. Termination of relationship with competitors

Termination of a relationship with a competitor is not regulated by the Law as an anticompetitive conduct.

n. Settlements

Article 51 of the Law states that "in any moment of the procedure of analysis and sanction of anticompetitive conducts by the Competition Commission, but before issuing the final resolution, the economic agent or the association of economic agents involved in the conduct that is being investigated can settle with the Competition Commission, accepting the charges and the corresponding sanction, which in that case will be the fine for the anticompetitive conduct reduced in 1/3."

Cases of recidivism cannot be settled.

(II) COLLUSIVE CONDUCTS

a. Introduction

Horizontal or collusive conducts, are prohibited per se, and refer to any type of agreement or practices between competitors or potential economic agents, which have as their object or effect inter alia, fix prices or discounts, restrict production-marketing or market sharing.

Contracts, agreements, arranged practices, combinations or arrangements described above are considered null. Economic agents who realize these activities shall be sanctioned, without prejudice of the corresponding penal or civil responsibility. These economic agents shall be sanctioned even when these contracts, agreements, arranged practices or combinations have not yet produced any effect.

The Law prohibits verbal or written contracts or agreements among competitors or potential competitors, when their objective or fundamental effect is one of the following:

(i) establishing agreements to fix prices, tariffs or discounts;
(ii) restraining, totally or partially, the production, the distribution, the provision or the commercialization of goods and services;
(iii) distributing, directly or indirectly the market in territorial areas, clients, provision sectors or supply sources; or
(iv) establishing, agreeing or coordinating positions or agreeing to abstain to participate in biddings, quotations, call for tenders or public auctions.

The following criteria will be considered by the Competition Commission for the existence of restrictive practices forbidden by their nature:

(i) if there is an important and continuous correlation in prices between two or more competitors for a significant period of time that cannot be attributed to variations in production prices;
(ii) if economic agents have agreed mechanisms of control of the behavior of other participants or any other practice restricting competition;
(iii) if the number of participants in the relevant market is reduced;
(iv) if the anticompetitive conduct arises from abuse or improper use by the economic agents of powers granted to them by the authorities or the Law;
(v) if the market behaves in such a way that the only possible reason of such behavior is because of an anticompetitive practice;
(vi) if the alleged infringers have held meetings and/or other forms of communication;
(vii) if the chambers of commerce or bar associations instructed their members in such a way that such recommendations have the effect of preventing, restrict or limiting its members to compete freely in the market;
(viii) if the sale price offered in the country for goods or services between two or more competitors is substantially higher or lower than their international reference, except where the difference results from tax reasons, or distribution expenses; and
(ix) if a bid is submitted with evident negligence or recklessness; or if bids are unusually similar or have no economic basis; or if by the circumstances of the case it is possible to infer the existence of an atypical price pattern of winning bids, or any geographical or customer allocation between the bids submitted.

Collusive conducts will be sanctioned in the same way as unilateral anticompetitive conducts.

b. Horizontal price fixing

As explained above, any agreement tending to fix prices between actual or potential competitors is always considered anticompetitive and thus completely forbidden by Law. This is a very dangerous practice and will always be sanctioned.

c. Horizontal agreements to allocate customers or territories

Agreements between competitors to allocate customers or territories are also always anticompetitive. Article 5.3 of the Law defines as a forbidden collusive conduct when competitors agree to "*distribute, directly or indirectly the market in territorial areas, clients, provision sectors or supply sources.*"

It is important to note that this practice will be considered anticompetitive when it corresponds to an agreement in a horizontal level and not necessary when it is caused by a vertical influence. A famous case of vertical territory allocation is the one of an important Cola Company that has 2 exclusive distributors in the Country, one for the Central-South part, and other for the Northern-East.

d. Agreements not to compete

Non-compete agreements are part of the horizontal agreements to allocate customers or territories. They are also, forbidden by Law by the same Article 5.3

e. Horizontal boycotts

Horizontal boycotts are considered one of the most classic and negative conducts between competitors. Article 5.2 prohibits "*verbal or written contracts or agreements among competitors or potential competitors, with the objective or fundamental effect of restraining, totally or partially, the production, distribution, provision or selling of goods and services.*"

f. Joint ventures and other competitive collaborations

Article 11 of the Law states that "*associations formed for a determined duration of time in order to develop a determined project are not considered to be concentrations.*" Article 13 of the Regulations directly permits Joint Ventures or other competitive collaborations.

This criterion follows the one of the Public Procurement Law, which accepts this type of associations for the development of specific projects.

The Regulations say that "*the Competition Commission shall hall approve transactions involving temporary concentration of companies created to develop a specific project, as a joint venture, strategic alliances, among others*."

g. Trade associations

Trade associations are not directly considered to be anticompetitive. In fact, they are relevant participants in the economic development of the Country.

Nevertheless, the Law is applicable also to these types of associations. Article 4 includes among the persons (juridical or physical) to whom competition law is applicable professional associations. Is says: "*also professional associations legally constituted or not, are considered to be economic agents submitted to the present Law."*

For instance, Article 4.h of the Regulations signals as a criterion for the determination of a collusive conduct "*when the chambers of commerce or bar associations instructed their members in such a way that such recommendations have the effect of preventing, restrict or limiting its members to compete freely in the market.*"

Recently, the Competition Commission has sanctioned the National Association of Pharmaceuticals because of anticompetitive conducts related to the imposition of territorial allocation of drugstores.

h. Bid rigging

Bid rigging is anticompetitive and illegal. Public Procurement Law considers such conduct as especially harmful when related to Public Contractors.

Competition Law states in Article 5.4 "*prohibits verbal or written contracts or agreements among competitors or potential competitors, with the objective or fundamental effect of, establishing, agreeing or coordinating positions or agreeing to abstain to participate in biddings, quotations, call for tenders or public auctions.*"

i. Interlocking directorates

Interlocking directorates is still an unexplored area by Competition Law in Honduras.

j. Facilitating practices

The Law in Article 5.4 prescribes as prohibited any agreement or arrangement between competitors or potential competitors to coordinate positions. It is understood that any coordination of a commercial position between competitors is considered harmful included in the prohibition of Law.

k. Information exchange

Information exchange between competitors is one of the criteria used by the Competition Commission to evaluate collusive conducts. It is not considered collusive itself, but it is a trace of a possible anticompetitive activity.

Among this practices, Article 4.f of the Regulations include that the alleged infringers have held meetings and/or other forms of communication, or if economic agents have agreed mechanisms of control of the behavior of other participants or any other practice restricting competition.

l. Leniency program

Recently, leniency programs have been incorporated to the Law.

An economic agent involved in collusive conducts will be exonerated of the fines when such agent is the first to give enough evidence to the Competition Commission in relation to a collusive conduct, only if in such moment the Competition Commission does not have enough elements to start or continue the investigation process of the disclosed particular activity. This evidence may be handled at the investigation stage or at the previous stage.

Also, the Competition Commission may reduce the amount of the fine when the economic agents though not complying with the above mentioned requirements provides significant evidence of the process. This reduction varies between 30% to 50% of the fine if it is the second economic agent to provide information; or between the 20% to 30% if it is the third economic agent to provide information; and finally will be of up to 20% for the rest of the economic agents who provide information successively.

In any case, leniency exonerates of the fine due to the anticompetitive conduct; but it does not waive any criminal or civil responsibility.

Leniency has to be asked in writing and has to be granted officially through a resolution of the Competition Commission. Strict confidentiality must be observed by the Competition Commission related to this matter.

In order to obtain the exoneration stablished by the leniency program, the following requirements are to be complied by the economic agent:

(i) it has to cooperate with the Competition Commission during the whole process of investigation;

(ii) it has to put to an end its participation in the alleged anticompetitive conduct, except when the Competition Commission determines that such participation is needed to continue effectively with the investigation;

(iii) it has not destroyed any evidence related to the anticompetitive conduct nor has disclosed to any third party the intention to grant information to the Competition Commission; and

(iv) it did not compel third Parties to participate in the anticompetitive conduct; nor have been the promoter or leader of such behavior.

m. Settlements

Article 51 of the Law provides settlement in the same way for unilateral conducts than for collusive conducts. It says that in "*any moment of the procedure of analysis and sanction of anticompetitive conducts by the Competition Commission, but before issuing the final resolution, the economic agent or the association of economic agents involved in the conduct that is being investigated can settle with the Competition Commission, accepting the charges and the corresponding sanction, which in that case will be the fine for the anticompetitive conduct reduced in 1/3.*"

Cases of recidivism cannot be settled.

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OVERVIEW OF COMPETITION LAW IN MEXICO

Gerardo Calderón-Villegas

Luis F. Amado-Córdova

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

The current Federal Economic Competition Law (the "Mexican Competition Law") came into force on July 7, 2014, superseding the previous Competition Law from 1992.

The Mexican Competition Law: (i) restricts monopolistic practices and regulates concentrations; (ii) creates the Federal Economic Competition Commission (Comisión Federal de Competencia Economica, "Cofece") with broad investigative and enforcement powers; (iii) sets forth the basic procedure for actions to be carried out by and/or before the Commission; and (iv) establishes the sanctions that may apply for breaching the competition law, without prejudice of the private right of action for damages and lost profits that might be applicable.

On November 10, 2014, Cofece published the Regulatory Provisions of the Mexican Competition Law, which regulates in greater detail the items addressed in the law, amended on February 5, 2016. The Federal Institute of Telecommunications ("Ifetel") published its Regulatory Provisions of the Mexican Competition Law on January 12, 2015.1

In addition, Cofece has published guidelines and technical criteria covering the following topics:

(i) Guidelines

- 001/2015 Relative monopolistic practices and illegal concentrations investigations proceedings guidelines;
- 002/2015 Initiating monopolistic practices investigations guidelines;
- 003/2015 Immunity program (leniency) and reduction of sanctions guidelines;
- 004/2015 Merger control guidelines;
- 005/2015 Leniency program and reduction of fines guidelines;
- 006/2015 Absolute monopolistic practices investigations proceeding guidelines; and
- 007/2015 Information exchange guidelines.

[1] Both authorities, Cofece and Ifetel, enforce the Mexican Competition Law as further discussed in item c) below.

(ii) Technical criteria

- on the application of a quantitative index to measure market concentration;
- on request and issuance of precautionary measures and determination of bonds; and
- on request for dismiss a criminal action.

The difference between the guidelines and technical criteria is that the latter are binding for Cofece whereas the guidelines are not.

b. Theories of harm present in the law

(i) Theories of harm in Merger Control

Cofece/Ifetel carries out the analysis of a reportable transaction considering the specific post-closing effects resulting from such operation. In this regard, Cofece/Ifetel reviews a transaction analyzing what would the possibilities for the resulting undertaking be to: (i) manipulate the prices of the products involved; (ii) foreclose other competitors from the market; (iii) establish barriers to entry in the market; (iv) carry out monopolistic practices; and, consequently, (v) harm consumers.

(ii) Theories of harm regarding Absolute Monopolistic Practices or Cartel Practices

In absolute monopolistic practices or cartel practices cases, the Mexican Competition Law establishes that the nature of the alleged competitive harm under this scenario would be analyzed under a by object basis (*per se*).

(iii) Theories of harm regarding Relative Monopolistic Practices or Abuse of Dominance Practices

In relative monopolistic practices or abuse of dominance practices cases, the Mexican Competition Law establishes that the nature of the alleged competitive harm in this kind of actions would be analyzed under a "by effects basis" (rule of reason).

c. Authority in charge of enforcement of antitrust law and regulations

Cofece is the authority in charge of enforcement of the Mexican Competition Law in the majority of industries and cases, except for those related to the telecommunications and broadcasting industries, where the authority empowered to enforce the Mexican Competition Law is Ifetel. Each authority enforces its own set of Regulations of the Mexican Competition Law.

Both authorities have broad investigation and enforcement powers to deal with antitrust issues in their respective fields, including conducting merger control processes, monopolistic practices investigations and proceedings to resolve the existence of dominant undertakings. These authorities may initiate administrative procedures on its own or at the request of third parties, investigate and resolve such cases, and enforce its orders through administrative penalties. They may also refer criminal cases to the Federal District Attorney. Moreover, Cofece and Ifetel may issue advisory opinions in antitrust matters.

d. Nature of antitrust enforcement

Antitrust enforcement in Mexico is of an administrative, criminal and civil nature, as follows.

From an *administrative* stand point, in addition to the obligation to cease the prohibited practices or divest prohibited concentrations, undertakings found responsible for antitrust violations could face fines in the following amounts[2]:

(i) up to 10% of the annual income of the offender for carrying out an absolute monopolistic practice, failing to comply with remedies imposed in a merger control process, or for non-compliance with a precautionary measure; or

(ii) up to 8% of the annual income of the offender for carrying out a prohibited relative monopolistic practice or a prohibited concentration, or for breaching a settlement agreement for early termination of an investigation.

In case of recidivism, Cofece/Ifetel may double the amounts of the fines listed above.

Furthermore, an undertaking that induces, provokes or participates in a monopolistic practice or prohibited concentration could face a fine of up to 180,000 times the daily minimum wage in Mexico ("DMW") (approximately USD 690,000 dollars[3]).

Maximum fine for individuals participating in monopolistic practices or illegal concentrations on behalf of legal entities is 200,000 times the DMW (approximately USD 824,000); in addition those individuals could be banned from participating in management positions or as representatives of corporations for up to 5 years.

Regarding *criminal* liability, only individuals directly involved in cartel conduct may face a fine of approximately USD 40,000 and up to 10 years of imprisonment.[4] There is no criminal liability for corporations in Mexico for antitrust violations.

Finally, undertakings found responsible of violations of the Mexican Competition Law may face individual or class civil actions for damages.

e. Investigational powers of authority

Cofece/Ifetel, when conducting investigations on monopolistic practices and illegal concentrations, is empowered to (i) conduct dawn raids to the premises of target companies, being able to access any place, storage device, or any other source of evidence, obtain copies of information, and impound the same. Moreover, Cofece/Ifetel has the possibility to request explanations from any officer, representative, or member of the inspected company regarding such information; (ii) issue requests for information to target companies and third parties; and (iii) subpoena any individual involved in the potential violation.

In addition, Cofece/Ifetel is able to impose fines and order the arrest of individuals not cooperating with an investigation as coercive measures.

[2] Please refer to article 127 of the Mexican Competition Law.
[3] DMW in Mexico is MXP$ 73.04 and exchange rate considered was MXP 19 per USD 1.
[4] Please refer to article 254 bis of the Federal Criminal Code.

f. Attorney-client privilege

Please note that there is no specific provision that regulates legal privilege in Mexico (i.e. a client's privilege that prevents from disclosing all communications between such client and its legal advisor to an authority);

Notwithstanding the above mentioned, there are Professional Secrecy obligations that must be observed by Mexican legal advisors, considering the following:

(i) each of the corresponding Mexican States has enacted its own Professions Law, which regulate -under very similar terms- the Professional Secrecy obligations to be observed by professionals that receive confidential information from their clients due to the nature of their work -including legal advisors-;

(ii) professional Secrecy protects the communications exchanged between a client and its legal advisor so that such info cannot be disclosed by the latter, unless expressly authorized by the client; and

(iii) in general, Professions Laws specifically establish that every professional is obliged to keep the confidentiality of their client's matters, but for any request made by law.

Please note that there is no legal provision on legal privilege that can prevent an undertaking from disclosing information when an authority requests it, but it is possible for the undertaking to refuse to make such a disclosure on other grounds, for instance arguing that the information is reserved or confidential depending on the information that is being requested.

g. Interactions with other regulators

Cofece/Ifetel works closely with other regulators to conduct its investigations on monopolistic practices and illegal concentrations and when analyzing transactions under the merger control process. Cofece/Ifetel is empowered to request information to other government bodies.

In addition, Cofece is regularly consulted on antitrust issues by regulators regarding specific regulation, bidding processes and other antitrust related matters.

Cofece has also entered into agreements with certain authorities to fight and prevent monopolies, monopolistic practices, illegal concentrations, barriers to free competition and other restrictions to the efficient operation of the markets, among others Cofece has agreements in place with the Public Health Regulator (*Instituto Mexicano del Seguro Social* - IMSS), National Central Bank (*Banco de Mexico* -BANXICO), the Consumer Protection Agency (*Procuraduria Federal del Consumidor* - PROFECO), the Tax Administration Service (*Servicio de Administración Tributaria* -SAT), the Energy Regulation Commission (*Comisión Reguladora de Energía* - CRE) and of course with Ifetel.

h. Treaties in place

Mexico has entered into several free trade agreements (amongst other into the North America Free Trade Agreement with the U.S. and Canada, and the Free Trade Agreement with

the European Union) which have general obligations for the parties to the agreement to combat acts that attempt against free competition. Moreover, please note that Mexico has entered into particular mutual assistance and cooperation agreements with the U.S. and the European Union – derived from the above mentioned free trade agreements- in order for each countries' antitrust regulators to work together in fighting acts that affect free competition.

i. Standards of evidence

Although it was believed that Cofece only used to prove its cases the clear and convincing standard of evidence, a recently concluded case – which resolution has been confirmed by the Mexican Supreme Court – involving an absolute monopolistic practice investigation into the market of medicines acquired by the Public Health Sector proved otherwise[5]. Under the above mentioned case, Cofece changed its usual approach by using a more flexible, rule of reason-like method, carrying a very thorough analysis of the conducts of the companies involved, who systematically assigned public bids to each of the members of the cartel. The above mentioned in such a way that Cofece analyzed and discarded any and all possible explanations that could justify the achievement of the alleged absolute monopolistic practices carried out by the parties involved in the cartel.

j. Methods of engagement with authority

Some of the methods for engagement used by Cofece/Ifetel in its activities are of an informative nature, such as talks, lectures, conferences, development of guidelines on a particular subject matter, creation of databases, press releases, newsletters and publications; but other ones are more of a participatory nature, such as questionnaires and surveys on particular matter, forming knowledge exchange groups to discuss new regulations or amendments to the law and meetings and interviews when investigating the competition status in particular market.

k. Judicial review of decisions

Cofece/Ifetel final decisions may be challenged only by way of a constitutional bi-instance trial (*amparo indirecto*) before Federal Courts Specialized in Antitrust, Broadcasting and Telecommunications on a matter of law. Intra-procedural resolutions could not be challenged separately in advance. First instance is resolved by a Federal District Judge, whose ruling may be then reviewed by a Collegiate Circuit Tribunal integrated by 3 Magistrate.

It is important to mention that the above mentioned Courts would only review and rule on potential violations of fundamental constitutional rights of the parties both in the final ruling by Cofece/Ifetel or during the administrative proceeding conducted before this authority.

l. Private litigation

Private enforcement individual or collective (i.e. class) actions can be brought under the general provisions of the Federal Civil Code and the Federal Civil Proceedings Code before the

[5] Please refer to case number *IO-003-2006: Eli Lilly y Compañía de México, S.A. de C.V.; Laboratorios Cryopharma, S.A. de C.V.; Probiomed, S.A. de C.V.; Laboratorios Pisa, S.A. de C.V.; Fresenius Kabi México, S.A. de C.V.; and Baxter, S.A. de C.V.*

specialized courts referred to above against any undertaking by a party who has suffered loss as a result of a monopolistic practice, the abuse of a dominant position, an illegal cartel or an illegal merger. However, a prior finding of infringement by Cofece/Ifetel is a pre-condition to bringing such an action.

The general limitation period for bringing a civil action for damages is two years from the date that Cofece/Ifetel's administrative ruling becomes final (once the amparo trial is resolved or if no amparo trial is filed within the 15 working days after the final ruling is notified to the affected party). However, in the case of class actions, the limitation period is three years and six months.

Additionally, since a final ruling declaring an infringement of competition law is a precondition to any civil action for damages being brought, it is important to mention that Cofece/Ifetel is not empowered to investigate activities that ceased for more than ten years.

II – MERGER CONTROL

a. Types of transactions

Any and all transactions implying a concentration, defined as any merger, acquisition or other action by which companies, associations, shares, equity quotas, trusts, or assets in general are accumulated, are subject to merger control process, regardless of the shareholding percentage involved (i.e. minority acquisitions are caught).6

Those transactions meeting the applicable thresholds would be subject to mandatory merger control process, whereas transactions involving amounts below these thresholds could be reported voluntarily and be processed following the same rules for the mandatory filing.

b. Notification of foreign-to-foreign mergers

There is an exemption available that eliminates any notification obligation for a foreign-to-foreign transaction when the involved parties would not acquire control of Mexican companies or assets in addition to those owned prior to the transaction.

c. Definition of "control"

Mexican Competition Law does not provide a definition of "control". Notwithstanding, the Merger Control Guidelines refers to the concept of "control" provided in the Mexican Capital Markets Act (Ley del Mercado de Valores), as well as the same concept as it is regulated in the Regulations of the Intellectual Property Law. In essence, the question of control relates to whether an undertaking, directly or indirectly, may exercise a decisive influence over another, either de facto or de iure.

6 Please refer to article 61 of the Mexican Competition Law.

d. Jurisdictional thresholds

Those transactions meeting any of the following thresholds are subject to mandatory merger control filing[7]:

(i) transactions which value in Mexico exceeds 18 million times the DMW (approximately USD 69 million); or

(ii) transactions involving the accumulation of more than 35% of the assets or shares of an undertaking with assets or sales in Mexico exceeding 18 million DMW (approximately USD 69 million); or

(iii) transactions that (a) imply an accumulation of assets or capital stock in Mexico exceeding 8.4 million DMW (approximately US$ 32 million), and (b) involves undertakings whose combined assets or annual sales in Mexico exceed 48 million DMW (approximately USD 185 million).

e. Triggering event for filing and deadlines

Merger control filing must be submitted at any time before closing of the transaction.[8] Cofece/Ifetel must issue its resolution on a notified transaction within 60 working days after (i) the filing; or (ii) the submission of the basic information; or (iii) the submission of the additional information. This term may be extended for an additional period of 40 working days in complex cases.[9]

f. Exemptions

The following type of transactions are not subject to merger control notification: (a) when the controlling shareholder increases its equity participation in the controlled entity and such shareholder has had the control of the controlled company since its incorporation or the acquisition of the control has been authorized by the Authority in a prior merger-control proceeding; (b) formation of trusts, where the principal purpose is not to transfer the ownership of the assets; (c) when the undertaking acquiring stock is an investment fund; provided such participation does not grant "relevant influence" in the management of the target. "Relevant influence" is not defined by Mexican law; and (d) the acquisition of stock of companies listed on a recognized stock exchange, provided the participation in such company does not exceed 10%.[10]

g. Rules regarding foreign investment, special sectors or similar relevant approvals

A foreign investment notice is required to be filed after closing a transaction where a non-Mexican entity acquires shares of a Mexican entity. In addition, some transactions in regulated sectors require authorization from the relevant regulatory agency.

[7] Please refer to article 86 of the Mexican Competition Law.
[8] Please refer to article 87 of the Mexican Competition Law.
[9] Please refer to article 90 of the Mexican Competition Law.
[10] Please refer to article 93 of the Mexican Competition Law.

h. Information requested for the filing

In order to submit a merger control filing, the following information is required[11]:

(i) corporate name and corporate and financial information of the notifying parties, and of those undertakings participating directly or indirectly;

(ii) the name of the legal representative and the document or instrument that contains the representation powers in accordance with the applicable legislation;

(iii) a description of the concentration, kind of transaction and a draft of the corresponding legal act, as well as a draft of the non-compete clauses if these were to exist, and the reasons for their inclusion, including evidence of the reasoning for carrying out the transaction;

(iv) a description of the involved undertakings' capital structure, identifying each partner or stockholder's direct or indirect holdings, before and after the concentration, and of the individuals or legal entities that have and will have control thereof;

(v) indication regarding the undertakings involved in the transaction that either have direct or indirect participation in the capital structure, in the administration or in any activity of other undertakings that produce or market equal, similar or substantially related goods or services to those provided by the undertakings participating in the concentration;

(vi) information regarding the market share of the parties involved and that of their competitors;

(vii) the location of the involved parties' facilities or establishments, the location of their main distribution centers and the relationship between these and said undertakings; and

(viii) a description of the main goods or services that are produced or offered by each party involved, specifying their use in the relevant market and a list of similar goods or services, and the main competitors that produce, distribute or market the latter in Mexican territory.

Cofece/Ifetel is empowered to request additional information in the course of the merger control process.

i. Sanctions applied for late or no filing

A fine ranging from the equivalent of 5,000 times the DMW (approximately USD 19,000) to 5% percent of the economic agents' income is applicable for failing to notify a concentration meeting the thresholds for mandatory merger control filing. The same fine is applicable for late filing.[12] In addition, if a transaction meeting the thresholds for mandatory merger control filing is carried out before obtaining clearance from Cofece/Ifetel, the transaction would be considered null and void from a legal stand point.

[11] Please refer to article 89 of the Mexican Competition Law.

[12] Please refer to section VIII article 127 of the Mexican Competition Law.

j. Parties responsible for filing

The economic agents directly participating in the concentration are responsible for filing. This obligation applies for both parties, the seller and the buyer.

In cases where the direct participants are not able to notify, due to a legal or factual impossibility validated before Cofece/Ifetel, the notification may be carried out by the surviving entity, by the party acquiring control over the companies or associations, or by the party intending to perform the act or to produce the effect of accumulating stock, partnership interest, trust participation, or assets under the transaction. [13]

k. Filing fees

As of January 1, 2016 each merger control filing is subject to a fixed filing fee of MXP $160,000 (approximately USD 8,500).

l. Effects of notification

Due to the suspensory regime for merger control under the Mexican Competition Law, all transactions reported before Cofece/Ifetel, could not be implemented until a clearance decision has been issued, even those transactions reported voluntarily.[14]

In addition, those transactions cleared by Cofece/Ifetel could not be investigated as illegal concentrations, unless when approved based on false information or when the transaction has been subject to ulterior conditions which were not fulfilled in the legal timeframe provided for such purpose.

m. Gun jumping and closing - sanctions

A reported transaction closed prior to receiving Cofece/Ifetel clearance will be considered null and void.[15] The Mexican Competition Law does not establish any monetary sanction in the case of implementing a transaction prior to clearance. Nonetheless, if the transaction is considered to be illegal (that is to say, a transaction that leads to the creation of a dominant position, or damages the market) the parties can be imposed a fine of up to 8% of their annual domestic turnover.[16]

n. Type of remedies and their negotiation

Cofece/Ifetel may establish or agree to conditions or remedies submitted by the parties of a merger control process of a structural or behavioral nature. Specifically, remedies or conditions may consist of:

[13] Please refer to article 88 of the Mexican Competition Law.
[14] Please refer to article 86 of the Mexican Competition Law.
[15] Ibid.
[16] Please refer to section VII article 127 of the Mexican Competition Law.

(i) carrying out or abstaining from a specific action; divesting specific assets, rights, partnership interest or stock in favor of third parties;

(ii) modifying or eliminating terms or conditions from the acts intended to be executed;

(iii) committing to implement actions that are intended to foster the participation of competitors in the market, as well as providing them access or selling of goods or services; or

(iv) other measures aimed at preventing the concentration from hindering, impairing or preventing competition or free market access.[17]

Cofece/Ifetel may only impose or accept conditions that are directly related to correcting a concentration's effects. The conditions that are imposed or accepted shall be proportionate to the intended correction.

As per the negotiation of remedies, regarding concentrations considered to pose possible risks for the competition process and free market access, Cofece/Ifetel shall inform the notifying parties within at least 10 days prior to the case being scheduled for a Board of Commissioners session, in order to allow the parties to propose conditions or remedies that may correct the aforementioned risks. Alternatively, the notifying parties may submit, from the moment the written notification is filed and until one day after the concentration is scheduled for a Board of Commissioners session, proposed conditions or remedies to avoid hindering, damaging or impeding the process of economic competition and free market access as a result of the concentration.

In case the proposed remedies are not submitted together with the written notification, the timeframe for issuing a resolution shall be rebooted and computed from the initial stage from the date the proposed remedies are submitted.[18]

o. Timetable for clearance

Within 10 business days as of filing, Cofece/Ifetel may request "basic information" (generally, related to corporate and financial matters of the involved companies). This information must be delivered within 10 business days as of the date in which the request for "basic information" is effective.

Within 15 business days as of filing (if basic information has not been requested) or as of the submission of the basic information requested, Cofece/Ifetel may request "additional information" (mainly, economic information for the analysis of market power, entry barriers, etc.). This information must be submitted within the following 15 business days as of the date in which the request for "additional information" is effective.

Within 60 business days as of filing or as of the submission of the basic information or as of the submission of the additional information, Cofece/Ifetel must rule on the case. This term may be extended for an additional period of 40 working days in highly complex cases. [19]

[17] Please refer to article 91 of the Mexican Competition Law.
[18] Please refer to article 90 of the Mexican Competition Law.
[19] Please refer to article 90 of the Mexican Competition Law.

p. Involvement by third parties

Third parties are able to file a complaint against a pretended transaction, and Cofece/Ifetel is obliged to consider the information submitted by means of such a complaint. However, the complaint would not trigger an investigation on the transaction, as it is being reviewed through the merger control process, nor the complainant would have access to the merger control file or documents and may not challenge the procedure.

Furthermore, third parties have no other rights than to collaborate with Cofece/Ifetel by providing such data and documents they deemed pertinent so these are taken into account when issuing the resolution.

q. Types of resolutions that may be issued

Cofece/Ifetel's resolution may authorize, object or subject the authorization to certain conditions or remedies that are intended to prevent the possible negative effects to free market access and economic competition which could result from the notified concentration.[20]

r. Review of ancillary restraints

Any aspect of a notified transaction can be evaluated substantively during the course of the review process, including ancillary restraints. Non-compete clauses must be expressly mentioned and explained in the filing.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

The Mexican Competition Law prohibits in broad terms those monopolies and practices which "diminish, damage or impede free competition in the production, processing, distribution and marketing of goods and services." Monopolistic practices are classified either as "absolute" or "relative" monopolistic practices.

Relative monopolistic practices are actions unilaterally performed by undertakings with "substantial market power" to unduly displace other agents from a "relevant market". Relative monopolistic practices consist of acts, contracts, agreements or procedures whose purpose or effect is to eliminate third parties in a specific market, unduly prevent market access to third parties or grant exclusive advantages to certain economic agents.[21]

Relative monopolistic practices are not illegal per se, as they are analyzed under a rule of reason basis. Thus, in order for such practices to be illegal, they must be performed by an

[20] Please refer to section V Article 90 of the Mexican Competition Law.
[21] Please refer to article 54 of the Mexican Competition Law.

economic agent with substantial market power and should have a negative impact on the affected markets.

Notwithstanding the practices described below, it is worth noting at some examples of relative monopolistic practices recognized by the Mexican Competition Law:

(i) boycott: whenever an undertaking invites other parties in order for them to exert pressure against certain undertaking or to refuse to sell, market or acquire goods or services from such undertaking, with the purpose of dissuading it from a certain conduct, exert reprisals or compel its actions in a specific sense[22];

(ii) crossed subsidies: whenever an undertaking uses profits attained from the sale, marketing or provision of a good or service to finance the losses that result from the sale, marketing or provision of another good or service[23];

(iii) margin squeeze: whenever an undertaking carries out margin squeeze actions (i.e. when an undertaking that controls an essential facility -that is necessary for itself and for other competitors to offer certain goods or services to final consumers- increases the price for other competitors to access such essential facility and, thus, reduces the profits margin of its competitors)[24]; and

(iv) other practices: Mexican competition law has a catch all provision for any other conduct that could qualify as a relative monopolistic practice, which basically establishes that it is considered as a relative monopolistic practice the action carried out by one or several undertakings with the purpose or effect of increasing –directly or indirectly– the costs, affect the production process or reduce the demand for the products of another undertaking.[25]

In any event, undertakings found responsible for antitrust violations could face fines in the following amounts[26]:

(i) up to 10% of the annual income of the offender for carrying out an absolute monopolistic practice, failing to comply with remedies imposed in a merger control process, or for non-compliance with a precautionary measure; or

(ii) up to 8% of the annual income of the offender for carrying out a prohibited relative monopolistic practice or a prohibited concentration, or for breaching a settlement agreement for early termination of an investigation.

In case of recidivism, Cofece/Ifetel may double the amounts of the fines listed above.

Furthermore, an undertaking that induces, provokes or participates in a monopolistic practice or prohibited concentration could face a fine of up to 180,000 times the daily minimum wage in Mexico ("DMW") (approximately USD 690,000 dollars[27]).

[22] Please refer to section VI of the Mexican Competition Law.
[23] Please refer to section IX of the Mexican Competition Law.
[24] Please refer to section XIII article 56 of the Mexican Competition Law.
[25] Please refer to section XI article 56 of the Mexican Competition Law.
[26] Please refer to article 127 of the Mexican Competition Law.
[27] DMW in Mexico is MXP$ 73.04 and exchange rate considered was MXP 19 per USD 1.

Maximum fine for individuals participating in monopolistic practices or illegal concentrations on behalf of legal entities is 200,000 times the DMW (approximately USD 824,000); in addition those individuals could be banned from participating in management positions or as representatives of corporations for up to 5 years.

b. Exploitative offenses

Please note that the Mexican Competition Law does not regulate exploitative offenses as a monopolistic practice.

c. Predatory pricing

The Mexican Competition Law considers as a relative monopolistic whenever an undertaking systematically sells certain goods or services below average (total or variable) cost. This practice in commonly known as "predatory pricing".[28]

d. Price discrimination

The Mexican Competition Law considers as a relative monopolistic whenever an undertaking carries out discriminatory actions on the price and/or on the terms and conditions on transactions with different buyers or suppliers that are under exactly the same circumstances.[29]

e. Resale price maintenance

The Mexican Competition Law considers as a relative monopolistic whenever an undertaking imposes to its distributors or suppliers the re-sale price or other conditions regarding the commercialization of certain goods or services.[30]

f. Tying arrangements

The Mexican Competition Law considers as a relative monopolistic whenever an undertaking imposes to its distributors or suppliers tying the sale of certain product to the acquisition of a different one.[31]

g. Bundling (including loyalty and market share discounts)

The Mexican Competition Law considers as a relative monopolistic whenever an undertaking imposes to its distributors or suppliers bundling obligations[32] or conditions a

[28] Please refer to section VII article 56 of the Mexican Competition Law.
[29] Please refer to section X article 56 of the Mexican Competition Law.
[30] Please refer to section II article 56 of the Mexican Competition Law.
[31] Please refer to section III article 56 of the Mexican Competition Law.
[32] Please refer to section III article 56 of the Mexican Competition Law.

transaction or a discount in a transaction with its suppliers or distributors on the obligation for them to not use, acquire or sell the goods or services manufactured and/or marketed by a third party.[33]

h. Exclusive dealing

The Mexican Competition Law considers as a relative monopolistic practice whenever an undertaking either establishes exclusive distribution agreements to its distributors or suppliers, whether based on subject matter, geographic territories or time periods, including the allocation of customers or suppliers; or imposes non-compete obligations to its distributors or suppliers for certain time periods.[34]

i. Refusal to deal

The Mexican Competition Law considers as a relative monopolistic practice whenever an undertaking unilaterally refuses to sell, market or supply certain undertakings, goods or services which are offered to third parties.[35]

j. Essential facilities

The Mexican Competition Law considers as a relative monopolistic practice whenever an undertaking refuses or restricts another party from accessing an essential facility[36], or grants such access under discriminatory terms and conditions.[37]

k. Customer termination

Although the Mexican Competition Law does not consider as a relative monopolistic practice the actions carried out by an undertaking to terminate the relationship it currently has with their customers, intermediaries or competitors, please note that this kind of action could qualify as a relative monopolistic practice (refusal to deal).

l. Termination of intermediaries

Please refer to section k.

m. Termination of relationship with competitors

Please refer to section k.

[33] Please refer to sections IV and VIII article 56 of the Mexican Competition Law.
[34] Please refer to section I article 56 of the Mexican Competition Law.
[35] Please refer to section V article 56 of the Mexican Competition Law.
[36] An essential facility is a non-replaceable facility controlled by a dominant company, which is essential for providing certain goods or services in one or more markets.
[37] Please refer to section XII article 56 of the Mexican Competition Law.

n. Settlements

Before the statement of probable responsibility is issued in a procedure before Cofece/Ifetel (i.e. during the investigation stage of the proceedings) relating to a relative monopolistic practice or unlawful concentration, the target of such investigation may apply for early termination of the proceeding and reduction of fine, provided (i) the applicant commit to suspend, eliminate or correct the corresponding practice or concentration, in order to restore the process of free market access and economic competition, and (ii) the proposed means are legally and economically feasible and appropriate to avoid, or eliminate, the relative monopolistic practice or unlawful concentration under investigation.[38]

The investigation proceeding shall be suspended during the settlement negotiation is resolved. The resolution may award the applicant with a fine reduction benefit of up to 100% of the applicable fine and order the necessary actions to restore free market access and the economic competition process. In the event that the Economic Agent does not expressly accept the resolution, the suspended procedures will be reinstated.

Undertakings may only receive the benefits under this article once every 5 years.[39] Notwithstanding the resolution under this process, third parties may still claim damages for civil liability in connection with the relative monopolistic practice or unlawful concentration.

(II) COLLUSIVE CONDUCTS

a. Introduction

According to the Mexican Competition Law absolute monopolistic practices are agreements or arrangements among competitors, which purpose or effect is to: (i) fix prices; (ii) limit the production, purchase or distribution of services or products; (iii) segment markets; (iv) "rig" bids; and/or (v) any exchange information with the purpose or effect to carry out any of the previously listed conducts.[40]

The Mexican Competition Law provides that, in addition to the civil and criminal sanctions that may be applicable to the parties involved, such agreements and arrangements are null and void; and therefore they cannot be enforced and will not have any legal effect whatsoever.

In any event, undertakings found responsible for antitrust violations could face fines in the following amounts[41]:

- up to 10% of the annual income of the offender for carrying out an absolute monopolistic practice, failing to comply with remedies imposed in a merger control process, or for non-compliance with a precautionary measure; or

[38] Please refer to article 100 of the Mexican Competition Law.
[39] Please refer to article 102 of the Mexican Competition Law.
[40] Please refer to article 53 of the Mexican Competition Law.
[41] Please refer to article 127 of the Mexican Competition Law.

- up to 8% of the annual income of the offender for carrying out a prohibited relative monopolistic practice or a prohibited concentration, or for breaching a settlement agreement for early termination of an investigation.

In case of recidivism, Cofece/Ifetel may double the amounts of the fines listed above.

Furthermore, an undertaking that induces, provokes or participates in a monopolistic practice or prohibited concentration could face a fine of up to 180,000 times the daily minimum wage in Mexico ("DMW") (approximately USD 690,000 dollars[42]).

Maximum fine for individuals participating in monopolistic practices or illegal concentrations on behalf of legal entities is 200,000 times the DMW (approximately USD 824,000); in addition those individuals could be banned from participating in management positions or as representatives of corporations for up to 5 years.

b. Horizontal price fixing

Mexican Competition Law considers as an absolute monopolistic practice whenever an undertaking enters into an agreement or arrangement with a competitor with the purpose or effect of fixing, coordinating or manipulating the sale or purchase price of goods or services commercialized in the market.[43]

c. Horizontal agreements to allocate customers or territories

Mexican Competition Law considers as an absolute monopolistic practice whenever an undertaking enters into an agreement or arrangement with a competitor to allocate or segment the market for certain goods or services, either by a group of customers, suppliers, time periods or territories.[44]

Mexican Competition Law considers as an absolute monopolistic practice whenever an undertaking enters into an agreement or arrangement with a competitor to establish an obligation not to produce, process, distribute, market or acquire a restricted or limited amount of goods or to render a limited or restricted number, volume or frequency of services.[45]

d. Agreements not to compete

Non-compete agreements are not expressly covered by the Mexican Competition Law provisions related to collusive behavior. However, any agreement aimed not to compete would be deemed illegal if result in price fixing, market allocation, output restriction or bid rigging. In addition, non-compete agreements are analyzed and could be authorized under the merger control process.

[42] DMW in Mexico is MXP$ 73.04 and exchange rate considered was MXP 19 per USD 1.
[43] Please refer to section I article 53 of the Mexican Competition Law.
[44] Please refer to section III article 53 of the Mexican Competition Law.
[45] Please refer to section II article 53 of the Mexican Competition Law.

e. Horizontal boycotts

Please note that the Mexican Competition Law does not consider horizontal boycotts as an absolute monopolistic practice (i.e. a collusive conduct between competitors), but as a relative monopolistic practice. Thus, the analysis of this kind of conducts is carried out under a rule of reason approach and consequently they are not considered as illegal per se.

f. Joint ventures and other competitive collaborations

Unlike other jurisdictions, in Mexico all agreements between competitors are analyzed following a per se approach under the provisions related to absolute monopolistic practices. Furthermore, any agreement between competitors aimed to fix prices, allocate markets, restrict output or rig bids is considered illegal. Notwithstanding, Cofece has recognized that joint ventures and other collaboration between competitors (i.e. joint purchase, distribution, manufacture, R&D agreements, among others) can be pro-competitive not raising antitrust concerns.

Furthermore, Cofece has authorized this type of collaborations under the merger control process and in the guidelines on information exchange expressly recognizes that, under certain circumstances, competitors "may collaborate to jointly improve the supply of products", for instance to "acquire better quality inputs or under most favorable terms and conditions". In accordance with the guidelines, those projects would be competitive when the information exchanged and the collaboration resulted essential to achieve the goals of the project and do not constitute a vehicle to unduly coordinate actions or displace third parties from the market.

g. Trade associations

Recommended actions made by trade associations to competitors aimed to coordinate prices, offers, production or commercialization or distribution terms, or the exchange of information in such regard, constitute indicia of absolute monopolistic practices and therefore grounds to initiate investigations.

Trade associations also conduct legitimate business such as consult and collaboration with the industry and government or addressing common concerns of their members. Cofece recognizes that in order for trade associations to conduct its legitimate business, historic and aggregated information from its members needs to be shared. The age and level of aggregation of the information would depend on the type of industry and therefore shall be analyzed on a case by case basis.

h. Bid rigging

The Mexican Competition Law considers as an absolute monopolistic practice to establish, arrange or coordinate bids or abstentions from tenders, contests, auctions or purchase calls, both in public and private processes.[46]

[46] Please refer to section IV article 53 of the Mexican Competition Law.

i. Interlocking directorates

Mexican Competition Law does not expressly addresses the issue of interlocking directorates, in the context of collusion.

j. Facilitating practices

The Mexican Competition Law sanctions those undertakings that contribute, foster, induce or participate in the execution of monopolistic practices or illegal concentrations.[47]

k. Information exchange

The exchange of information between competitors, when resulting in, or having the purpose of, price fixing, allocation of markets, restricting output or rigging bids, constitute a stand-alone violation under the Mexican Competition Law.[48]

However, as with the collaboration agreement covered on item "f." above, Cofece has also recognized that certain information exchanges are legitimate and pro-competitive, including those taking place in the context of a collaboration agreement or when participating in trade associations, as long as the information exchange is essential for achieving the purposes of the collaboration or a legitimate action by the trade association.

Leniency program

Companies and individuals may apply for a leniency program. Benefits of participating in a leniency program include full criminal immunity for all applicants and substantial reduction in fine (almost nil for the first applicant and 50% to 30% for subsequent applicants). To be awarded with leniency applicants shall fully cooperate with Cofece/Ifetel during the investigation and the administrative process and submit evidence of the cartel conduct. In addition, the applicants must end participation in the cartel conduct, unless instructed otherwise by Cofece/Ifetel.[49]

b. Settlements

Other than through the leniency program, settlement is not available for collusive behavior under the Mexican Competition Law.

[47] Please refer to section XI article 127 of the Mexican Competition Law.
[48] Please refer to section V article 53 of the Mexican Competition Law.
[49] Please refer to article 103 of the Mexican Competition Law.

OVERVIEW OF COMPETITION LAW IN PARAGUAY

Alejandra Guanes

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

The Competition Law was enacted in the year 2013 by Law No 4956/13 (the "Competition Law"). The Competition Law defends and promotes free market competition, expressly prohibiting anti-competitive acts. The Competition Law was consolidated and strengthened with the enactment of Decree 1490 of April 14, 2014 (the "Decree").[1]

The scope of the Competition Law includes state monopolies and has extraterritorial reach to the extent that the anticompetitive conduct affects the local market.

The regulations target anticompetitive agreements, abuse of dominant position and abuse of dominant position through predatory pricing, and lay down rules for merger notification. The Competition Law takes a rule of reason approach and gives notable importance to efficiency gains.

b. Theories of harm present in the law

The analysis of Compatibility of the Operation of Concentration (the "OC") with the Market seeks to determine the theory of harm in the Competition Law.

The National Commission for Protection of Competition (Comisión Nacional de Defensa de la Competencia in Spanish, the "CONACOM") targets to determine whether the OC entails an obstacle against an effective competition by creating or reinforcing a dominant position in the relevant markets affected by the OC. For that, it takes into account the following factors[2]:

(i) if the operation produces an increase in the concentration in the relevant market and if, as a result of it a concentrated market is generated to levels entailing.

(ii) if the operation facilitates the realization of conducts or practices which entail an obstacle against an effective competition, as well as the imposition of barriers to entry for new competitors, by creating or reinforcing a dominant position in the relevant market.

[1] Article 1 of the Competition Law.

[2] Article 24 of the Decree.

(iii) if the operation is or may be intended to unduly drive other natural or legal persons out of the relevant market, or impede them to enter the latter, especially in the OC between natural or legal persons located in different stages of a supply chain.

c. Authority in charge of enforcement of antitrust law and regulations

The CONACOM is the enforcement authority of the Competition Law.[3] The CONACOM is governed by a staggered board of directors constituted by three members (the "Board"). All the members of the Board serve for 6-year terms, each of them being elected every two years instead of all at once. On July 28th 2015, the members of the first Board were appointed by Decree 3827/2015.

Although the Competition Law is fully in force, there are still no actions from the government aimed towards the application of such regulation. The appointment of a head of the investigation unit is still pending.

d. Nature of antitrust enforcement

The nature of antitrust enforcement is administrative.[4]

e. Investigational powers of authority

The Directorate of Investigation (the "Directorate") is headed by a Director who is responsible for[5]:

(i) requesting to the CONACOM the commencement of an investigation procedure;
(ii) carrying out investigations, proceedings and further necessary acts for the application of sanctions as foreseen in the Competition Law; and
(iii) other responsibilities pursuant to the Competition Law and its regulation.

Upon commencement of the investigation, the Directorate has a term of 90 days for the pertinent diligences, to verify the grounds on which the claim is based upon. Within the aforementioned term, the Directorate submits a technical report suggesting the dismissal of the allegations or the formulation of the pertinent accusation.[6]

To carry out investigations related to competition affairs, the CONACOM is entitled to:

(i) require information or documents to other entities or public institutions;
(ii) obtain from natural or legal persons all kinds of civil and commercial documents, including accounting and company books, receipts, internal and external commercial correspondence and magnetic records of data including, in this case, software necessary for their reading, as well as information related to the

[3] Article 15 of the Competition Law.

[4] Article 34 of the Decree.

[5] Article 30 of the Competition Law.

[6] Articles 50 and 55 of the Competition Law.

organization, dealings, share capital structure and ownership structure of the company. This power does not reach the scope of private correspondence or that of information related to personal data, the publication of which constitutes an invasion to personal and family privacy or classified information;

(iii) summon and interrogate, through its officers appointed to that effect, people subject to investigation or their representatives, employees, officers, advisors and third parties; and,

(iv) carry out inspections, with or without prior notice, in the business or industrial sites of the individuals under investigation. Examine the books, records, documentation and goods, being able to verify the development of production processes and to take statements from people present therein. Obtain during the inspection copies of physical, magnetic or electronic files, as well as any other document deemed pertinent, and photographs or films deemed necessary. If required, force entry in the case of locked commercial or industrial establishments, for which a judicial no-knock warrant is necessary.

f. Attorney-client privilege

The attorney-client privilege is ruled by Article 81 of the Decree and states that all of those employees or public servants with access to information classified as confidential by the directors, or deemed confidential pursuant to other applicable laws, they are bound to keep such information secret.

Notwithstanding the administrative, civil and criminal responsibilities connected to the secrecy breach, the breach constitutes a gross misconduct in the case of public servants under Law No. 1626/2000 that governs the Civil Service.

g. Interactions with other regulators

In procedures pursued before the CONACOM, in connection with economic sectors subject to regulation and supervision by other public institution or ruling entities (such as telecommunications, finance, insurance and any other public service), the CONACOM must request the pertinent authority to submit a report on the technical aspects of the services and/or goods under assessment, the markets involved, the conduct under investigation and the regulation applicable to the same [7]

Likewise, Article 78 of the Decree states that public institutions have the duty to cooperate with the CONACOM and are obliged to submit, upon request, the information required. In addition, they may be required to submit non-binding reports for the CONACOM on matters under their competence. The institutions must submit the information or the reports within 10 days, extendable, counted from the day after the notice of the requirement. If the obligation is not fulfilled, the CONACOM may continue with the proceedings.

The entities or public institutions are not bound to submit the aforementioned information in the following exceptional cases:

[7] Article 80 of the Decree.

(i) when the information involves information protected as bank secrecy, tax privacy, commercial, industrial or stock market secrecy, governed by their pertinent legislations.
(ii) when the information involves personal data, the disclosure of which shall constitute invasion to personal and family privacy.

h. Treaties in place

All conducts restricting competence in conflict with the obligations resulting from treaties, conventions and international agreements approved or ratified by Paraguay are prohibited.[8]

With the Mercosur Competition Protocol of 1996 (the "Protocol"), Paraguay formally committed to adopt a policy in harmony with the competition policies of the Mercosur region. The Protocol created a supranational body, the Committee for the Defense of Competition (the "CDC"), with enforcement powers in matters referred to it by the national competition agencies of the member countries. The Protocol never entered into force, as it was only ratified by Brazil and Paraguay.

The Mercosur Competition Agreement (the "MCA") abrogated the Protocol in 2010, but its ratification is still pending. The MCA has the purpose to:

(i) promote cooperation and coordination among member states in the application of national competition laws within Mercosur;
(ii) provide mutual assistance in competition policy issues; and,
(iii) assure a careful examination by its member states of their relevant reciprocal interests.

i. Standards of evidence

There are no specific rules as to the production of evidences; therefore, this area is pursuant to the general rules of the Civil Procedure. The parties may submit all kinds of evidences to the extent that they do not affect the morality, the personal freedom of the litigating parties or of third parties and as long as they are not prohibited for the case.

j. Methods of engagement with authority

Any person acquainted with any act that deems a transgression to the principles and rules of the Competition Law can denounce it to the CONACOM. The denouncement, the internal subsequent proceedings and the safeguards for the denouncing person are subject to the provisions contained in the regulation of the Competition Law. Notwithstanding the fact that the denouncer provides identification in all cases, the same request the Direction of the CONACOM, for good reasons, not to disclose their identity.[9]

[8] Article 7 of the Competition Law.

[9] Article 46 of the Competition Law.

k. Judicial review of decisions

The rulings from the CONACOM can be challenged by contentious administrative action before the Court of Appeal.

The appeal is filed by the aggrieved party before said court within the set and non-extendable period of 18 days, counted as of the notice of the decision, or upon expiration of the term for its issuing, in the event of tacit denial.[10]

l. Private litigation

Not applicable.

II – MERGER CONTROL

Merger control legislation entered into force in June 2014, one year after publication of the Competition Law. It is exercised over any economic concentration of enterprises, which is defined as the acquisition of control over one or more companies, business units, going concerns or assets form which an independent turnover can be identified, by means of a merger, the transfer of a going concern or any act or agreement that transfers to a person or economic group a decisive influence on the passing of resolutions relating to the ordinary or extraordinary management of a particular enterprise.

a. Types of transactions

The types of transactions are[11]:

(i) a merger between two or more formerly independent companies;

(ii) the acquisition of control of the whole or parts of one or more undertakings. Control may result from rights, contracts, or any other means that, either separately or in the aggregate, grant the possibility of exercising a decisive influence over an undertaking, in particular by: a) transfer of ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the constitution, voting or decisions of an undertaking; and

(iii) the formation of a full function joint venture.

b. Notification of foreign-to-foreign mergers

Paraguayan merger control system applies to foreign-to-foreign transactions where such a transaction has effects on competition in the Paraguayan territory[12]. In any event, the

[10] Article 68 of the Competition Law.

[11] Article 12 of the Competition Law.

Paraguayan authorities would have no jurisdiction to decide on the effects of a merger outside Paraguay.

c. Definition of "control"

Control is constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by[13]:

(i) Ownership or the right to use all or part of the assets of an undertaking; or
(ii) Rights or contracts, which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

d. Jurisdictional thresholds

There are two thresholds that trigger the obligation to notify[14]:

(i) that as a consequence of the transaction a share of 45% or more of the national market of a specific product or service, or of a geographically determined market within it, is acquired or increased; or
(ii) the aggregate turnover in the domestic market of Paraguay of the undertakings concerned to the concentration exceeds in the last accounting period the amount of 100.000 minimum wages (approx. USD 31.450.000).[15]

The aggregate turnover is calculated taking into account the profits made by the participants during the last financial year, after deducting sales reductions or discounts over sales, value added tax, selective consumption tax and any other tax directly involved with the volume of the business.

e. Triggering event for filing and deadlines

The parties to a merger, or individually the party that acquires control, are required to file notice within 10 days following a closing, publication of purchase offer, or acquisition of participation in the following cases[16]:

(i) the transaction increases to, or exceeds 45% of the relevant market for a specific good or service; or
(ii) the transaction exceeds 100.000 minimum wages according to the latest fiscal year figures.

[12] Article 3 of the Competition Law.

[13] Article 12 of the Competition Law.

[14] Article 14.1 of the Competition Law.

[15] 1 USD = 5.800 Gs.

[16] Article 14.1 of the Competition Law.

f. Exemptions

A concentration does not take place[17]:

(i) when credit institutions or other financial entities or insurance companies, the main activity of which includes the transaction and negotiation of securities, either by themselves or through third parties, temporarily hold shares that had been acquired in a legal person aiming at reselling the same, provided that they shall not exercise the voting rights conferred to the same, for the purpose of determining the competitive behavior of such legal person, or, if they exercise such voting right for the purpose of preparing the total or partial realization of such legal person or its assets, or the realization of said shares, and that realization taking place within the term of 1 year, counted from the date of acquisition; the Pertinent Authority may prorogue the term upon previous request, when such entities or companies prove that such realization was not reasonably possible within the that term; or

(ii) when the control is acquired by a person by virtue of a mandate, conferred by public authority pursuant to legislation related to liquidation, bankruptcy, insolvency, default, application for bankruptcy or similar procedure.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

There is no specific legislation for merger control involving foreign investment in Paraguay. However, some sector-specific operations (e.g. in the banking, telecommunications, insurance sectors) require special authorization in order to be carried out.

h. Information requested for the filing

The notice includes the following information[18]:

(i) ID of the individuals or legal entities filing the notice and of any other person involved in the transaction;

(ii) certified copy of the corporate documents pursuant to which the signatory exercise the representation of the notifying party;

(iii) name and contact information of the individuals responsible for the notice that will serve as spokesperson with the Authority;

(iv) description of ownership and control structure of the undertakings involved in the transaction;

(v) financial Statements of the last fiscal year of all undertakings concerned in the transaction;

(vi) description of the transaction, type of transaction, and, non-compete provisions, if any;

[17] Article 12.5 of the Competition Law.

[18] Article 16 of the Decree.

(vii) detail of the undertakings involved in the transaction having a direct or indirect participation in the stock, management or any activity of other undertakings producing or commercializing goods or services that are equal, similar or substantially related to those goods and services produced or commercialized by the undertakings concerned in the transaction;
(viii) value of the transaction;
(ix) copy of the final or most recent version of the agreement;
(x) list and description of goods and services produced or offered by the undertakings concerned in the transaction;
(xi) market shares of the undertakings concerned and their competitors, if available;
(xii) location of plants or facilities of the undertakings concerned, location of their main distribution centers and their relation to the undertakings;
(xiii) information regarding clearance of the transaction in other jurisdictions; and
(xiv) [optional] analysis, reports or documents evidencing that the transaction is compatible with the market.

The parties responsible for notifying does so within 10 days after a notifiable event takes place, i.e. the written conclusion of the agreement or of the publication of the offer to purchase or exchange, or of the acquisition of a controlling share of another legal entity.

i. Sanctions applied for late or no filing

Failure to notify the transaction and late filing are considered infractions. In such scenarios, the CONACOM may declared the transaction void and impose fines, without regards to whether the transaction is compatible with the market.

The Competition Law, in Article 63, contemplates sanctions and monetary penalties in the event of non-compliance or infringements by individuals or legal entities against the rules established by the present Act, such as how Prohibited agreements, abusive behavior and concentration.

The Authority can:

(i) issue a warning and order the parties to stop the contravening act, for example, the Authority may prohibit the parties from implementing the concentration / completing the transaction";
(ii) declare the transaction or concentration or contravening act void; and
(iii) impose fines up to the equivalent of 150% of the profits obtained through the contravening practice or up to 20% of the domestic turnover for sales of the products related to contravening practice within the affected market in the past 12 months.

The amount of fines must not be less than the amount obtained in profits, where the latter are quantifiable.

j. Parties responsible for filing

In a merger, both parties concerned are responsible for filing. In an acquisition of control, only the acquirer is responsible.

k. Filing fees

The filing fees are 0.005% to 0.1% of the value of the transaction in Paraguay on a sliding scale according to the value of the operation in Paraguay.

l. Effects of notification

In all cases subject to the expected notification, there is statutory maximum time period of 90 days for the approval of mergers. Transactions are deemed automatically cleared upon expiration of such time period.

The time period is calculated as of the date of the filing or the date of the completion of the filing, if the Merger Control Department finds that the filing was incomplete (the Merger Control Department has 5 days from the filing to require additional information).[19]

Investigation is divided in 2 phases:

(i) PHASE-I: 30 days. In first phase-review, the CONACOM may (i) grant clearance; (ii) declare that the transaction does not fall under the scope of the merger control system; or (iii) open second-phase review.[20]

(ii) PHASE-II: 60 days. Second-phase review opens if the CONACOM finds that, due to the complexity of the transaction, further investigation is required. During second-phase review the CONACOM may "stop the clock" in order to require additional information.[21]

m. Gun jumping and closing – sanctions

Under the Competition Law there is no express prohibition on closing a transaction before clearance is granted; nor there is an express provision enabling the parties to close the transaction before clearance is granted by the CONACOM.[22]

Accordingly, in case a transaction is closed prior to closing there are no sanctions if the transaction is deemed compatible with the market. If the CONACOM subjects the authorization to specific conditions or denies authorization, the transaction shall be considered void. [23]

[19] Article 17 of the Decree.

[20] Article 19 of the Decree.

[21] Article 21 of the Decree.

[22] Art 63 of the Competition Law, and arts. 34 and 35(a) of the Decree.

[23] Art 63 of the Competition Law, and art. 35(c) of the Decree.

n. Type of remedies and their negotiation

CONACOM can establish structural or behavioral solutions according to the features of the notified operation. The conditions, which the Direction may subject to authorization of the Operation of Concentration, may consist of[24]:

(i) performing a determined conduct or refusing to perform the same;
(ii) alienating assets, rights, participations or shares;
(iii) eliminating a determined production line;
(iv) modifying or eliminating terms or conditions of performed acts.
(v) committing to carry out acts aiming at enhancing the participation of competitors in the market, as well as giving access or selling goods or services to these; or
(vi) any other conditions aiming at avoiding that the concentration be incompatible with the market.

o. Timetable for clearance

Initially a transaction must be approved in 90 days.[25] Until the date of this report the appointment of a Head of the Investigation Unit is still pending, therefore there are no precedents.

p. Involvement by third parties

Not possible.

q. Types of resolutions that may be issued

By means of a resolution with grounds, the Authority may:

(i) authorize the operation of concentration;
(ii) set conditions that must be fulfilled to grant the authorization; or
(iii) deny the authorization.

r. Review of ancillary restraints

Not required. Only upon request from the parties.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

[24] Article 30 of the Decree.

[25] Article 14.5 of the Competition Law.

a. Introduction

The unilateral conduct behavior occurs through an abuse of dominant position. The Article 9 of the Competition Law defines the dominant conduct, as a natural or legal person who have a dominant position when for a determinant product or service it is not exposed to an effective and substantial competition.

Criteria to determine the existence of a dominant position are described as follows:

(i) extent to which the good or service may be substituted, conditions and time necessary;
(ii) extent to which regulations restrict market entry; and
(iii) extent to which a competitor may unilaterally influence pricing or restrict supply or demand, and the extent to which competitors may counter such conduct.

Market dominance is not per se illegal according to the Competition Law, but the abuse of a dominant position. Certain practices in particular may be constitutive of an abuse of dominance:

(i) fixing prices or other inequitable business terms ;
(ii) restricting output, distribution or technical development, without justification;
(iii) refusal to sell, without justification;
(iv) applying different terms to similar transactions, without justification;
(v) tying;
(vi) threatening to discontinue to deal in order to obtain or attempt to obtain more favorable terms exceeding agreed terms.

The fines will be set by the CONACOM in minimum wages. Be used as reference the legal minimum wage which was in force at the date of actual payment of the fine or forced execution of payment. Legal minimum wage in force up to the March 2016 is Gs. 1.824.055 = USD 324 approximately (USD 1 = Gs. 5.620).

The maximum fines for antitrust infringement, in no case can be more than equivalent of 150% of the profits obtained through the contravening practice or up to 20% of the domestic turnover for sales of the products related to contravening practice within the affected market in the past 12 months. The amount of fines must not be less than the amount obtained in profits, where the latter are.

Penalties may also be applied to directors and legal agents of the infringers and to controlling companies and their directors and legal agents

b. Exploitative offenses

Contained in point a) Introduction, section I above. Paraguay does not have administrative or judicial cases to date.

c. Predatory pricing

Provisions addressing abuse of dominant position through predatory pricing brings two prohibitions as follows[26]:

(i) selling at prices below production cost or profit margin, without justification, with the purpose of driving competitors out of the market; and
(ii) selling at prices below purchase, or restocking, or profit margin, without justification, with the purpose of driving competitors out of the market.

The prohibitions will not apply to perishables, obsolete stock, goods that can be restocked at a lower price, goods sold at the same price as another competitor in the relevant market considering time and territory, or stock clearances.

The competition authority in coordination with the Trade Ministry may determine costs at origin in accordance with antidumping regulations.

d. Price discrimination

Contained in point a) Introduction, section IV above. Paraguay does not have administrative or judicial cases to date.

e. Resale price maintenance

The Competition Law does not provide a definition for Resale Price maintenance. Paraguay does not have administrative or judicial cases to date.

f. Tying arrangements

Tying arrangements on a contractual basis are prohibited when the effect is exclusionary or exploitative, causing a serious damage to competitors and suppliers[27]. Contained in point a) Introduction, section V above. Paraguay does not have administrative or judicial cases to date.

g. Bundling (including loyalty and market share discounts)

Contained in point a) Introduction, section I above. Paraguay does not have administrative or judicial cases to date.

h. Exclusive dealing

The Competition Law does not provide a definition for Exclusive dealing. Paraguay does not have administrative or judicial cases to date.

[26] Article 8 of the Decree.

[27] Article 11 of the Competition Law.

i. Refusal to deal

Contained in point a) Introduction, section III above. Paraguay does not have administrative or judicial cases to date.

j. Essential facilities

The Competition Law does not provide a definition for Essential facilities. Paraguay does not have administrative or judicial cases to date.

k. Customer termination

Not dealt with in the Competition Law or the Decree.

l. Termination of intermediaries

Not dealt with in the Competition Law or the Decree.

m. Termination of relationship with competitors

Not dealt with in the Competition Law or the Decree.

n. Settlements

Not dealt with in the Competition Law or the Decree.

(II) COLLUSIVE CONDUCTS

a. Introduction

Collusive conducts are those produced by means of an agreement among competitors or with suppliers/providers. The Competition Law, in its Article 8 prohibits any agreement, decision or practice covenanted or deliberately parallel, regardless of their written or oral form, their formalities or lack thereof, intended for, producing or able to produce the effect of impeding, restricting or distorting the competition in all or part of the national market.

Illegal agreements are:

1. Agreements having the intention of:

   (i) setting or imposing, directly or indirectly, or recommending collectively the buy or sale prices, or other transaction conditions abusively;

(ii) limiting, restricting or controlling, in an unjustified way the market, production, distribution, technical development or the investments to the detriment of competitors or consumers;
(iii) ceasing the sales in determined areas or discontinuing production;
(iv) coordinating public or private bids;
(v)affecting the conditions of credit, discounts, refunds, etc.; or
(vi) the agreed refusal to acquire.

2. *Customer sharing agreements:*
(i) dividing customers or agreeing not to gain customers from other competitors;
(ii) dividing geographic territories; or
(iii) agreeing the exit or not entering certain markets (either in terms of product or territory).

3. *Group Boycotts:*
(i) the collective unjustified denial of taking part in an agreement, or admission into an association, decisive for the competition.

The fines will be set by the CONACOM in minimum wages. Be used as reference the legal minimum wage which was in force at the date of actual payment of the fine or forced execution of payment. Legal minimum wage in force up to the March 2016 is Gs. 1.824.055 = USD 324 approximately (USD 1 = Gs. 5.620).

The maximum fines for antitrust infringement, in no case can be more than equivalent of 150% of the profits obtained through the contravening practice or up to 20% of the domestic turnover for sales of the products related to contravening practice within the affected market in the past 12 months. The amount of fines must not be less than the amount obtained in profits, where the latter are.

Penalties may also be applied to directors and legal agents of the infringers and to controlling companies and their directors and legal agents.

b. Horizontal price fixing

Price fixing is an agreement between participants on the same side in a market to buy or sell a product, service, or commodity only at a fixed price, or maintain the market conditions such that the price is maintained at a given level by controlling supply and demand Contained in point a., section I above. Paraguay does not have administrative or judicial cases to date.

c. Horizontal agreements to allocate customers or territories

Contained in point 2., section III above. Paraguay does not have administrative or judicial cases to date.

d. Agreements not to compete

Contained in point 1., section VI above. Paraguay does not have administrative or judicial cases to date.

e. Horizontal boycotts

Contained in point 3., section I above. Paraguay does not have administrative or judicial cases to date.

f. Joint ventures and other competitive collaborations

The Competition Law refers to any agreement. Consequently, it is not limited to a specific type of agreement.

g. Trade associations

The Competition Law refers to any associations. Consequently, it is not limited to a specific type of associations.

h. Bid rigging

Contained in point 1., section IV above. We do not have knowledge of any administrative or judicial cases to date.

i. Interlocking directorates

Contained in point a 1., section III above. We do not have knowledge of any administrative or judicial cases to date.

j. Facilitating practices

The Competition Law does not provide a definition for facilitating practices. We do not have administrative or judicial cases to date.

k. Information exchange

The Competition Law does not provide a definition for information exchange. We do not have knowledge of any administrative or judicial cases to date.

l. Leniency program

Not dealt with in the Competition Law or the Decree.

m. Settlements

Not dealt with in the Competition Law or the Decree.

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OVERVIEW OF COMPETITION LAW IN PERU

Carlos A. Patrón

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations (including sector-specific competition regulation)

Legislative Decree N° 1034, the Repression of Anticompetitive Conducts Law (the "Competition Law"),[1] establishes the principal competition rules that apply to undertakings in all sectors of economic activities in Peru. This statute focuses on preventing and providing remedies for anticompetitive conducts, limiting local authorities to performing ex post behavioral controls of individuals and corporations in the marketplace and, therefore, does not contain general provisions establishing prior controls or authorizations to corporate mergers or concentrations.

Law N° 26876, the Antitrust and Anti-oligopoly Law for the Electricity Sector (the "AAL") and its supplementary regulations (the "AAL Regulations"),[2] impose a mandatory notification and authorization procedure for vertical or horizontal concentrations that take place in the field of electricity generation, transmission or distribution. This is the only sector of Peruvian economic activity in which prior concentration controls have been established to date.

b. Theories of harm present in the law

The Peruvian Competition Law explicitly states its goal as to promote economic efficiency and consumer welfare in the market.

In turn, the AAL states its goal as to prevent concentrations that have the effect of diminishing, harming or impeding competition and free enterprise in the electricity generation, transmission or distribution markets or in related markets.

c. Authority in charge of enforcement of antitrust law and regulations

The Protection of Free Competition Commission (the "Competition Commission") at the Peruvian National Institute for the Defense of Competition and for the Protection of Intellectual Property ("INDECOPI" for its Spanish acronym) is charged with enforcing the Competition Law in all fields of economic activity, with the exception of practices that affect or may affect the public telecommunications markets.[3] It is also charged with enforcing the AAL and, accordingly,

[1] Legislative Decree No. 1034, published June 25, 2008. The Competition Law abrogated Legislative Decree No. 701, Law Against Monopolistic, Controlist and Restrictive Practices, enacted in November 1991.

[2] Supreme Decree NO. 017-98-ITNCI and Supreme Decree NO. 087-2002-EF.

[3] The Peruvian Private Investment in Telecommunications Supervisory Agency ("OSIPTEL" for its Spanish acronym) is charged with the enforcement of the Competition Law

with conducting the mandatory pre-notification and authorization procedures for concentrations in the electricity sector.

Decisions issued by the Competition Commission are appealable before the Tribunal for the Defense of Competition (the "Competition Tribunal" or the "Tribunal"), the second and final administrative decision making body at INDECOPI.

d. Nature of antitrust enforcement

INDECOPI is an administrative agency, and as such, the acts of its decision-making bodies are administrative in nature and subject to judicial review litigation. Competition law related crimes were abrogated from the Peruvian Penal Code in 2008 and, accordingly, infractions to the Competition Law do not currently result in criminal liability.

The Competition Law authorizes the Competition Commission to sanction infractions to said statute by imposing pecuniary fines on each individual defendant.

The maximum fines that may be imposed if infractions are considered to be very severe, may not exceed twelve percent (12%) of the gross sales or income earned by the defendant in the fiscal year prior to the Competition Commission's decision.

As an exception, maximum fines may not exceed a cap of 1,000 Reference Tax Units (approximately USD 1.1 million) if the defendant is a trade association or a professional body or if the defendant initiated its economic, industrial, or commercial activities after January 1 of the calendar year prior to the Competition Commission's decision.

If the infringing defendant is a corporation or a legal entity, the Competition Law empowers the Competition Commission to impose ancillary fines of up to 100 Tax Reference Units (approx. USD 110,000.00) on each of the representatives, directors, or officers who took part in the infractions committed. INDECOPI regularly asserts these types of penalties in horizontal collusion cases. Furthermore, in past decisions, the Tribunal has explicitly barred infracting corporations from disbursing or reimbursing the ancillary fines imposed on their directors and officers, mandating that the fines imposed on the latter may not be paid by the former nor affect its assets.[4]

In addition to its fining capacity, the Competition Commission has the power to grant interlocutory and permanent injunctions. Interlocutory injunctions may be issued ex parte at any point during an investigation to secure compliance with its final decisions.

e. Investigational powers of authority

INDECOPI's decision-making bodies are vested with superlative investigative powers, matched only by the Peruvian tax administration. Accordingly, both the Competition Commission and the Competition Tribunal are empowered to the following:

in matters related to activities that affect or may affect the markets for public telecommunications services.

[4] Ruling No. 0407-2007-TDC-INDECOPI, March 22, 2007.

To summon individuals and corporations the exhibition and presentation of any kind of documentation, including corporate and accounting books, invoices, commercial correspondence and any form of electronic media content (including the application software required to process it), as well as to require information related to the organization, the businesses and the shareholder and property structure of any corporation.

Notwithstanding, correspondence and telecommunications may only be seized, opened or intercepted by Peruvian authorities with a Judicial warrant, under privacy of communications rights warranted by the Constitution. Similarly, the Peruvian Constitution warrants that bank secrecy and tax privacy may only be limited at the request of a Judge, of the General Attorney or of a Congressional Investigative Commission, and only for the purposes of the investigated matter.

To subpoena, compel testimony and interrogate investigated parties or their representatives, employees, officers, advisors, as well as third parties, deploying any technological means it deems necessary to generate a complete and reliable record of their testimonies, including voice and video recordings.

To perform dawn raids and inspection visits without warning on the premises of individuals and corporations and examine books, records, documentation and chattel, being entitled to corroborate the development of productive processes and to compel testimony from the people present on said premises. During such inspections, authorities may make copies of any physical or electronic document or file, as well as film or photograph as deemed necessary.

f. Attorney-client privilege

Under the Peruvian Constitution, information that constitutes client-attorney privilege is exempt from disclosure to authorities.

g. Interactions with other regulators

The Competition Law grants exclusive subject matter, personal and territorial jurisdiction to the Competition Commission and the Competition Tribunal in matters related to the enforcement of the Competition Law in all fields of economic activity, with the exception of activities that affect or may affect the public telecommunications markets, as well as in matters related to the enforcement of the AAL. Accordingly, no other administrative authorities are empowered to become involved in an investigation carried out by INDECOPI's decision-making bodies.

Notwithstanding, pursuant to the Competition Law, all public institutions are obliged to supply INDECOPI's decision-making bodies any information that may be requested from them by the latter during the course of an investigation, within the limits imposed by bank secrecy and tax privacy regulations.

h. Treaties in place

Peru is a member of the Andean Community.

In addition, INDECOPI currently has co-operation agreements in place with the competition authorities of Brazil, Chile, Colombia, Ecuador, El Salvador and Panama, and is a member of the International Competition Network (ICN).

i. Standards of evidence

The Peruvian Constitution warrants individuals the fundamental right to the presumption of innocence in all criminal trials. The Peruvian Constitutional Tribunal has consistently held that this fundamental right is extendable to administrative fining procedures, such as those that result from the breach of the Competition Law.[5] Accordingly, Peruvian competition authorities are barred from presuming the existence of anticompetitive practices.

Applying this criteria to price-fixing cases, for instance, Peruvian competition authorities have consistently held that, absent additional direct or circumstantial evidence of an effective agreement, a "parallel behavior" by itself does not constitute a violation to the Competition Law. This position was first adopted by the Tribunal in Municipalidad Provincial de Lambayeque v. Cooperativa de Transportes San Pablo, et al., stating the following:

"[S]ection 6 of [the Competition Law] alludes, among others, to 'parallel behaviors', which, as such, do not constitute an infraction to the law, since competition in the market may determine a tendency towards standardizing prices. Accordingly, the existence of parallel practices or conducts in a market that offers objective conditions for collusion constitutes only circumstantial evidence of cooperation.

Hence, in order to determine the effective existence of collusion, it is indispensable that additional evidence or circumstantial evidence exist, demonstrating an agreement or the adoption of a common will among competitors.

It is worth noting that, while it is not necessary to find conclusive direct evidence, such a signed agreement or a recording of a meeting in which ways to restrict or limit competition among undertakings that compete in a particular market are decided, it is necessary to find evidence or circumstantial evidence that, as a whole, directly or indirectly demonstrate the existence of such an agreement".[6]

j. Methods of engagement with authority

Competition enforcement and concentration clearance activities performed by INDECOPI's decision-making bodies are carried out through written procedures, although public oral hearings are generally allowed prior to the issuance of final decisions.

Local authorities are barred from meeting with a party to a procedure if the counterparty is not present at the time.

While the authorities will, from time to time, issue general guidelines and pre-publish draft normative amendments for public feedback before enactment, they will not issue opinions on request.

[5] Constitutional Tribunal Decision, Case File No. 3312-2004-AA/TC, December 17, 2004.
[6] Ruling No. 105-96-TRI/SDC/Indecopi, December 23, 1996.

k. Judicial review of decisions

The Peruvian Constitution warrants that decisions handed-down by the Public Administration's final decision-making bodies may be judicially reviewed. Accordingly, in the case of INDECOPI, the rulings handed-down by the Competition Tribunal may be subject to judicial review.

Judicial review litigation is regulated in the Judicial Review Procedure Law and supplemented by the Peruvian Code of Civil Procedure.

l. Private litigation

INDECOPI is an administrative agency, and as such, enforcement activities carried out by its decision-making body are deemed public prosecution.

Upon the conclusion of administrative fining procedures at INDECOPI, article 49 of the Competition Law authorizes any person harmed by agreements or practices prohibited under said law to file civil liability (torts) suits before the Judiciary in order to recover damages.

Civil liability actions are regulated in articles 1969 to 1988 of the Peruvian Civil Code. Peruvian civil legislation allows recovery in cases of damages caused by intentional harm and negligence (article 1969 of the Civil Code), and subjects damages resulting from hazardous activities to strict liability (article 1970 of the Civil Code).

Article 1985 of the Civil Code allows recovery of compensatory damages, including direct and consequential losses (i.e., direct economic losses and current or future lost earnings) and nonpecuniary injuries (i.e., moral and personal damages). Punitive damages are not allowed under Peruvian civil legislation. The statute of limitations to file a civil liability suit is of two years.

In addition, article 49 of the Competition Law empowers INDECOPI to file class action suits before the Judiciary on behalf of consumers related to anticompetitive practices. INDECOPI is allowed to delegate this faculty upon private or public entities that are capable of adequately representing consumers' interests. In these actions, INDECOPI is authorized to seek any remedy necessary to protect the affected consumers' rights, including civil liability damages and the recovery of any amounts paid in excess.

II – MERGER *CONTROL*

a. Types of transactions

The AAL imposes a mandatory pre-notification and authorization procedure for vertical or horizontal concentrations that occur in the fields of electricity generation, transmission or distribution.

Peruvian regulations define 'horizontal concentration' as transactions that involve companies that undertake one of the aforementioned activities and 'vertical concentration' as transactions that involve companies that undertake more than one of said activities.

Article 2 of the AAL provides a wide and detailed description of a "concentration", stating that a concentration is deemed to have occurred in the following cases:

- Mergers;
- Incorporation of a common company;
- Direct or indirect acquisition of control over other companies by means of the purchase of equity or interests;
- Direct or indirect acquisition of control over other companies by means of any other contract or legal mechanism that grants the direct or indirect control of a company, including joint-venture agreements or other forms of association in participation, temporary transfer of equity or interests, syndication or other forms of shareholders agreements, management agreements, and any other similar partnerships or business collaboration agreements that have like or similar consequences;
- Acquisition of productive assets of any company that carries out activities in the electric sector; or,
- Any other act, contract or legal mechanism by means of which companies, associations, equity, interests, trusts or assets are concentrated among competitors, suppliers, clients, shareholders or other economic agents.

b. Notification of foreign-to-foreign mergers

Notification is compulsory even if the transaction is executed abroad or subject to foreign legislation.

In the past, the Competition Commission has stated that the AAL "does not extend the jurisdiction of the Free Competition Commission into the international arena, only referring to the concentration of Peruvian electricity companies that may result from operations carried out abroad, limiting the application of the law to the consequences that said operations may have in the national territory".[7] Furthermore, the Competition Commission has stated that the AAL dos not collide with the territorial principal of consuetudinary international law, for it only includes within the scope of the AAL those concentration acts that, despite being carried out abroad, produce a lasting change of the current control structure of companies located within the Peruvian electricity sector.[8]

c. Definition of "control"

The Competition Commission has defined the concept of "concentration" as any operation that produces a relevant modification in the structure of control over a given undertaking. Accordingly, it has stated in the past that an acquisition of shares "only constitutes a concentration operation if it produces a relevant modification in the structure of control of a company".[9] Likewise, it has recognized that in order to determine the application of the AAL to a

[7] Ruling NO. 012-99-INDECOPI/CLC, 3 December 1999.
[8] Ruling NO. 001-2010/CLC-INDECOPI, 7 January 2010.
[9] Ruling NO. 015-1998-INDECOPI-CLC, 23 December 1998.

particular case, it must "evaluate if the operations involved cause a concentration of the companies, that is, a substantial modification in the structure of control of said companies";[10] and has established that "the term 'concentration' covers all operations (…) that result in the acquisition of control by one party over another company or group of companies".[11]

In turn, the Competition Commission has defined the concept of "control" in its case law as the capacity to influence in a preponderant and continuous fashion over the strategic commercial and competitive decisions of a company, a power that may be exercised through a company's shareholders' assembly, board or main management positions.[12] Pursuant to the administrative decisions handed-down by the Competition Commission, the AAL applies to the acquisition of either sole or joint control.

Under the Competition Commission's criteria, "sole control" over an undertaking occurs when a party acquires more than 50 per cent of the share capital of the former. However, such a shareholding does not confer sole control when minority shareholders retain a power of veto in respect to the strategic commercial and competitive decisions of the target company. Likewise, sole control may be also acquired through a lesser portion of an undertaking's equity. Accordingly, a minority share-holding may confer sole control when it confers enough rights to decide on its own over the strategic commercial and competitive decisions of the target company (e.g., when the remaining shares are dispersed).

Finally, the Competition Commission considers that "joint control" exists where a plurality of companies must reach an agreement in order to adopt the key strategic commercial and competitive decisions concerning the controlled undertaking. Normally, joint control results from a power of veto over the controlled company's governance. Such a situation is to be determined taking into account the voting rights and veto rights conferred by the controlled company's bylaws or by existing shareholders' agreements, that result in the necessity of reaching an agreement in order to decide upon said company's business and commercial plan, budget or the appointment of its board members or main management positions.

Under past administrative decisions, veto rights conferred to minority shareholders that exclusively allow them to oppose capital increases or mergers, for instance, are considered minority shareholder protection provisions that do not confer joint control over the undertaking.

d. Jurisdictional thresholds

Notification of transactions that result in a concentration is compulsory in advance of their implementation when certain thresholds, based on market share,[13] are met. In order to determine concentrations caught within the scope of the AAL, Peruvian legislation sets forth two different thresholds depending on the type of concentration involved:

(a) Horizontal concentrations: A clearance decision is required in the case of companies that carry out energy generation, transmission or distribution activities that have at the

[10] Ruling NO. 012-99-INDECOPI/CLC, 3 December 1999.
[11] Ruling NO. 016-2002-INDECOPI/CLC, 29 August 2002.
[12] Ruling NO. 012-99-INDECOPI/CLC, 3 December 1999.
[13] Market shares are determined by calculating the total income of the company concerned as a percentage of total income of all the companies in Peru involved in the same electrical activity in the calendar year preceding the date of notification, as published by the Peruvian energy regulator OSINERGMIN.

moment of notification or thereafter, jointly or severally, a market share equal to or greater than 15% of the relevant market.

(b) Vertical concentrations: A clearance decision is required in the case of companies that carry out energy generation, transmission or distribution activities that have at the moment of notification or thereafter, jointly or severally, a market share equal to or greater than 5% in any of the markets involved.

e. Triggering event for filing and deadlines

While no specific deadlines are established in the AAL, notifications must be filed before the underlying transactions come into effect.

f. Exemptions

A notification does not have to be filed in the event of the acquisition, in a single act or successive acts, of no more than 10% of the total voting shares or equity of the target company, provided that this does not result in the bidder being in either direct or indirect control of the target.

In addition, a concentration is not deemed to occur when control is acquired by a person by virtue of a temporary mandate conferred by legislation in the event of the lapsing or relinquishment of a concession, patrimonial restructuring or any other analogous procedures.

As a general rule, the acquisition of productive assets owned by companies that do not operate in the electricity generation, principal transmission or distribution markets, is not considered to constitute an act of concentration. In turn, the acquisition of productive assets held by companies that do operate in the electricity generation, principal transmission or distribution markets, will be deemed to constitute a concentration, with the following exceptions:

• If the value of the productive assets acquired, in a single or successive act, does not amount to more than 5% of the value of the acquiring company's own productive assets.

• If the productive assets are not operational and are acquired by way of a private investment promotion processes (e.g., privatization and concessions) carried out by the Peruvian Promotion of Investment Agency (PROINVERSIÓN).

Finally, under guidelines issued by the Competition Commission interpreting the scope of the AAL,[14] the mere change in the controlling partners of a Peruvian operating company, when the new controlling partner does not previously control other companies involved in generation, transmission or distribution activities within Peruvian territory, is not deemed to constitute a concentration.

[14] Schedule II of the 1999 Annual Memory of the Free Competition Commission.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

As a general rule, there are no limitations to foreign investment in economic activities, with the exception of the media broadcasting industry.

Likewise, in addition to concentration clearance, concentrations that result in the transfer of Government granted concessions or authorizations, may require sector specific approvals before such transfers may be implemented.

h. Information requested for the filing

Filing is performed with a standard form notification issued by the Competition Commission that contains, among other, the following information:

Identification of the persons, legal or natural giving the notification, as well as the other parties involved in the concentration.

Details of the control and structure of each person participating in the concentration operation, including connected companies that belong to the same economic group.

Details of any links that persons involved in the concentration operation may have, with other companies working in the market or related markets.

Descriptive details of the concentration transaction and any markets that may be affected by it.

Details of the geographical area of the market(s) affected, the degree of competition therein, and the ease of entry to and exit from the market(s) in which the concentration operation is to take place.

Details of the likely effects of the concentration operation on the market, including any likely economic improvements.

Copies of the final draft documents relating to the concentration operation as well as copies of any market analysis carried out during the evaluation period of the deal.

i. Sanctions applied for late or no filing

The Competition Commission has the power to impose fines on both companies and individuals that partake in concentration operations.

Failing to notify and request prior authorization from the Competition Commission may result in fines of up to 500 Tax Reference Units (approximately USD 550,000.00).[15]

j. Parties responsible for filing

Notifications must be filed jointly by all parties to a merger or by the person or company, directly or indirectly, acquiring control over undertakings that carry out activities in Peru

[15] The value of the Tax Reference Unit is reviewed annually by Central Government.

k. Filing fees

Notifications are subject to an administration fee that must be paid at the time of filing. The amount to be paid is either 50 Tax Reference Units (approximately USD 55,000.00) or 0.1% of the total value of the concentration operation, whichever is greater.

l. Effects of notification

Transactions may not be implemented until the Competition Commission has issued a clearance decision. Hence, once the concentration is notified to the authority, said concentration shall not be legally enforceable, nor will it have binding effects vis-à-vis the corresponding authorities or third parties, until a clearance decision has been issued.

Peruvian law does not empower the Competition Commission to grant derogation under any circumstances.

m. Gun jumping and closing – sanctions

Carrying out a concentration after omitting to notify the Competition Commission or carrying it out after notification but before receiving clearance may result in fines of up to 10% of the gross income or sales of companies involved in the operation.

n. Type of remedies and their negotiation

Before a final decision is reached, authorities may propose amendments to the proposed concentration, in order eliminate elements that may restrain competition in the relevant markets or related markets. If these recommendations are accepted and agreed to be implemented by the notifying parties, authorities may grant clearance subject to certain conditions to secure the fulfilment of the agreed upon commitments.

The Competition Commission may order the partial or total dissolution of any concentration operation that has been executed illegally, or in violation of the provisions of the AAL. Under these circumstances, the exercise of voting rights conferred by shareholdings or any other act that confers control over the undertaking subject to concentration will be suspended until the order for dissolution has been affected.

If the order for dissolution is not complied with, the Competition Commission is authorized to initiate all necessary actions, including judicial actions, to secure that the concentration act's effects are annulled, including the sale of the productive assets or shares and the declaration of the nullity of the concentration act for breaching imperative norms.

Finally, the Competition Commission or the Tribunal may revoke the authorization of a concentration (i) if such authorization was granted on the basis of information given during the notification stage later found to be fraudulent, or (ii) if the concentration is found not to have complied with any of the conditions imposed by authorities in its clearance decision.

o. Timetable for clearance

Post-notification procedures include mandatory maximum timeframes to secure completion requirements and to perform substantive assessment. On average, a final decision on the notified concentration is issued by the Competition Commission between three to four months from the date of the initial filing.

If the Competition Commission does not issue a decision within the maximum allowed timeframe, the authorization of the notified concentration shall be deemed denied on the grounds of incompatibility with the market.

p. Involvement by third parties

Under Peruvian law, all information presented during authorization procedures shall be deemed privileged and confidential, and may therefore only be used for the purposes of said procedures. In addition, Peruvian law imposes a general confidentiality obligation on all authorities involved in a pre-notification and authorization procedures under the AAL, holding the latter liable for any information unlawfully divulged.

Accordingly, third parties are generally not granted access to the information being reviewed during authorization procedures and will only access the ensuing final decision once it has been issued.

Furthermore, as a general matter, the Tribunal has held in prior decisions that third-parties will only be considered to have a legitimate interest to take part in authorization procedures when one of the following criteria is met: (i) when the administrative act (i.e., clearance decision) issued or to be issued violates, does not recognize or impairs a right of said party; or (ii) when the administrative act issued or to be issued violates, affects a legitimate and direct interest (i.e., a direct, personal, current and proven interest) of said party.[16] In past decisions, both the Competition Commission and the Tribunal have denied third-party status to consumer advocate groups on said grounds.[17]

Notwithstanding the above, it a standard practice for INDECOPI to request the Ministry of Energy and Mines, the energy sector regulator (OSINERGMIN) and the consumer advocate bureau of the national Ombudsman to issue their opinion concerning notifications subject to approval. The opinions issues by these governmental bodies are not binding for INDECOPI.

q. Types of resolutions that may be issued

Notified concentrations that are not found to have the effect of diminishing, harming or preventing competition may be authorized unconditionally by the Competition Commission or the Tribunal.

Clearance may be denied for notified concentrations on grounds of incompatibility with the market.

[16] Ruling NO. 0819-2005/TDC-INDECOPI, 10 December 2001.
[17] Ruling NO. 028-2001-INDECOPI/CLC, 1 October 2001; Ruling NO. 0819-2005/TDC-INDECOPI, 10 December 2001.

Likewise, the authorities may clear the concentration subject to the fulfilment of certain conditions. In the past, the Competition Commission has conditioned clearance on two occasions, subject to the fulfilment of certain behavioral remedies.[18]

r. Review of ancillary restraints

Ancillary restraints that exceed what is reasonable and strictly necessary to secure the viability of the principal agreement are subject to review during substantive assessment and may result in conditional clearance decisions or the requirement that amendments be executed before clearance is issued.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

Article 10 of the Competition Law deals with a single firm's actions that constitute abuse of a dominant position.

The Competition Law defines a "dominant position" as an undertaking's ability to substantially restrict, affect, or distort supply or demand in a particular market, independently of its competitors, suppliers, or customers.

The standard methodology employed by INDECOPI for testing dominance requires, first of all, determining the relevant market, which in turn implies defining the relevant geographic market and product market, and, secondly, the dominance of the firm in said market.

Under Peruvian law, dominance may be the result of factors such as significant market share, the particular characteristics of supply and demand of the good or services involved, the costs associated with technological developments, competitors' access to sources of finance or other supplies, the existence of economic, legal, or natural barriers to entry, the absence of suppliers, clients, or competitors or their lack of negotiation power, among others. Notwithstanding, generally, when determining dominance, INDECOPI heavily relies on a market share test, complemented by an analysis of competitive conditions in the market and ease of market entry. While INDECOPI has not explicitly defined a market share threshold above which dominance will be found, a review of the existing administrative precedents reveals that a market share greater than 50 percent may be considered a strong indicator of dominance.

Pursuant to the Competition Law, it is not illegal for an undertaking to obtain or enjoy a dominant position, but only to abuse such a position. Accordingly, the statute focuses exclusively on "behavioral" controls, and, as previously explained, does not contain "structural" control

[18] Ruling NO. 012-99-INDECOPI/CLC, 3 December 1999; Ruling NO. 081-2006-INDECOPI/CLC, 16 November 2006.

provisions such as restrictions on economic concentrations arising from mergers, acquisitions, or joint-ventures, even if their effect is such as to harm, diminish, or impede competition.

The types of practices that may be characterized as abuse are listed in article 10.2 of the Competition Law, although this list is open-ended and allows authorities to consider as abusive other types of conducts of similar effects.

b. Exploitative offenses

Currently, both the Competition Law and binding precedents issued by INDECOPI explicitly limit the concept of abuse of dominant position to practices that may have an exclusionary effect on competition, thus barring exploitative abuses, such as excessive pricing or exploitative price discrimination, from the scope of enforcement.

c. Predatory pricing

Predatory pricing is not explicitly listed as a practice that may constitute an abuse of dominant position under the Competition Law. Notwithstanding, as previously explained, the Competition Law's list of practices that may be characterized as abuse is open-ended and allows authorities to deem other types of conducts of similar effects as abusive.

Predatory pricing charges have been brought forward in a handful of cases. All of these cases have been ruled in favor of defendants.

In Wendell v. Proquinsa,[19] INDECOPI admitted that predatory pricing could qualify as a conduct of similar effect to those explicitly listed in Peruvian legislation as abuse. In this case, INDECOPI defined predation as pricing below a certain level of cost with the intention of eliminating one or several competitors. In addition, in finding in favor of the defendants, INDECOPI established that to determine predation it was necessary to demonstrate (i) selective price undercutting, (ii) unprofitable or very low profit pricing, and (iii) pricing policies targeted to a specific competitor, although specific tests for these purposes were not established.

d. Price discrimination

Discriminatory practices, whether related to pricing or other commercial terms and conditions, are explicitly categorized in article 10.2.b of the Competition Law as potential abuses of a dominant position.

To be deemed abusive, the Competition Law requires that the discriminatory practices have a potentially exclusionary effect. Accordingly, discriminatory practices used by a dominant company to extract prices higher than normal, in so far as they exclusively pursue an exploitative effect, are excluded from the scope of the Competition Law.

The Competition Law explicitly states that the volume discounts and bonuses resulting from generally accepted commercial uses, granted in certain compensatory circumstances, such as advanced payment or large volume or amount purchases, do not constitute abusive

[19] Ruling No. 070-96-INDECOPI-CLC, September 17, 1996.

discriminatory practices, so long as the discounts and bonuses are generally granted on equal terms.

Historically, discriminatory practices have been one of the most common claims in fining procures arising from private suits relating to potential abuses of dominant positions. Peruvian authorities have sided with the defendants in the majority of these cases.

Discriminatory or differentiated price treatment may be justified on cost structure (e.g., differences in distribution costs) and volume discounts. Other defenses taken into account by INDECOPI include absence of continuity in the discriminatory practice. For instance, in SNI v. Centromín,[20] INDECOPI considered that the defendant's conduct of charging higher prices to local refined lead buyers, compared to prices charged to international clients, was not unlawful because it was sporadic.

Likewise, in El Comercio v. AreoContinente,[21] INDECOPI considered that an airline could impose higher freight charges on a local newspaper compared to other newspapers with which it had entered into commercial agreements to exchange publicity for transportation.

e. Resale price maintenance

As a general rule, anticompetitive understandings among non-competing businesses in a distribution chain are treated under the Competition Law as vertical restraints or mutually voluntary collusive agreements. Among the types of practices that may be characterized as a vertical restraint, the Competition Law includes vertical price fixing agreements, which would allow authorities to review resale price maintenance (RPM) agreements. Other indirect forms of achieving a result similar to an explicit price fixing agreement, such as minimum advertised price (MAP) programs, could also be reviewed under the Competition Law, in so far as the practices produce an effect similar to RPM. Notwithstanding, to date, there has been no relevant case law on the matter.

In order for an anticompetitive vertical collusion to be found, the Competition Law requires that at least one party to the agreement enjoy a dominant position in its corresponding market. Likewise, it is important to note that vertical restraints are not deemed per se illegal under the Competition Law and, accordingly, are subject to a reasonability test.

f. Tying arrangements

Tying arrangements are explicitly listed as potential abuses of a dominant position in article 10.2.c of the Competition Law.

The Competition Law broadly defines tying as subordinating contracts to the acceptance of additional goods or services that, by nature or commercial uses, are not related to the purpose of said contract.

Although case law is sparse, INDECOPI has tended to side with plaintiffs in these types of cases. For instance, in Servicios Técnicos Marítimos v. ENAPU, INDECOPI deemed illegal that the State operated monopoly port authority force terminal users to contract its trailer

[20] Ruling No. 001-98-CLC, January 9, 1998.

[21] Ruling No. 004-98-CLC, September 30, 1998.

transportation services, prohibiting potential competitors from offering alternative services in the ports.[22] Likewise, in INDECOPI v. Los Portales, INDECOPI sanctioned the concessionaire of Lima's international airport's parking services for tying a mandatory two-hour parking fee to all vehicles that entered the airport,[23] although this decision was issued prior to the explicit exclusion of exploitative practices from the scope of the Competition Law referred to above.

g. Bundling (including loyalty and market share discounts)

Bundling is not explicitly listed as a practice that may constitute an abuse of dominant position under the Competition Law. Notwithstanding, as previously explained, the Competition Law's list of practices that may be characterized as abuse is open-ended and allows authorities to deem other types of conducts of similar effects as abusive. Accordingly, bundling could potentially be reviewed by INDECOPI as a practice of similar effect to an unlawful tying arrangement, although there is no relevant case law on the matter.

h. Exclusive dealing

The Competition Law defines exclusive dealing as the establishment, imposition, or suggestion of unjustified exclusive distribution or sale agreements, or non-compete or equivalent clauses.

Pursuant to the Competition Law, exclusive dealing arrangements could potentially be judged as either a unilateral abuse of dominant position case or a mutually voluntary vertical restraint case. In the latter case, as previously discussed, the Competition Law requires that at least one party to the agreement enjoy a dominant position in its corresponding market, although if an unreasonable restraint were to be found, both parties to the agreement could result subject to fines. While local case law is scarce, INDECOPI has judged most cases brought to its attention as unilateral abuses of a dominant position.

In past decisions, INDECOPI has held that exclusive dealing arrangements that result in a market foreclosure of less than 15 percent of available distribution channels were not anticompetitive and that a foreclosure rate greater than 30 percent to 40 percent could result harmful to competition.[24] Likewise, INDECOPI has held that exclusive dealing arrangements of three years or less may not be deemed anticompetitive so long as they are commercially justifiable and contract termination costs are not prohibiting.[25]

i. Refusal to deal

The Peruvian Constitution warrants individuals the right to freely choose its trading partners and determine their contractual obligations. Accordingly, refusals to deal may only be considered unlawful in very specific circumstances and only if such practice is carried out by a

[22] Ruling No. 014-93-CLC, December 23, 1993.

[23] Ruling No. 057-95-CLC, December 29, 1995.

[24] Ruling No. 45-2009-CLC/INDECOPI, June 25, 2009.

[25] Ibid.

dominant undertaking and no commercially reasonable justification may be found. Accordingly, a review of existing case law reveals that INDECOPI has largely tended to side with defendants.

In cases in which an unjustified refusal to deal has been found, INDECOPI has sanctioned both refusals to deal in which the dominant firm's refusal had an impact in a vertically integrated secondary market and refusals to deal in which the dominant firms did not, directly or indirectly, compete with the plaintiff. Thus, for example, in Holguín v. Enaco, INDECOPI sanctioned the state coca-leaf collection monopoly Enaco for refusing to sell coca-leaf to a company the competed in the coca tea market;[26] while in Cab Cable v. Electrocentro, INDECOPI sanctioned an electricity distributor for refusing to rent its posts to a local cable company.[27]

In cases favorable to the defendants, INDECOPI has considered that a refusal to deal may be justified on financial, commercial, or contractual grounds. For example, in Tele Cable v. Fox and Turner, INDECOPI considered reasonable that Fox Latin American Channel and Turner Broadcasting System America refuse to grant broadcasting licenses to a local cable operator that had repeatedly breached contractual payment obligations to the defendants.[28] Likewise, in IEQSA v. Centromín and Minero Perú, INDECOPI considered that a refusal to sell refined zinc to the plaintiff was justifiable on the grounds that one of the defendants had already committed its entire production to other buyers, while the other defendant was involved in a privatization process that impeded it from selling the product.[29]

j. Essential facilities

The refusal to grant a competitor access to an essential facility is not explicitly listed as a practice that may constitute an abuse of dominant position under the Competition Law. Notwithstanding, INDECOPI has explicitly sanctioned this practice in the past as a conduct similar in effect to an unjustified refusal to deal.

The concept of an essential facility has been loosely defined under Peruvian case law as an infrastructure that is indispensable for production in another market. In addition, INDECOPI has held that the refusal to grant access to such facility may only be considered anticompetitive when said facility is under the control of a monopolist or an undertaking with a dominant position and it is impossible or unreasonable to replicate the facility.[30]

k. Customer termination

Customer termination is not explicitly listed as a practice that may constitute an abuse of dominant position under the Competition Law and has in the past been treated by INDECOPI as a type of unjustified refusal to deal.

[26] Ruling No. 016-94-CLC, July 27, 1994.

[27] Ruling No. 869-2002/TDC-INDECOPI, December 11, 2002.

[28] Ruling No. 005-2003-INDECOPI/CLC, May 14, 2003.

[29] Ruling No. 013-97-CLC, May 14, 1997.

[30] Ruling No. 870-2002/TDC-INDECOPI, December 11, 2002.

l. Termination of intermediaries (retailers, wholesalers, dealers, agents and brokers)

The termination of intermediaries or distributors is not explicitly listed as a practice that may constitute an abuse of dominant position under the Competition Law. In the past, INDECOPI has conceptualized these claims as a type of unjustified refusal to deal that may result unlawful, for instance, when pursuing to discipline distributors that carry competing products.[31]

m. Termination of relationship with competitors

The termination of relationships with a competitor is not explicitly listed as a practice that may constitute an abuse of dominant position under the Competition Law and has in the past been treated by INDECOPI as a special case of an unjustified refusal to deal.[32]

n. Settlements

In the event of investigations arising from an interested party claim, Peruvian Law allows for private extra-judicial settlements between the plaintiffs and defendants. Notwithstanding, the execution of a private settlement will not automatically result in the termination of administrative fining procedures, being the authorities empowered to continue prosecution as a matter of public interest or if they deem that third-parties to the settlement have been affected by the anticompetitive practices under investigation.

In addition, the Competition Law allows individuals indicted in an administrative fining procedure to offer to voluntarily undertake a commitment to cease and desist conducts subject to investigation, adopting corrective actions to remedy the effects of such conducts, as discussed in greater detail in section III (ii) m below. If approved by the Commission, a settlement is executed with the authority, resulting in the termination of procedures, with a formal declaration of administrative liability for the conducts subject to such settlement.

(II) COLLUSIVE CONDUCTS

a. Introduction

The Peruvian Competition Law sanctions horizontal and vertical collusion.

Horizontal collusion is defined under article 11.1 of the Competition Law as agreements, decisions, recommendations, or concerted practices among competing undertakings which have, or may have, as their object or effect to restrict, prevent or feign competition. The types of specific practices that may be characterized as forms of horizontal collusion are listed in the Competition Law, although this list is open-ended and allows authorities to deem other types of conducts of similar effects as equally illegal.

[31] Ruling No. 857-2014/SDC-INDECOPI, December 15, 2014.
[32] Ruling No. 45-2009-CLC/INDECOPI, June 25, 2009.

In turn, vertical collusion is conceptualized under article 12 of the Competition law as coordinated or mutually voluntary conducts among two or more non-competing businesses that operate upstream or downstream in the supply chain, which have, or may have, as their object or effect to restrict, prevent or feign competition. As previously noted, in order for an anticompetitive vertical collusion to be found, the Competition Law requires that at least one party to the arrangement enjoy a dominant position in its corresponding market.

As a general rule, conducts that could potentially constitute an infringement to the Competition Law (either as an abuse of a dominant position or a form of collusion) are judged under a rule of reason standard, with the exception of certain types of horizontal agreements among competitors that are considered hard-core cartels and are therefore deemed unlawful per se.

b. Horizontal price fixing

Price-fixing agreements entered into between undertakings that compete in horizontal markets have historically been the main focus of ex officio enforcement priorities by INDECOPI and have been deemed the most serious types of infringements to the Competition Law, resulting in some of the highest fines imposed.

Article 11.1(a) of the Competition Law defines price fixing as a direct or indirect concerted setting of prices or other commercial or service terms.

INDECOPI has consistently held that, absent additional direct or circumstantial evidence of an effective agreement, a "parallel behavior" does not in itself constitute or demonstrate the existence of a price-fixing agreement.[33] Accordingly, to sanction a price-fixing arrangement, authorities must additionally collect direct or circumstantial evidence to demonstrate the existence of such agreement. Advanced announcements of price or product changes, while not explicitly listed as a form of horizontal collusion, may be considered as circumstantial evidence of a price-fixing agreement.

Pursuant to article 11.2 of the Competition Law, "naked" horizontal price-fixing arrangements are deemed per se illegal. Inter-brand horizontal agreements among competitors that are not complementary or ancillary to other licit agreements, are characterized as "naked" and therefore fall under the aforementioned provision.

c. Horizontal agreements to allocate customers or territories

The allocation of clients, suppliers, and territories is explicitly listed as a form of horizontal collusion under the Competition Law. As is the case with price-fixing agreements, article 11.2 of the Competition Law deems "naked" horizontal arrangements of this nature to be per se illegal.

[33] Ruling No. 0225-1997/TDC-INDECOPI, September 5, 1997.

d. Agreements not to compete

Non-compete agreements are not explicitly listed as a practice that may constitute horizontal collusion under the Competition Law and will generally be deemed by the authorities as a type of market or customer allocation. When such agreements result ancillary to broader integration agreements among competitors, the former will be judged under rule of reason standards.

e. Horizontal boycotts

Horizontal boycotts are defined in the Competition Law as a concerted unjustified refusal to deal or to satisfy purchase or sale requirements. Unlike price-fixing and market allocation agreements, the legality of potential horizontal boycotts is judged under a rule of reason standard. Accordingly, agreements among competitors not to purchase from, or supply to, specific businesses, will be considered a form of horizontal collusion if entered into without sufficient commercially reasonable justification.

f. Joint ventures and other competitive collaborations

As previously discussed, the Peruvian Competition Law focuses exclusively on "behavioral" controls, and does not contain "structural" control provisions such as restrictions on economic concentrations arising from mergers, acquisitions, or joint ventures, even if their effect is such as to harm, diminish, or impede competition. The only sector of economic activity subject pre-notification and authorization procedures in the event of vertical or horizontal concentrations is the electricity generation, transmission and distribution markets, as a result of specific legislation.

Accordingly, joint ventures and other forms of competitive collaborations are generally not considered a form of horizontal collusion in so far as they do not exclusively pursue anticompetitive aims on the market. Notwithstanding, ancillary restraints of trade among the undertakings collaborating in a joint venture may be subject to scrutiny under rule of reason standards.

While relevant case law is scarce, in the past, for instance, INDECOPI has stated that collaborative agreements with the sole purpose of jointly advertising a standard product identified under a common trademark, may be deemed licit so long as they are not ancillary to an agreement to restrict competition, are not employed as a mechanism to implement a price-fixing agreement, and do not limit or restrict each individual undertaking's ability to advertise on its own.[34]

g. Trade associations

Non-profit private entities, including trade associations and professional bodies, are subject to the Competition Law's collusion provisions.

[34] Ruling No. 276-97-TDC, November 19, 1997.

In determining the individual liability of a trade association in a collusion claim, INDECOPI has held that the separation between a legal entity (i.e., the association) and its members does not hinder the possibility of sanctioning the former when it serves as an instrument for the execution of an illegal horizontal restraint. In such cases, the entity is not punished for the acts of its members but for its own actions and participation in the collusion that stemmed from a different decision-making source.[35]

INDECOPI has further held that non-profit entities, such as trade associations, are bound by the general competition rules and, accordingly, that guilds are liable for their participation in price-fixing agreements through actions that serve as incentive, support or props of such infractions.[36]

Examples of business associations that have been subject to competition investigations or have been sanctioned for having infringed the competition legislation are abundant and include poultry producers,[37] trucking companies,[38] urban transport companies,[39] moto-taxi,[40] the national bread bakers' guild,[41] port-pilotage,[42] and insurance companies.[43]

In addition, INDECOPI has stated that the autonomy granted to professional bodies under the Peruvian Constitution does not exclude them from the scope of application of competition legislation and, thus, has held that professional bodies are subject to the rules set forth in competition legislation, not only for the economic activities directly carried out by them, but also for the binding decisions adopted on behalf of its members while acting as an assemblage of enterprises (i.e. adopting decisions, through its decision-making bodies, that bind its members).[44]

Examples of professional bodies that have been held to have infringed the Competition Law include the professional body of pharmacists (Colegio Químico Farmacéutico del Perú),[45] attorney bar associations (Colegio de Abogados de Loreto),[46] as well as the professional body of public notaries (Colegio de Notarios de Lima).[47]

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] Ruling No. 032-2005-INDECOPI/CLC, June 20, 2005.

[39] Ruling No. 015-1993/CLC, December 30, 1993.

[40] Ruling No. 003-2000-INDECOPI/CLC, June 16, 2000.

[41] Ruling No. 001-1993/CLC, July 15, 1993.

[42] Ruling No. 010-2002-INDECOPI/CLC, June 28, 2002.

[43] Ruling No. 0224-2003/TDC-INDECOPI, June 16, 2003.

[44] Ruling No. 068-96-INDECOPI-CLC, September 17, 1996.

[45] Ibid.

[46] Ruling No. 0237-1999/TDC-INDECOPI, July 7, 1999.

[47] Ruling No. 003-2003-CLC/INDECOPI, April 23, 2003.

h. Bid rigging

Bid-rigging (including bid rotation, cover bidding and bid suppression) is explicitly listed as a form of horizontal collusion under the Competition Law. As is the case with price-fixing agreements, article 11.2 of the Competition Law deems "naked" horizontal arrangements of this nature to be per se illegal.

i. Interlocking directorates

Interlocking directorates are not explicitly characterized as a form of horizontal collusion under the Competition Law and have not been subject to investigations by INDECOPI in the past. Generally, interlocking directorates should not infringe the Competition Law, to the extent that the conformation of such directorates is not the result of a collusive horizontal agreement or serve as a mechanism to facilitate, monitor or enforce such arrangements.

In addition, in numerous occasions, INDECOPI has stated that arrangements among undertakings subject to a common control do not constitute horizontal collusion. Accordingly, interlocking directorates resulting from a common control structure should not give rise to competition concerns.

j. Facilitating practices

Facilitating practices are not explicitly characterized as a form of horizontal collusion under the Competition Law. Nevertheless, exchanges of information concerning intended pricing or other types of facilitating practices may be construed as indicative of a restrictive practice and may, together with additional direct or indirect evidence, serve to demonstrate an unlawful collusion.

k. Information exchange

The exchange of information among competitors is not explicitly deemed a form of horizontal collusion under the Competition Law, although it could be eventually circumstantial evidence of price-fixing or other collusive agreements.

Under its past case law, INDECOPI has stated that such types of exchanges may be deemed economically favorable and not restrictive of competition when they pursue the exclusive goal of compiling common information required by companies to determine independently and autonomously their future conducts in the market.[48] If, however, the conduct of such competitors is in any way, directly or indirectly, coordinated, or the liberty of such competitors to act is in any way limited, a restriction to competition may be found.[49]

[48] Ruling No. 276-97-TDC, November 19, 1997.

[49] Ibid.

Furthermore, INDECOPI has stated that the exchange and publication of production and sale information through trade associations will not be objectionable if such information is aggregated and made available to the general public.[50]

l. Leniency program

Pursuant to article 26 of the Competition Law, individuals and corporations may request immunity as part of a proffer or confession that serves to identify, evidence and sanction illegal anticompetitive activities.

Leniency applications may be filed prior to the initiation of administrative sanctioning procedures. Exceptionally, leniency applications may be filed after indictments have been served, although if admitted the petitioner will not be eligible for full immunity but will instead be granted a fine reduction of up to 50%.

Upon the admittance of an application, the authority will issue a marker to the petitioner, who will then have a term of thirty (30) to sixty (60) business days to substantiate the anticompetitive conducts being reported.

To qualify for immunity, the petitioner must proffer sufficient evidence to warrant the initiation of fining procedures and sanction the illegal practices under investigation. If so, the authority will execute a leniency agreement with the petitioner, granting full immunity from administrative sanctions, subject to the fulfillment of ongoing collaboration duties during the course of the resulting fining procedures. Immunity will be confirmed by the Competition Commission at the conclusion of administrative fining procedures and can only be rejected in the event of a non-remedied breach of said collaboration commitments.

However, the execution of a leniency agreement does not hinder the right of individuals affected by the anticompetitive practices to seek damages before the judiciary.

Subsequent leniency applications will only be admitted if the new petitioners proffer information and evidence of significant added value to the authority's investigative and enforecement activities. In these cases, subsequent petitioners will not be eligible for full immunity but will be granted a fine reduction in the range of 30%-50% for the second applicant, 20%-30% for the third applicant and no more than 20% for all succeeding applicants.

Leniency petitioners deemed to have exercised coercion over other economic agents involved in the anticompetitive practice will not be eligible for immunity. In these cases, however, the authority may nonetheless grant a fine reduction if the applicant proffers information and evidence of significant added value to its investigative and enforecement activities.

The Competition Law warrants that the identity of leniency collaborators will be kept confidential by the authorities, even after administrative fining procedures have concluded. The breach this confidentiality obligation may result in administrative and criminal liability for the authorities.

[50] Ibid.

m. Settlements

In addition to its leniency provisions, the Competition Law allows individuals and corporations indicted in an administrative fining procedure to individually or jointly offer to voluntarily undertake a commitment to cease and desist conducts subject to investigation, adopting corrective actions to remedy the effects of such conducts.

In evaluating such petitions, the authorities will take into account that the petitioners offer corrective measures that secure the re-establishment of the competitive process, as well as to revert the harmful effects of the infringing conducts. In addition, petitioners may offer to undertake complementary actions that demonstrate their commitment to abide by the law.

The Competition Law grants authorities ample powers to negotiate the terms of a settlement with the petitioners. The approval of such settlement by the Competition Commission will result in the termination of procedures, with a formal declaration of administrative liability for the conducts subject to such settlement.

The breach of the commitments undertaken in a settlement is deemed as a severe infraction and may result in fines of up to 1,000 Tax Reference Units (approximately USD 1.1 million), in addition to coercive fines that may be imposed until such commitments are fulfilled.

The approval of a settlement does not hinder the right of individuals affected by the anticompetitive practices to seek damages before the judiciary.

Settlement petitions (including the fact of their filing) are treated as confidential while they are under review and until such time as they are approved. The decision by the Competition Commission approving a settlement will be accessible to the general public, although the background documentation on record may remain classified.

Settlement petitions that are rejected will continue to be treated as confidential and the authorities are barred from employing background information compiled during the negotiations as evidence to sanction the investigated anticompetitive practices.

Applicable for all cases

OVERVIEW OF COMPETITION LAW IN URUGUAY

Alejandro Alterwain

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

In Uruguay, antitrust matters (including merger control) are governed by Law No. 18,159 (referred to in Spanish as "Ley de Promoción y Defensa de la Competencia") enacted on July 20, 2007, which repealed previous antitrust regulations (Sections 13 to 15 of Law 17,243) and by Governmental Decree 404/007.

The National Competition Authority (NCA) has also issued some guidelines referring to sanctions applied for late or no filing (Decision 50/2009), market definition (Decision 2/2009), templates for merger control filing (Decision 39/2010), and consultation with the authority (Decisions 37/2010 and 38/2011), among others.

It should be noted that Uruguayan regulations mainly follow the EU regime, as they reproduce the list of prohibited conducts in Sections 101 and 102 of TFEU.

Law 18,159 incorporated the "rule of reason" as a way of analyzing economic activities. Consequently, there are no prohibited practices "per se" under Uruguayan law. In addition, and as explained below, the country's competition law expressly states that its purpose is to foster consumer welfare.

b. Theories of harm present in the law

Section 1 of Law 18,159 stipulates that the purpose of the law is to foster current and future users' and consumers' welfare. Consequently, both antitrust authorities and national courts have required harm to consumer welfare as a condition for finding antitrust infringements.

Law 18,159 does not state which standard of harm (consumer or total surplus) it endorses. However, according to the legislative history of the law, it could be argued that the law endorses a consumer protection standard. Some recent case law also confirms this interpretation. For example, the Administrative Court annulled three NCA decisions that ordered the professional bars of lawyers, notaries and public accountants and economists to repeal their fee schedules. According to the Court, the referred decisions were invalid as the NCA had not proved that the referred fee schedules caused harm to consumers.[1]

[1] Administrative Claims Court (Tribunal de lo Contencioso Administrativo), Decision 458/2014, October 9, 2014, "ASOCIACIÓN DE ESCRIBANOS DEL URUGUAY (AEU) v. ESTADO. MINISTERIO DE ECONOMÍA Y FINANZAS" (Case 885/11); Decision 400/2014, September 30, 2014, "COLEGIO DE ABOGADOS DEL URUGUAY v. ESTADO. MINISTERIO DE ECONOMÍA Y FINANZAS" (Case 149/12); Decision 659/2014, November 18, 2014, "COLEGIO DE CONTADORES, ECONOMISTAS Y

c. Authority in charge of enforcement of antitrust law and regulations

The National Competition Authority ("NCA") is the Commission for the Promotion and Defense of Competition (referred to in Spanish as "*Comisión de Promoción y Defensa de la Competencia*"), an agency of the Ministry of Economy. Its members are elected and removed by the Executive Branch.

Certain agencies responsible for regulating communications, energy, water works, and financial services also have antitrust jurisdiction in their own and related areas of activity. According to recent case law, each industry is always subject to antitrust jurisdiction of the regulator, even if it is a general or administrative regulator. For example, the Administrative Court held that a decision concerning a boycott of a vendor of lottery tickets should have been decided by the Uruguayan Lottery Agency, an agency of the Ministry of Economy, and not by the NCA, and hence annulled the NCA decision.[2]

d. Nature of antitrust enforcement

The NCA and the sectorial regulators with antitrust jurisdiction are administrative enforcers.

Private litigation is also available with the Judiciary, but no criminal actions are available regarding antitrust infringements.

e. Investigational powers of authority

The NCA is not entitled to conduct raids at the investigated party's premises. For said purpose, it needs the aid of the Judiciary.

The Regulations only provide for a general cooperation duty for all companies and individuals, with penalties in case of noncompliance. Said duty does not include information such as "*trade secrets, designs, know-how, inventions, formulas and patents*".

f. Attorney-client privilege

The relationship between attorney and client is subject to "Professional Secrecy" According to professional secrecy rules, information entrusted by clients in the context of a professional relationship must not be disclosed by the attorney, unless there is just cause for such disclosure. Just cause exists when the client authorizes the disclosure, when the attorney needs to disclose the information in self-defense (i.e., when accused of a crime) or when there is express legal exemption.

ADMINISTRADORES DEL URUGUAY v ESTADO. MINISTERIO DE ECONOMÍA Y FINANZAS" (Case 63/12).

[2] Administrative Claims Court, Decision 411/2014, September 30, 2014, "BANCA DE CUBIERTA COLECTIVA DE QUINIELAS v ESTADO. MINISTERIO DE ECONOMÍA Y FINANZAS. Acción de nulidad" (case 660/10).

The only specific legal references are to Articles 220 of the Code of Criminal Procedure and Article 302 of the Penal Code. Article 302 of the Penal Code states that attorneys who breach professional secrecy commit a criminal offense, punishable by fine.

Article 220 of the Code of Criminal Procedure provides that lawyers should not testify at trial on secret acts that come to their attention because of their profession. It also states that lawyers cannot refuse to testify when they are formally released from their secrecy obligation.

g. Interactions with other regulators

Please refer to answer to point c.

h. Treaties in place

There are currently no international treaties in place, except for some regulations at MERCOSUR level regarding coordination between the national competition authorities of MERCOSUR States.[3]

i. Standards of evidence

The general principle is that investigated parties are presumed innocent and it is the NCA's burden to show the infringement.

As mentioned, the Administrative Court decisions referring to fee schedules fixed by Professional bars (see response to point b) have said, quoting case law from the European Court of Justice, that the NCA needs to prove the infringement, including the investigated practice's effects on price.

j. Methods of engagement with authority

There are no standing requisites to actively engage with the NCA. According to Section 21 of Decree 404/007 "any individual or legal entity, state-owned or private, national or foreign, can file a complaint regarding the existence of prohibited practices…" Therefore, any kind of company, consumer, supplier, etc., can engage with the NCA, which can also act ex-officio.

The claimant must always identify itself to the NCA. However, under certain circumstances, it can request that the NCA keep its name confidential.

k. Judicial review of decisions

The NCA's decisions can be appealed within a term of 10 days as of notification of the decision. This timing is general for all decisions taken by governmental bodies in Uruguay.[4]

If the decision is confirmed, it can then be further appealed before an Administrative Claims Court ("*Tribunal de lo Contencioso Administrativo*") which will annul or confirm the

[3] MERCOSUR/CMC/DEC. No. 43/10, Acuerdo de Defensa de la Competencia del MERCOSUR.

[4] Uruguayan Constitution, sections 317 and 319; Act No. 15,869.

administrative decision. The Court is not entitled to modify the content of the administrative decision. It can discretionally suspend the effects of the NCA's decision until the Court issues its decision.

l. Private litigation

Private litigation is also available, though unregulated. According to scholarly opinions, antitrust claims are governed by general civil (torts) law. Thus, plaintiff must show actual damages, among other requirements, for recovery.

According to some recent decisions, a Court is entitled to analyze the unlawfulness of a behavior and can order recovery of damages even if the NCA decision is annulled by the NCA, the Executive Branch or the Administrative Court.[5] Therefore, case law has confirmed that the NCA's decision is not a prerequisite for private litigation.

II – MERGER CONTROL

a. Types of transactions

Covered transactions are those that modify the control structure of the participating companies, such as company mergers; acquisition of shares; acquisition of commercial, industrial or civil establishments; total or partial acquisitions of business assets; and all other types of legal transactions involving transfer of total or partial control of economic units or companies.

b. Notification of foreign-to-foreign mergers

There is no exception for foreign-to-foreign mergers. The Antitrust Act stipulates the effects doctrine for the entire antitrust regime. In practice, the NCA has analyzed transactions executed abroad between foreign parties with effects in Uruguay, when any of the two filing thresholds are met.

c. Definition of "control"

There is no definition of "control" under Uruguayan antitrust regulations. Under the Corporations Law "controlled companies are those which, by virtue of equity ownership or stake or due to special connections are under the dominating influence of another or other companies". Commentators of the Corporations Law understand that control includes both ownership of shares (more than 50%) or control by means of agreements.

[5] For example, Civil Appeals Court 4, Decision SEF-0009-000111/2014, June 11, 2014, "MARBURY S.A. - CYBERFARMA - v ROCHE INTERNACIONAL LTDA" (case 2-58882/2006)". According to the Court, "The fact that the Executive Branch has annulled the penalties to the defendant does not prevent the Judiciary from deciding as to the alleged illicit conduct".

d. Jurisdictional thresholds

Notification of a covered transaction is mandatory when:

(i) as a result of the transaction the parties to the transaction obtain a share equal to or exceeding 50% of the relevant market ; or

(ii) the annual turnover of all parties to the transaction in Uruguay, in any of the last three fiscal years, amounts to UI 750,000,000 (750 million indexed units[6]) or more.

e. Triggering event for filing and deadlines

The filing deadline is 10 days prior to the execution of the agreement. This deadline may be computed differently according to the applicable type of transaction.

In the case of transactions that create "*de facto* monopolies" (100% of the relevant market), the NCA has to analyze the transaction's effects and decide whether to accept or reject it. Regarding the timeframe for decision making, please refer to answer to point o.

f. Exemptions

The notification duty does not apply in the following situations:

(i) the acquisition of companies in which the buyer already holds at least 50% of the shares;

(ii) the acquisition of bonds, nonvoting shares, debentures or any form of debt in the company;

(iii) the acquisition of a single company by a foreign company that has no assets or shares in other companies in Uruguay; and

(iv) the acquisition of companies, regardless of whether they have been declared in bankruptcy or not, that have not had any activity in the country in the last year.

Said exemptions do not apply to de facto monopoly cases mentioned in the previous section.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

Please refer to previous answer.

h. Information requested for the filing

The merging parties should provide the following information to the NCA:

[6] As of March 2016, approximately USD 78,000,000.

(i) the identification of the companies involved in the transaction as well as of their shareholders, directors and managers;
(ii) the ownership or control structure of the companies involved following the transaction;
(iii) a list of goods and services provided or rendered by the companies and by the new entity, if any;
(iv) turnovers per product by the companies within the last three years;
(v) the companies offering substitute products for those provided by the merging parties; and
(vi) a list of product markets and market share.

To that end, the notifying parties must follow the template described in NCA Decision 39/010 of June 15, 2010.

The information must be accompanied by probative elements made available by the merging parties. Likewise, in the event that information is estimated, the method used for its calculation must be specified.

If necessary, notwithstanding the above, the NCA may request additional information from the merging parties to evaluate the transaction. Moreover, the NCA may request periodical information from the applicants even after submission of the notification or approval of the transaction is given.

i. Sanctions applied for late or no filing

NCA Decision 50/009 provides the regulations applicable to sanctions in case of failure to notify. Said regulations establishes, among other aspects, that fines imposed for such failures will amount to between a minimum of 100,000 indexed units[7] and the equivalent of 5% of the annual turnover of the infringer, including the target.

In case of "de facto" monopoly situations, the NCA can also request the Judiciary to unwind the transaction if closed without authorization.

j. Parties responsible for filing

All parties to a transaction, including their directors and agents, are responsible for submitting the notification to the NCA.

k. Filing fees

No filing fees are provided for.

[7] As of January, 2016, approximately USD 10,000.

l. Effects of notification

The effect of the notification is to inform the NCA about the transaction, as the general rule is that the NCA does not clear transactions.

Only if the transaction creates a de facto monopoly (100% of the relevant market) must it be cleared by the NCA.

m. Gun jumping and closing – sanctions

Only transactions creating a *de facto* monopoly will be suspended while pending approval from the NCA. Regarding sanctions, please refer to answer to point i.

n. Type of remedies and their negotiation

There is no regulation of remedies. In our opinion, however, the NCA can accept remedies (at least structural) proposed by the merging parties. The system is flexible enough to allow some negotiation between the parties and the NCA.

o. Timetable for clearance

Ten days after the submission is filed the parties are entitled to close the transaction. The only exception is when the transaction creates a de facto monopoly, in which case the parties must await authorization.

In the "de facto monopoly" scenario the NCA must issue an opinion within 90 calendar days from the date of receipt of the submission. If the NCA does not issue any opinion within the 90-day term, the proposed concentration can be considered duly authorized.

The NCA can suspend the 90-day term to request additional information from the notifying companies creating the de facto monopoly. Such term will be considered suspended until the NCA receives, to its satisfaction, all the requested information.

p. Involvement of third parties

Regulations do not stipulate any kind of involvement of third parties. In practice, the procedure with the NCA is usually reserved until it ends. However, third parties are entitled to appeal the decisions, which are published on the NCA's website.

There is no special standing required to bring an appeal with the NCA and its hierarchical superior. The only requirement may be that the appellant holds a "simple interest" in the decision.

Standing to file an action at the Administrative Claims Court is much more stringent. The appellant must show a "direct, personal and legitimate interest" to request the annulment of a decision.

q. Types of resolutions that may be issued

Clearance decisions are only stipulated for the creation of *de facto* monopolies. For all other cases covered by transaction notification, the NCA usually issues a decision confirming that the disclosed information is sufficient or requesting further information.

r. Review of ancillary restraints

There are no specific regulations for ancillary restraints.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

Section 2 of Law 18,159 prohibits "abuse of dominant position as well as all practices, conducts or recommendations, individual or concerted, having the effect or purpose of restricting, limiting, hampering, distorting or hindering ongoing or future competition in the relevant market." Therefore, said stipulation merges articles 101 and 102 of TFEU in a single section.

This regulation's wording is especially confusing regarding unilateral conducts, since it prohibits the abuse of dominant position as well as other kinds of individual behaviors. Therefore, one might ask what kind of companies, not holding a dominant position, may be governed by the antitrust regulations regarding their unilateral acts. In other words, is it possible to act illegally without holding a dominant position?

The Commission has shown an erratic stance regarding the dominant position requirement. In one case, for instance, the Commission dismissed a claim against the Uruguayan Chamber of Agricultural Services (CUSA, for its Spanish acronym) in connection with the setting of resale prices, since it understood that CUSA did not hold a dominant position, considering the countervailing power of the claim and the scant barriers to enter such market.[8]

In another case, regarding tied sales in the market of dialysis machines leasing for hospitals and other health care centers (detailed below), the Commission understood that one of its requirements was "substantial power in the market for the pertinent good." The entire economic report makes reference to "market power" and not to "dominant position," and one of the companies under investigation was actually sanctioned, since it was understood that the same had "market power."[9]

However, in more recent cases the Commission has made the dominant position requirement much more flexible and less relevant. For instance, in a case involving two multinational tobacco companies over setting of predatory prices, the Commission held that players can hold an "atypical" dominant position, which could derive from their international strength and not from their particular market share ("deep pocket" theory). This was the case in

[8] Decision No. 9/012

[9] Resolution No. 128/013, SUBJECT: MONTE PAZ S.A. v/ ABAL S.A. and B.A.T.

MONTEPAZ v. ABAL HNOS. and B.A.T., where Abal Hnos., distributor in Uruguay of Philip Morris, with only a 12.5% share of the cigarette market, was understood to hold a dominant position, even when the complainant Montepaz had a share close to 84% of the market in Uruguay.

The maximum fines for antitrust infringement can be an amount consisting of the highest of the following values:

(i) 20,000,000 IU (twenty million indexed units, approximately USD 2 million – March, 2016).

(ii) the equivalent of 10% (ten percent) of the violator's annual turnover;

(iii) the equivalent of three times the damage caused by the anticompetitive practice, if determinable.

The minimum fine consists of 100,000 UI (a hundred thousand indexed units, approximately USD 10,000 -March 2016).

Penalties may also be applied to directors and legal agents of the infringers and to controlling companies and their directors and legal agents.

b. Exploitative offenses

Section 4 A) of Law 18,159 expressly prohibits "arranging by mutual agreement or directly or indirectly imposing purchase or sale prices or other transaction conditions in an abusive manner."

In a 2009 report referring to a foreign exchange bureau at the Carrasco International Airport, which was being investigated by the Central Bank for allegedly charging excessive prices, the NCA stated that, pursuant to Law 18,159, said exchange office could be abusing a dominant position, depending on how relevant market was defined.[10]

However, in 2015 the NCA conducted a general survey of alleged excessive prices in several markets related to mass consumer goods (personal care, cleaning, some types of food (e.g., mayonnaise), etc.) with a somewhat different approach.

The NCA stated that "the NCA does not condemn high prices if they arise in the context of competition. The case is different when those high prices are the consequence of anticompetitive practices, such as collusive agreements."[11] Therefore, the said report then focused on whether collusion existed among supermarkets, but not on whether either the suppliers or the supermarkets were committing an abuse of dominant position by imposing excessive prices, even when some markets were clearly dominated by some suppliers.

Although the NCA expressed that abuse of dominant position should also be analyzed, it could be construed that it implicitly rejected the chance of condemning high pricing.

[10] NCA Report 2/2009, July 28, 2009.

[11] NCA Report 70/2015, September 2, 2015.

c. Predatory pricing

Law 18,159 does not explicitly refer to predatory pricing, but that prohibition is inferred from the general prohibition in Section 2, which bans "*abuse of dominant position as well as all practices, conducts or recommendations, individual or concerted, having the effect or purpose of restricting, limiting, hampering, distorting or hindering ongoing or future competition in the relevant market*."

There are two important cases decided by the NCA referring to predatory pricing.

The first is MONTEPAZ v. ABAL HNOS. and B.A.T., explained above. In that case the NCA made clear two relevant issues:

(i) according to the NCA, a party can be condemned for predatory pricing –and therefore for any other unilateral conduct- without holding a dominant position, as understood in the traditional way. In said case, the condemned party held close to a 12.5% share of the market; and

(ii) harm to consumers is a condition for infringement. In said case, according to the NCA, the harm was done by one investigated party (Abal Hnos, Philip Morris) to another investigated party (B.A.T), which was allegedly affected by the below cost pricing of the former.

The other relevant predatory pricing case refers to a complaint by the taxi-owners association against "Easy Taxi," the e-hailing application that allows users to book a taxi and track it in real time. According to the taxi-owners association, Easy Taxi, without charging for its service, was displacing the radio system run by the association and was, hence, liable for conducting a predatory pricing scheme.

The NCA dismissed the complaint, as it was shown that the radio system was mandatory in Montevideo and, therefore, it was impossible for Easy Taxi to displace the radio operated by the complainant from the market.[12]

d. Price discrimination

Under Section 4 C) of Law 18,159, it is prohibited to "unjustifiably apply to third parties unequal conditions in the case of equal obligations, placing them at an important disadvantage compared with their competitors."

To date no resolutions have been issued on price discrimination. There is only one decision on discrimination in treatment regarding other commercial conditions.

In said case, a lottery sub-agent from Montevideo filed a claim with the Commission for an alleged abuse of dominant position by Banca de Cubierta Colectiva Quiniela (the association of lottery sales agents) of Montevideo.

The claimant alleged that Banca was discriminating against it since it was not providing the claimant with an electronic terminal for sub-agency operations (a circumstance that would put the claimant at a competitive disadvantage).

[12] NCA Decision 90/2015, October 13, 2015.

The Commission sustained that said conduct translated into discriminatory treatment. It stated that "the claimant was in equal or better objective conditions than some of the competitors, however, claimant was put in a different position from the rest, by not being allowed to operate normally in the market and, finally, by terminating same."

The Commission also classified Banca's conduct as an infringement of several prohibitions of Law 18,159. According to the Commission, Banca "adopted a conduct of 'hindering' the regular activity of the claimant; "distorting" claimant's competitiveness compared to other operators (Agents and Sub Agents), and finally "restraining" claimant's operations in the same market." It additionally stated that the conduct reported "limited or restricted, in an unjustified manner, the technological development of the claimant and the distribution or rendering of claimant's services," in violation of article 4 letter B)".[13]

The Commission imposed a sanction of 100,000 indexed units[14] on the association. Said decision was later repealed by the TCA, but based on a jurisdictional matter.

e. Resale price maintenance

There is no express regulation regarding RPM, except for the general prohibition of anticompetitive behavior in Section 2 of Law 18,159. Section 4 B also states that it is prohibited to "limit, restrict or unjustifiably arrange the production, distribution and the technological development of goods, services or factors of production, in prejudice of competitors and consumers."

Probably the most important case was the one referring to fee schedules of lawyers, notaries, accountants and economists, which were considered anticompetitive by the NCA. As explained in point b of Section I, said NCA decisions were then annulled by the Administrative Claims Court.

Another important case involved a USD 250,000 fine imposed on Disco - a major supermarket chain - inducing some importers of frozen products to keep RPM with some competitors of Disco. In that case, not only was Disco penalized, but also some of those importers who agreed to proceed as requested by Disco.

In the CUSA case mentioned above it was understood that the suggested price lists were not anticompetitive since the same had an "orientation" purpose and mainly because given the characteristics of the market - in which there is no dominant position - said lists did not have an impact on same.[15]

It should also be noted that there is RPM currently being investigated by the NCA, which could shed more light on the NCA's criteria.

f. Tying arrangements

Section 4 D) of Law 18,159 prohibits "subordinating the execution of agreements to the acceptance of complementary obligations that are not related with the purpose of the agreement."

[13] NCA Resolution No. 51/009 of November 24, 2009.
[14] As of March 2016, approximately USD 10,500.
[15] Reports No. 36/011 and 5/012.

The NCA decided a case involving a company which provided dialysis equipment under lease to certain health care centers and included in the agreements the obligation of purchasing the reagent for use in said machines from the same supplier.

The NCA just warned one company, which agreed to sign a commitment to cease the questioned conduct.[16] A second company with no dominant position and whose practice did not qualify as tied sales was not sanctioned. The NCA based its decision on the European Commission precedents in the Microsoft case.

g. Bundling (including loyalty and market share discounts)

Bundling, loyalty and market share discounts are not expressly regulated but may be prohibited, under rule of reason analysis, under the general prohibition of Section 2 of Law 18,159.

We are unaware of any precedent in this regard in Uruguay.

h. Exclusive dealing

Section 4 H) of Law 18,159 bans "unjustifiably establishing zones or activities where one or some of the economic agents operate with exclusivity, preventing the rest of the operators from operating in same."

One of the first cases related to exclusivity agreements, decided pursuant to the former and now repealed antitrust law (Sections 13 to 15 of Law 17,243) is one involving a series of laboratories that created a discount system called "FARMADESCUENTO", whereby the laboratories who were parties to the arrangement granted discounts to consumers of their products.

Another discount system was created in parallel, CYBERFARMA. As a consequence, FARMADESCUENTO eliminated from the system the drugstores affiliated with CYBERFARMA, making drugstores choose between one system and the other.

The enforcement entity (then the General Office of Commerce, "DGC") understood that the imposition of exclusivity arrangements was a collective abuse of dominant position by laboratories that were part of FARMADESCUENTO. A penalty of approximately USD 700,000 was applied to the group of laboratories involved.

This decision was confirmed by the Ministry of Economy and Finance, and then was controversially annulled by the President of Uruguay. However, the case was taken to the Administrative Claims Court, which - without noticing the contested decision had been annulled - finally confirmed its enforceability.[17]

In another case regarding exclusivity arrangements, Aeropuerto Internacional de Carrasco (Uruguay's international airport) was sanctioned by URSEC for having granted exclusivity for data transmission services within the airport premises to ANTEL (Uruguayan state-owned telecom company). The resolution was later revoked by the regulator URSEC

[16] Resolution No. 86/011 of August 1, 2011. SUBJECT: LABORATORIO FARMACO URUGUAY S.A. v/ BIOCARE S.R.L. and CIAME LTDA, and Report No. 37/011 of June 10, 2011.

[17] TCA Ruling No. 575 of August 9, 2010.

itself. However, Telefonica (ANTEL's competitor) took the case to the TCA, which annulled the revocation act.

Another important case is OSANIL S.A. v FÁBRICAS NACIONALES DE CERVEZA S.A. (FNC). In said case the Commission determined that FNC (with a 97% share in the beer market) offered discounts to retailers in exchange for not offering a competitor's product (Heineken beer). The Commission applied the highest fine to date, about USD 1,300,000.[18] Said case is being litigated at the Administrative Court.

i. Refusal to deal

According to Section 4 I) it is prohibited to "unjustifiably reject the sale of goods or the rendering of services."

In the telecommunications market, URSEC (regulator in the telecomm sector and with antitrust jurisdiction) has issued several decisions requiring major free-to-air TV companies to stop refusing to provide contents (national broadcasts and TV broadcasting of the soccer world cup FIFA 2010) to certain cable TV companies.[19]

In a more recent case, Disco, a major supermarket chain, was charged by a producer of artificial juices for refusing to buy its product. Disco prevailed at the NCA by showing that it was rightfully choosing not to buy products from said producer, as the chain was moving to a more natural product selection and was not interested in adding more "artificial" products.[20]

j. Essential facilities

According to Section 4 F) it is prohibited to "impede the access of competitors to infrastructures that are essential for the production, distribution or commercialization of goods, services or factors of production."

Some decisions by the NCA, regulators and the Administrative Claims Court have referred to the "essential facilities" doctrine, but without defining it. Therefore, it remains a very flexible and inaccurate concept under Uruguay law.

For example, the Administrative Court in the Telefonica case against the airport said that the airport operator was the owner of an essential facility, necessary for the distribution and commercialization of data transmission services.

In another case URSEC, the said telecom regulator with antitrust jurisdiction in that area, suggested that free-to-air channels from Montevideo were essential facilities for paid-tv

[18] NCA Resolution 51/013 of April 2013. Subject: OSANIL S.A. v FÁBRICAS NACIONALES DE CERVEZA S.A (FNC).

[19] URSEC Decision 381/2004, confirmed by Decision TCA 196/008, June 12, 2008, "MONTE CARLO TV S.A. v ESTADO. MINISTERIO DE INDUSTRIA, ENERGÍA Y MINERÍA y PRESIDENCIA DE LA REPÚBLICA" (Case 87/06); URSEC Decision 249/010, June 8, 2010.

[20] NCA Decision 35/2015, June 2, 2015.

companies.[21] Said position was later accepted by the Administrative Claims Court, which confirmed the sanctions imposed on the channels.[22]

The NCA also analyzed whether, in the case of supermarkets, the aisle headers and the space for beer refrigerators could be considered "essential facilities" for distribution. According to the NCA's opinion, that is not the case, as there is a market -and hence competition- for said places and infrastructures.[23]

k. Customer termination

A customer termination could be deemed an exploitative practice under Section 4 A) of Law 18,159 which prohibits companies from imposing abusive conditions on consumers. We are unaware of any precedent in this area.

l. Termination of intermediaries

Anticompetitive termination of intermediaries can breach antitrust regulations, particularly as an abuse of dominant position.

In 2006 it was reported that FNC, a quasi-monopoly in the beer market, had stopped the supply of beer to a retailer that did not agree to follow RPM.

The General Office of Commerce - the competent body in antitrust matters until the establishment of the Commission - decided that said conduct constituted abuse of dominant position. It also imposed publication of the decision in two nationally circulating newspapers at the infringing party's cost and sanctioned FNC with a fine of 1,000 readjustable units[24]. Said resolution was confirmed by the Administrative Claims Court.

m. Termination of relationship with competitors

An anticompetitive termination of a relationship with a competitor can infringe antitrust regulations pursuant to the general prohibition is Section 2 of Law 18,159.

No precedents are to be noted to this day.

n. Settlements

Settlements with the NCA are regulated under Section 28 of Decree 404/007.

According to said rule, in any stage prior to the final NCA decision, the investigated parties can make NCA a proposal to cease or modify the investigated parties' conduct. Said

[21] File 2004/1/2213, page 30.

[22] TCA Decision 196/008, June 12, 2008, "MONTE CARLO TV S.A. v ESTADO. MINISTERIO DE INDUSTRIA, ENERGÍA Y MINERÍA. PRESIDENCIA DE LA REPÚBLICA" (case 87/06).

[23] NCA Decision 51/013, April 10, 2013, and related reports.

[24] As of January, 2016, approximately USD 27,000

commitment does imply a confession regarding the facts or unlawfulness of the investigated conduct.

Once the NCA receives the proposal, it has 10 days business days to accept or reject it.

The settlement must necessarily include the following elements:

(i) the investigated party's duty to cease the practice within certain term;

(ii) the penalty to be imposed in case of breach of the settlement;

(iii) the duty to regularly inform the NCA about its behavior in the market.

The procedure will be suspended as long the party complies with the settlement and will end upon elapsing of the term set in the settlement.

If the breach of antitrust regulations (including the facts and the identity of the infringer) is obvious, then the settlement shall include (i) acknowledgement of the unlawfulness, and (ii) the penalties to be applied, which will be lower than if the investigated party were not to acknowledge the unlawfulness.

(II) COLLUSIVE CONDUCTS

a. Introduction

In general, there are few cases of collective anticompetitive practices at a single level (e.g., collusion or market sharing). An example of this is the sanction by URSEC (the telecommunications regulator) for collusion by the main cable TV operators in Montevideo.

Another example took place in 2014 in the tomato sauce market, where several manufacturers of processed tomato products formed a cartel in order to control the main variables of the market, preventing competition and divvying up market shares. The mechanism was quite original; the tomato sauce manufacturers collectively bought the boxes from a single provider, and then distributed them in proportional shares among the competitors.[25]

A particularity of said case is that it is the only one where the Commission applied the leniency program, provided for in Law 18,159. The Commission punished all the investigated parties -the highest fine was close to USD 450,000- but granted immunity to the party that provided the information.

We are unaware of any cases of vertical collective anticompetitive practices (e.g., distribution agreements) that have been sanctioned by authorities.

Collective dominant position was analyzed in the tied sales case. In the said case, the Commission concluded there was not a collective dominant position between the two market leaders companies of the market "since there were no indicators of coordination between them

25 Resolution No. 24/014 of August 2014. SUBJECT: TIMOPEL S.A. v PANCINI INDUSTRIAL DEL SAUCE S.A., BARRACA DEAMBROSI S.A., GIBUR S.A., VULCANIA S.A. and DOMINGO GHELFA.

for engaging in alleged anticompetitive practices, or evidence of an absence of competition absence among them."

The maximum fines for antitrust infringement can be an amount consisting of the highest of the following values:

(i) 20,000,000 IU (twenty million indexed units, approximately USD 2 million – March, 2016).

(ii) the equivalent of 10% (ten percent) of the violator's annual turnover;

(iii) the equivalent of three times the damage caused by the anticompetitive practice, if determinable.

The minimum fine consists of 100,000 UI (a hundred thousand indexed units, approximately USD 10,000 -March 2016).

Penalties may also be applied to directors and legal agents of the infringers and to controlling companies and their directors and legal agents.

b. Horizontal price fixing

Horizontal price fixing is banned under the general prohibition of Law 18,159 Section 2 and under Section 4 A) and B), which prohibit price fixing.

Not many horizontal price fixing cases have been decided by the NCA. One to be mentioned is a price fixing agreement between maritime shipping agents, which was implemented by their trade association ("Centro de Navegación Transatlántica") by means of minimum tariffs. Although both the association members and the association itself were warned by the NCA that they must all comply with the antitrust regulations, only the association was fined.[26]

There is also one precedent decided by URSEC, the telecom regulator, which sanctioned Montevideo's cable TV operators for price-fixing and imposed fines.[27] Said decision was then confirmed by the Administrative Claims Court.[28]

c. Horizontal agreements to allocate customers or territories

As with horizontal price fixing, horizontal agreements to allocate customers or territories are banned under Section 2 and under Section 4 A) and B) of Law 18,159.

d. Agreements not to compete

Agreements not to compete are obviously covered by the general prohibition of Law 18,159, though we are unaware of any administrative precedent or case law.

[26] NCA Decision 72/012, September 21, 2012. The fine amounted to 100,000 indexed units, USD 10,500 as of January 2016.

[27] URSEC Decision 65/2015, February 24, 2005.

[28] See TCA Decision 511/2010, July 19, 2010, "TRACTORAL S.A. con ESTADO. MINISTERIO DE INDUSTRIA, ENERGÍA Y MINERÍA y PRESIDENCIA DE LA REPÚBLICA" (Case. 34/06), among others.

e. Horizontal boycotts

Horizontal boycotts can be covered by the general prohibition of Law 18,159. In addition, article 4 G) bans behaviors "unjustifiably hindering entry into a market by any other competitor."

The NCA found that four clinical labs were boycotting a competitor by not allowing it to enter the market, through an agreement between the laboratories and the city of Salto's main hospital, which sent virtually all the hospital's patients to the referred four labs. The NCA ordered the investigated parties to cease said practice and imposed fines.[29] However, the Ministry of Economy (NCA's hierarchical superior) then repealed the decision. According to public information, the NCA's decision is now being litigated at the Administrative Claims Court.

f. Joint ventures and other competitive collaborations

There is no specific regulation on joint ventures or other competitive collaborations. Depending on how the joint venture or agreement is structured, it can be governed either by antitrust or by merger control regulations (i.e., if a "concentration act" takes place).

g. Trade associations

There is a specific reference to trade associations in the Law 18,159.

While Section 4 gives several examples of prohibited behaviors, part J of said Section bans "the same practices referred to above, when they are performed through associations of economic agents,"

At the beginning of past decade one of the first antitrust cases, decided under now repealed Law 17,243, referred to the bylaws of the Association of Advertising agencies, which established that members could only compete in terms of quality and prohibited price competition in public bids. It is interesting to note that the case began because the trade association published a letter in the press denouncing that one of its member had dared to bid at lower prices. The former antitrust agency ordered the trade association to amend its bylaws.

The other case worth mentioning was the one in the maritime shipping market, mentioned in point b above.

h. Bid rigging

Bid rigging is prohibited under Section 4 E which bans "coordinating participation or abstention in public or private tenders or calls for prices."

The first case on this matter was the one referred to above (point g), concerning the advertising agencies' bid rigging, which ended with the order of the former NCA to amend the trade association bylaws. A more recent case was decided in 2009, where two offerors in a public

[29] NCA Decision 10/2014, February 20, 2014.

bid for liquid oxygen were investigated for bid-rigging, though the case was finally dismissed due to lack of evidence.[30]

i. Interlocking directorates

Interlocking directorates can be covered by the general prohibition of Law 18,159, though there is no specific regulation and we are unaware of any administrative precedent or case law.

More generally speaking about directors' liability, antitrust regulations stipulate that corporate directors and legal representatives can be held liable and be fined if they are found to be actively involved in the investigated conduct.

j. Facilitating practices

There is no specific regulation regarding facilitating practices, though the general prohibition applies. We are also unaware of any precedent, except for the information exchange case that will be described below (see point k).

k. Information exchange

Exchange of information can facilitate anticompetitive behaviors. Therefore, it is governed and potentially prohibited under Section 2 of Law 18,159.

To analyze exchange of information situations, several factors need to be addressed: market structure, nature and age of the information, level of information, etc.

The NCA was consulted regarding a projected database which would be used to share commercial information, mainly for the use of consumers. Said database would have information regarding stores, locations, prices, etc. The NCA concluded that sharing sensitive information could have ambiguous effects, either procompetitive and anticompetitive, but the mere fact of creating that kind of database was not illegal per se.[31]

l. Leniency program

The antitrust regulations provide for a leniency program, under which applicants receive exemption or reduction of sanctions for antitrust infractions.

The first applicant receives full exemption from sanctions only if the information provided makes it possible to dismantle the cartel and punish its members. If said result is not possible, then the first applicant will be afforded an extenuating circumstance to its penalty.

The applicant must first provide the cartel information, but in an initial instance without much detail. It must explain the kind of agreement, duration, number of members, and means of

[30] NCA Decision 49/009, November 17, 2009.

[31] NCA Report 59/013, August 9, 2013.

evidence it has to prove the agreement. It must not reveal the name of the members but must state if it knows them and their representatives.

Then the Commission must analyze the information provided by the party and decide, within 20 business days, whether or not to grant leniency. Once the Commission decides to exempt the applicant from sanctions (or apply extenuating circumstances), the investigation begins. Based on the only case where a leniency program was applied, it is possible for the applicant to reach an agreement with the Commission.

Up to now, only one leniency process was made public in Uruguay. It involved a local cartel, concerning tomato sauce producers holding more than a 70% share of the market.

m. Settlements

Regarding settlements with the NCA, please refer to point n) of Section III (i) above.

Regarding settlements between parties, it should be noted that such agreements are permitted under Uruguayan law. However, under Section 1 of Law 18,159, said law is considered public policy, which means that parties cannot arrange to breach antitrust regulations. Therefore, parties cannot settle a case if the commitments imply some form of antitrust infringement.

OVERVIEW OF COMPETITION LAW IN VENEZUELA

José H. Frías

I – OVERVIEW OF ANTITRUST LAW

a. Applicable law and regulations

The Venezuelan competition rules are contained in:

(i) The Venezuelan Antimonopoly Law (*Ley Antimonopolio*), published in Official Gazette No. 40,549 dated 26 November 2014 ("the Antitrust Law");
(ii) Regulation No. 1 of Pro-Competition Law, published in Official Gazette No. 35,202 of 3 May 1993 ("Regulation No. 1");
(iii) Ruling No. SPPLC/036-95, published in Official Gazette No. 35,801 of 21 September 1995, containing the Block Exemption for Exclusive Distribution and Exclusive Purchasing Agreements ("Ruling No. SPPLC/036-95");
(iv) Ruling No. SPPLC/038-99, published in Official Gazette No. 5,431 of 7 January 2000, containing the Guidelines for Assessing Franchise Agreements ("Ruling No. SPPLC/038-99");
(v) Regulation No. 2 under the Competition Law, published in Official Gazette No. 35,963 dated 21 May 1996 ("the Merger Regulation");
(vi) Instructive No. 3 on Economic Concentrations, published in Official Gazette No. 36,209 dated 20 May 1997 ("the Instructive No. 3");
(vii) Merger Guidelines, published in Official Gazette No. 36,819 dated 1 November 1999 ("the Merger Guidelines"); and
(viii) Resolution No. 14/96, published in Official Gazette No. 36,000 dated 24 May 1996 ("Resolution No. 14/96").

b. Theories of harm present in the law

There are no specific theories of harm in the antitrust law with respect to prohibited practices, but only with respect to mergers.

According to the Merger Guidelines, there are several aspects to consider in determining whether a transaction is anti-competitive. Some of the most important are:

(i) the level of concentration in the relevant market before and after the transaction;
(ii) barriers to entry for new competitors;
(iii) the availability of substitute products;
(iv) the possibility of collusion between the remaining suppliers; and

(v) efficiencies created by the transaction (effective competition, benefits to consumers, promotion of cost reduction and development of new technology).

The Superintendence defines the relevant market affected by the transaction and the levels of concentration. However, the main focus of the test has been on barriers to entry, analysing the entry barriers for importation and the amount of potential competitors. The Superintendence also takes into account the effects of a merger on the suppliers and the customers. In case of a vertical merger, it will evaluate the effects on each market.

c. Authority in charge of enforcement of antitrust law and regulations

The authority in charge of enforcement of antitrust law and regulations in Venezuela is the Antimonopoly Superintendence. Although an independent administrative agency, the Superintendence depends on the Ministry of Commerce,

The Superintendent is the head of the Superintendence, who is appointed by the President of the Republic for a four-year term. The Superintendent is in charge of both investigating and resolving antitrust cases initiated of its own volition (ex officio) or at an interested party's request.

d. Nature of antitrust enforcement

Antitrust enforcement in Venezuela is administrative in nature, and may only be carried out by the Superintendence.

However, once the decisions of the Superintendence are final, affected parties may file lawsuits with the civil courts for the damages arising from anticompetitive practices declared by the Superintendence.

The Antitrust Law does not establish criminal sanctions for prohibited practices. However, article 114 of the Venezuelan Constitution stipulates that the law must punish, among other offences, "cartelisation". Despite this constitutional obligation, the last reform to the Antitrust Law in 2014 did not include any criminal sanction to cartelization. It must be taken into account that the obligation set forth in the Constitution does not establish a specific period for its application.

e. Investigational powers of authority

Under article the Antitrust Law, all persons and companies that carry out economic activities in Venezuela must provide all information and documents requested by the Superintendence.

The Superintendence has broad investigative powers. These include the power to:

(i) summon any person in relation to the facts under investigation;
(ii) require any person (including both interested and third parties) to submit documents and information relating to the case;
(iii) inspect books and documents relating to accounts, and

(iv) summon anyone to provide information relating to the proceedings.

In addition, under the Organic Law on Administrative Proceedings, which supplements the procedure contained in the Antitrust Law, the Superintendence may use the evidentiary means stipulated in the Venezuelan Civil Procedure Code and other procedural legislation. The Superintendence has used this power to obtain evidence or order evidence to be obtained by the following means:

(i) visual inspections of offices or premises of both interested and third parties;
(ii) expert evidence or reports; and
(iii) witness statements.

This evidence is obtained directly by the Superintendence without judicial assistance.

However, the Superintendence's investigative and evidentiary powers must be exercised within the right to due process and to a fair defence. For example, interested parties must be allowed to review and contest the evidence, access the file and generally review all actions taken in the proceedings as regards the gathering of evidence.

Under the Antitrust Law, the Superintendence's broad investigative powers have been used in order to carry out raids in company head-quarters. During those raids the Superintendence has the possibility to access all the documents (both physical and electronic). The general practice of the Superintendence has been to obtain copies of both physical and electronic documents, without taking the original ones.

Dawn raids are not specifically regulated under the Antitrust Law. The Superintendence, when it carries out a raids gives written notification to the company, usually a few days before the raid takes place; however, there have been cases where the notification of the raid has happened only a few hours before it takes place.

f. Attorney-client privilege

The Code of Ethics of the Venezuelan lawyer enshrined the confidentiality between lawyer and client, the faculty of the lawyer to not testify against his client.

g. Interactions with other regulators

Mergers and acquisitions between telecom companies and insurance companies are subject to approval by the corresponding regulators. However, both regulators must request a binding opinion by the Superintendence on the effects on competition of the transactions subject to review. Only if there is a favourable opinion by the Superintendence, the transaction may be approved.

Other than such binding opinions, the interactions of the Superintendence with other regulators are limited to the normal relationships between public offices, which imply collaboration. There are general rules applicable to request of information between public offices and agencies which apply to the Superintendence (but are not specific for it).

h. Treaties in place

There are no treaties in place with respect to antitrust law.

i. Standards of evidence

The burden of proof is held by the Superintendence; additionally, a requesting interested party may produce evidence.

j. Methods of engagement with authority

The only method of engagement with the Superintendence is through formal means, in writing. However, informal contacts with officers and even with the head of the Superintendence may occur and are not considered against the law. However, currently such informal contacts are discouraged by the current authorities.

k. Judicial review of decisions

The Superintendence's rulings may be appealed before the Administrative Courts (Juzgados Nacionales de lo Contencioso Administrativo) within 45 calendar days following notification of the ruling being appealed.

Rulings issued by the Administrative Courts may be challenged by appealing to the Political Administrative Chamber of the Supreme Court of Justice (Sala Político-Administrativa del Tribunal Supremo de Justicia) within five days following the ruling or notification thereof.

The usual time frame for a judicial review is between three and five years. This time frame includes the nullity action before the administrative courts and the appeal to the Administrative Chamber of the Supreme Tribunal of Justice. The decision of the Administrative Chamber is final.

l. Private litigation

There is no private litigation concerning anticompetitive practices. The determination of any violation of the Antitrust Law corresponds, exclusively, to the Superintendence. However, once a decision by the Superintendence determining an anticompetitive practice has become final, affected parties may file a lawsuit before the civil courts for the damages arising from such practices.

II – MERGER CONTROL

a. Types of transactions

Transactions subject to merger control include any:

- mergers of previously independent enterprises;

- joint ventures; and
- transactions as a result of which one or more enterprises directly or indirectly gain control over one or more previously independent enterprises, or parts thereof, through the acquisitions of equity, assets or otherwise.

Internal restructurings or reorganizations are not covered by the Antitrust Law. Operations not involving change of control are not covered either. However, if a shareholders' agreement or any other agreement implies a change of control, it may be subject to review.

b. Notification of foreign-to-foreign mergers

Mergers or acquisitions concluded by foreign entities outside Venezuela that may have an impact on competition in the Venezuelan market may be reviewed by the Superintendence. There must be a local nexus, such as presence (as a branch office or subsidiary) or assets in Venezuela for the merger control regime to apply. There have been no cases of foreign-to-foreign mergers being opposed by the Superintendence. The Superintendence has approved all foreign-to-foreign mergers that have been voluntarily notified. However, there is no official information about the number of cases.

If local issues arise from a foreign-to-foreign merger, a solution may be to submit the transaction to the Superintendence for prior review to determine whether the transaction can be considered anti-competitive. If the transaction breaches the competition rules, the Superintendence may order the divestiture or the selling of part of the assets and even the dissolution of the merger. The parties are bound by the Superintendence's decision.

The Superintendence has not opposed any foreign-to-foreign mergers. Until now, it has approved all voluntary filings regarding foreign-to-foreign mergers. However, there is no official information regarding the number of cases.

c. Definition of "control"

Under the Competition Law, "control" is defined as the "decisive influence over the activities of a company". In addition, the Merger Regulation states that the Superintendence, as the body responsible for establishing jurisdictional thresholds, also has the power to review any economic concentration which meets the relevant standard. The Merger Regulation does not apply to those transactions which do not involve a company gaining control over another.

Acquisitions of minority or other interests less than control are not caught by Venezuelan antitrust regulations.

d. Jurisdictional thresholds

Resolution No. 14/96 sets forth that the Superintendence may review transactions where the aggregate value of sales in Venezuela exceeds 120,000 tax units (US$ 3 million approximatively). In the case of partial acquisitions, companies with joint subsidiaries and mergers of insurance companies, special rules are applicable.

Regulation N° 2 establishes the following specific rules for determining the aggregate value of sales:

- for partial acquisitions, only the amount of the part to be acquired is considered;
- for companies with joint subsidiaries, any profits resulting from operations between the subsidiary and the parent company are disregarded - profits resulting from sales to other third parties are attributed equally between the proprietors of the joint subsidiary, and
- for insurance companies, the total amount of the premiums is considered.

The jurisdictional threshold is determined by calculating the aggregate amount of sales which is done by adding together the sales revenues of from the last financial year, of the parties to be merged and deducting sales, discounts, value-added tax, and other taxes which are applicable to the businesses.

Only companies doing business in Venezuela are relevant for calculating turnover. Both seller's and target's turnover must be included.

e. Triggering event for filing and deadlines

Since filing is voluntary, there is no triggering event to file the notification.

Under the Antitrust Law, filing is not mandatory. Therefore, the lack of notification would not constitute a violation of the Competition Law and there are no penalties for not filing. It is always up to the parties to decide whether to file a voluntary notification. If a transaction is not notified, the Superintendence may open an investigation after the closing if it deems that such transaction may affect competition in Venezuela. In this case, the Superintendence must notify the parties, which have 15 business days (that may be extended for 15 additional days) to present evidence and arguments. Once the evidence period is expired, the Superintendence should decide within 30 business days, which may be extended for two months.

f. Exemptions

There are no exemptions in the Antitrust Law.

g. Rules regarding foreign investment, special sectors or similar relevant approvals

Neither the Antitrust Law nor the Merger Regulations contain special rules regarding particular sectors. However, there are special rules applying to banking and insurance that include requirements unrelated to antitrust issues.

The National Telecommunications Commission (Comisión Nacional de Telecomunicaciones, "Conatel"), Venezuela's telecom regulatory authority, must approve any transaction between telecom operators that involves a change of control. Pursuant to the Telecom Law, the transaction will only be effective after authorisation by Conatel is obtained. Therefore, closing of the transaction can only take place after such authorisation is issued. Conatel should decide on the approval of the transaction within four months, which may be extended for two additional months.

There are no effective remedies in case of delays in issuing the approval by Conatel. Before granting its approval, Conatel must request an opinion from the Venezuelan antitrust authority, the Superintendence, on the competition issues arising from the transaction. Conatel may only approve a transaction if the opinion of the Superintendence is favorable. The Superintendence must issue its opinion within 45 business days after receiving Conatel's request. However, there are no penalties applicable to Conatel or the Superintendence for exceeding such terms. The Superintendence must determine whether the transaction may affect competition in the relevant market. The Superintendence considers both the post-transaction market concentration and the increase in concentration resulting from the transaction. The Superintendence also analyses barriers to entry, the dynamic of competition and efficiencies created out of the transaction.

In its opinion the Superintendence may recommend Conatel to impose certain conditions to approve the transaction. Only if the parties agree to comply with the recommendations the transaction may be consummated. Otherwise, the approval is considered denied.

Also, under the Insurance Law, transactions involving insurance companies must be approved by the Insurance regulator with a binding opinion by the antitrust authority.

h. Information requested for the filing

Instructive No. 3 sets out the information that must be included in the filing for the evaluation of the transaction. Such information includes identification of the parties and its subsidiaries and affiliates, identification of directors and managers of such entities, details of the transaction (including financial and economic aspects), details of the markets in which the parties are competitors and market access, information about the products and industrial processes involved (e.g. prices, materials), information on market shares, barriers to entry and type of competition. The parties may also present information on efficiencies arising from the transaction and any information regarding the failing firm argument, if applicable. Internal company documents, such as documents prepared for the board and reports and strategy papers prepared during the negotiation of the deal, are rarely requested and must only be disclosed upon request by the authority.

i. Sanctions applied for late or no filing

Since filing is not mandatory, there are no sanctions for not filing or for late filing.

j. Parties responsible for filing

Although any of the parties involved in a merger or an acquisition may make a voluntary filing, according to the Merger Regulation the filing must be made separately by all the parties to the transaction. In addition, once the process is opened, the Superintendence can request information from any party.

k. Filing fees

There are no filing fees.

l. Effects of notification

As notification is voluntary and parties can close a transaction before clearance is granted there is no suspensive effect in Venezuelan Antitrust Law. Closing before clearance is expressly permitted.

m. Gun jumping and closing - sanctions

Parties may close the transaction before clearance is granted. As notification is voluntary and parties can close a transaction before clearance, there are no penalties for closing before clearance.

n. Type of remedies and their negotiation

The Merger Regulations allow the Superintendence to order remedies such as divestitures or behavioural remedies. Partial divestitures, even if they are considered one of the best remedies to solve the anticompetitive aspects of a transaction, are seldom applied. These measures can only be ordered after closing; never as a result of a voluntary filing.

In the case of divestitures, the Superintendence has ordered that the control of the assets to be divested should be transferred to a trustee who is then charged with selling them in a specified period, often between six months and a year. If unsold, the assets are returned to the original owner. The transaction may be completed before complying with the remedies.

Remedies are seldom used by the Superintendence.

Usual practice does not involve negotiations with the authorities.

o. Timetable for clearance

Voluntary notifications should be evaluated within four months of the date of filing, although the period may be extended for two more months. However, prior notification does not prevent consummation of the transaction. If no filing is made, the Superintendence may open an investigation on the transaction within five years following consummation. If during the investigation the Superintendence finds that there is evidence of possible restrictive effects on competition arising from the transaction, the Superintendence may open a formal process. In this case, the Superintendence must notify the parties, which have 15 business days (that may be extended for 15 additional days) to present evidences and arguments. Once the evidence period is expired, the Superintendence should decide within 30 business days, which may be extended for two months. Pre-notifications meetings are not common.

However, an investigation of a transaction (either voluntarily notified or in a post-closing proceeding) may last between six months and one year

p. Involvement by third parties

In the case of voluntary filing, third parties may become parties in the proceedings and may oppose the transaction. In the case of transactions which are not notified, third parties may request that the Superintendence open an investigation to evaluate the transaction only after it is completed. In any case the Superintendence may request information from third parties.

Third parties may also appeal a decision on a merger (whether approving or denying the transaction). However, they must demonstrate that they have legitimate interest in such review.

Third parties cannot access confidential information provided to the Superintendence by the parties to the transaction. The parties can request that the Superintendence keep certain information confidential. Even if the decision is published, confidential information provided by the parties – or any other aspect that may be considered sensitive – is not disclosed.

q. Types of resolutions that may be issued

There are only two types of decisions that may be issued concerning a voluntary notification of a transaction: the transaction is either declared legal or illegal. Remedies, such as divestitures, may be ordered for the transaction to be deemed legal.

If the decision is the result of a post-closing investigation, the Superintendence may also impose fines on the parties. The fines may only be imposed for violation of the Antitrust Law, not for the lack of notification.

After a transaction has closed, the Superintendence can take measures in order to ensure the restoration of effective competition. Such measures include: orders for total or partial divestiture, dissolution of the transaction or fines of up to 20% of the gross sales of the offending party for the preceding year.

r. Review of ancillary restraints

If requested by the parties, the Superintendence's decision regarding the merger can cover ancillary restrictions. Non-competition clauses have been accepted previously if they are limited in territory, time, and product.

III – ANTICOMPETITIVE CONDUCTS

(I) UNILATERAL CONDUCTS

a. Introduction

The Venezuelan system prohibits all the conducts, practices and agreements that limit free competition. Boycotts, cartels and other horizontal agreements, bid rigging, vertical agreements and the abuse of dominant position, are prohibited under Antimonopoly Law.

Under Articles 5 and 6 of the Antimonopoly Law, the following practices are prohibited.

First, Article 5 prohibits exclusionary practices, actions or conducts by persons who, without having a legal right to do so, attempt to prevent undertakings, products or services from entering or remaining in the market. According to the criteria laid down by the Directorate, the following requirements must be met in order for a conduct to qualify as an exclusionary practice:

- the operator carrying out the practice must have sufficient economic capacity to affect the market structure;
- the operator must use that capacity to prevent operators from entering or staying in the market; and
- the exclusion must be irrational or unjustified.
- Article 6 of Antimonopoly Law prohibits boycotts, which are defined as inciting third parties to do any of the following:
- refuse to accept the delivery of goods or the provision of services;
- prevent the acquisition or provisions thereof; or
- refuse to sell raw materials or supplies or to render services to other firms.

Under article 49 of the Law, the Superintendence may order fines of up to 20 per cent of the infringing party's gross sales for the previous year, as part of the final resolution of the case. There are no minimum penalties. The penalties imposed are administrative in nature.

b. Exploitative offense

Our Antitrust Law lists a series of behaviors by a dominant firm or firms that are prohibited. These include certain practices in which the dominant firm uses its monopoly power to exploit other market participants without directly affecting the structure of the market, by charging high prices to customers, discriminating among customers, and paying low prices to suppliers.

c. Predatory pricing

They have been defined by the Superintendence as the establishment of the prices of goods and services at a very low level of prices, in order to get out the market to competitors. It is noted that the effect pursued by predatory pricing is the exclusion of competitors, which could be similar to the prohibition contained in Article 12 (I).

d. Price discrimination

Article 12 (I), prohibits abuses of a dominant position, which would exist, for example, in case of discriminatory prices and other marketing conditions.

e. Resale price maintenance

Resale price maintenance is prohibited by the Law. There are no exceptions to such prohibition.

f. Tying arrangements

The tying agreements are considered as a category of vertical agreements generally prohibited by law. As we will see later, verticals agreements could be authorized by Venezuelan authorities, only if the behavior in question does not prevent effective competition in the relevant market. Tying is also prohibited as an abuse of a dominant position.

g. Bundling (including loyalty and market share discounts)

There is no specific prohibition to bundling in the Law.

h. Exclusive dealing

There is no general rule either allowing or prohibiting exclusive dealing. A practice such exclusive dealing should be examined on a case-by-case basis. The national authority has considered exclusive dealing as a normal practice, after considering the relevant market affected.

i. Refusal to deal

Under Article 12 (III) of the Law, unjustified refusal to deal is prohibited as an abuse of a dominant position. There is no definition of what would be considered as an "unjustified" refusal to deal. A test of reasonability would apply, but on a case-by-case basis.

j. Essential facilities

It can be argued that Article 12(III) of Antimonopoly Law allows application of the essential facilities doctrine through an interpretation of the refusals to deal provision. According such article, a dominant firm must not refuse to satisfy purchase or service orders in an unjustified way. The incorporation of such doctrine in regulations gives a space for the antitrust agencies to apply the essential facilities doctrine. However, even though the Superintendence has not referred to the essential facilities doctrine, it could be applicable to obligations to interconnection between telecom operators that the Telecom Authority has imposed.

k. Customer termination

There is no a specific rule under the Antimonopoly Law regarding customer termination. Customer termination is a violation of the consumer protection law and falls into a separate and distinct legal framework.

l. Termination of intermediaries

Certainly these relationships are regulated primarily by the contracts between the parties, and at first no one can be forced to stay in a business relationship. However, Venezuelan

authorities have investigated some cases regarding termination of intermediaries, considering that there may be behavior prohibited by law. For example, the Superintendence has investigated the termination of a car dealership agreement, and has considered that under certain circumstances (especially if there is an economic dependence of the dealer vis a vis the car manufacturer), the termination may be considered as an abuse of a dominant position.

m. Termination of relationship with competitors

There is no specific regulation on termination of a relationship with a competitor.

n. Settlements

Parties are free to agree any settlement in a dispute. The Superintendence may object to the agreement and can order the continuation of the process until its conclusion, especially if is considered that the market could be affected.

(II) COLLUSIVE CONDUCTS

a. Introduction

The forbidden practices under the Antimonopoly Law are:

(i) "horizontal agreements" (cartels): agreements among competitors aimed at reducing, limiting or eliminating competition (such as price-fixing, output restrictions, market sharing, collusive tendering, etc.);
(ii) "vertical agreements": such as exclusive distribution agreements, franchising agreements, etc., that may reduce or eliminate competition;
(iii) exclusionary practices and boycotts;
(iv) abuse of dominant position; and
(v) unfair competition practices (such as misleading advertisement, confusion, appropriation of trade secrets, etc.).

According Article 8 of the Antimonopoly Law, agreements or contracts, held directly or through unions, associations, federations, unions and other groups subject to application of that law are prohibited, when restrict or impede economic competition among its members.

Article 9 of the Antimonopoly Law prohibits all horizontal and vertical agreements, concerted practices, collective recommendations and decision whose object is:

(i) to fix prices and other marketing or service conditions directly or indirectly.
(ii) to restrict production, distribution and technological development;
(iii) to divide markets, geographical areas, or industries or sources of supply among competitors;

(iv) to discriminate by applying different conditions for equivalent services to different customers, thus placing some competitors at a disadvantage in relation to others; and

(v) clauses whose object is to make the entering into of contracts subject to the acceptance of additional services which are not related to the subject matter of those contracts because of their nature or normal trading practices.

"Agreement" means documented agreements between economic actors whose aim is to carry out an anticompetitive practice, regardless of the existence or absence of subsequent action in the market. The concept of "concerted practice", for its part, involves firstly a meeting of minds to carry out one of the anticompetitive practices specified in Article 9 and, secondly, a parallel action in the market which does not arise from market reality. Both agreements and concerted practices require proof of a meeting of minds between economic operators. The difference lies in the fact that agreements require a formal contract, whereas the proof of a "meeting of minds" in concerted practices stems from the intentional exchange of information between the economic actors with the aim of carrying out anticompetitive behavior, whose effect is to produce parallel actions in the market.

With regard to recommendations and decisions, there is a distinction between "collective recommendations" and "decisions". Whereas the former arise from trade associations or similar bodies and are aimed at guiding the market behavior of competitors within the association, the latter are adopted by associations to force the competitors within them to behave in a particular way. In other words, decisions are binding.

Although Article 9 of Antimonopoly Law applies to both horizontal and vertical agreements, Regulation No. 1 exempts the following vertical agreements from the prohibition contained in that rule: vertical agreements whose object is to fix prices, distribute markets, restrict production, discriminate and, through their clauses, subordinate the conclusions of contracts to the acceptance of supplementary services which are not related to the object of those contracts because of their nature or normal trading practices (such as clauses tied on without any commercial justification). The exemption only applies if the behavior in question does not prevent or hinder effective competition in the relevant market. However, vertical agreements which affect effective competition may be authorized by the Directorate in accordance with the authorization procedure.

Also, for the determination of free competition restricting effects, and "dominant position," it is necessary to establish, first, the relevant market where the "economic concentration" is based. As in most competition laws in the world, we have two considerations in Venezuela to determine the relevant market: (a) the geographic market, and (b) the product market, which is not determined by the type of products included in such market, but by the possibility to substitute one product for another.

Even if there were no market share increase as a result of the economic concentration, the dominant position may be established also if the resulting company has significant advantages over its competitors considering its size and economic, financial and technological importance.

Article 11 of the Antimonopoly Law prohibits contracts between economic operators which fix prices and contracting conditions for the sale of goods or the provisions of services to third parties, with the intention or effect of restricting free competition in all or part of the market.

According to the Directorate's criteria, the following requirements must be met in order for the prohibition to apply:

- there must be a contract;
- intended to fix prices or other contracting conditions with third parties to the contract; and
- with anticompetitive results (rule of reason).

Establishing recommended prices is not considered a resale price agreement. Regulation No. 1 allows the Directorate to issue blocks exemptions for categories of practices. Pursuant to this power, the Directorate has issued a Block Exemption for Exclusive Distribution and Exclusive Purchasing Agreements.

Under article 49 of the Law, the Superintendence may order fines of up to 20 per cent of the infringing party's gross sales for the previous year, as part of the final resolution of the case. There are no minimum penalties. The penalties imposed are administrative in nature.

b. Horizontal price fixing

Article 9 (I) of the Antimonopoly Law prohibits all horizontal and vertical agreements, concerted practices, collective recommendations and decision whose object is to fix prices and other marketing or service conditions directly or indirectly.

c. Horizontal agreements to allocate customers or territories

Although Article 9 (IV) of the Antimonopoly Law prohibits all horizontal and vertical agreements, concerted practices, collective recommendations and decision whose object is to divide markets, geographical areas, or industries or sources of supply among competitors.

d. Agreements not to compete

This is a very common provision in business combination agreements, as it will assure the acquirer that the seller will not compete against the surviving the entity, which it formerly managed and know. However, this kind of provision must be quite specific in its geographical scope and shall establish a reasonable timeframe. Otherwise, it might be deemed an unlawful restriction of fair competition and may be declared null.

e. Horizontal boycotts

Article 6 of our Antimonopoly Law prohibits boycotts, which are defined as inciting third parties to do any of the following:

(i) refuse to accept the delivery of goods or the provision of services;
(ii) prevent the acquisition or provisions thereof; or
(iii) refuse to sell raw materials or supplies or to render services to other.

f. Joint ventures and other competitive collaborations

Any type of joint venture is subject to control if the resulting entity exercises the functions of an independent business unit on a permanent basis. If the resulting entity has as its purpose the coordination of the competitive practices of participating companies, or those of a joint company, the regulations governing horizontal agreements may be applied. The Superintendence first analyses whether the transaction constitutes a concentrative or cooperative joint venture. If the joint venture is concentrative the mergers rules apply.

g. Trade associations

Article 9 of the Antimonopoly Law prohibits all horizontal and vertical agreements, concerted practices, collective recommendations and decision whose object is:

- to fix prices and other marketing or service conditions directly or indirectly.
- to restrict production, distribution and technological development.
- to divide markets, geographical areas, or industries or sources of supply among competitors;
- discriminate by applying different conditions for equivalent services to different customers, thus placing some competitors at a disadvantage in relation to others; and
- clauses whose object is to make the entering into of contracts subject to the acceptance of additional services which are not related to the subject matter of those contracts because of their nature or normal trading practices.

One could say that the authorities in Venezuela have been very likely to investigate such associations, considering that in some sectors the market tends to be highly concentrated.

h. Bid rigging

Bid rigging is per se a violation of the law. However, authorities could analyze practices, in order to determine whether or not there is a violation of the law.

i. Interlocking directorates

Although in Venezuela there is no rule which explicitly refers to interlocking directorates, the application of the general rules of competition could allow national authorities to recognize the risks and take measures to eliminate them. If being director of competitors to each other increases the risk of exchange of sensitive commercial information, which may result in collusive or coordinated behavior, the Superintendence could investigate the practice.

j. Facilitating practices

Based on the analysis of the rulings of the Superintendence on collusion behavior and facilitating practices, there are major difficulties to:

- distinguish collusive conduct, especially one kind of tacit, than it would be simply a rational behavior of the firm to adapt to the conditions of the market, and
- to distinguish the agreements that should be considered illegal per se from those which should be subject to the analysis of the rule of reason.

k. Information exchange

The exchange of information itself is not provided by our Antimonopoly Law as a prohibited conduct per se. However, if the exchange of information is carried out in order to perform the practices prohibited above, it can be subject to investigation and punishment. Information exchanges about future pricing policy (discounts, costs, trading or marketing conditions), are likely to be regarded as anticompetitive. It will always depend on the general context in which the exchange takes place and the nature of the information which was shared.

l. Leniency program

No, there is no leniency program under the Antimonopoly Law.

m. Settlements

Parties are free to agree any settlement in a dispute. The Superintendence may object to the agreement and can order the continuation of the process until its conclusion, especially if it considers that the market could be affected.

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