

Antitrust Enforcement Trends in Latin America

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With so much emphasis in Latin America lately on the enforcement of anti-corruption laws like the FCPA, companies should not lose sight of the fact that antitrust enforcement in countries like Brazil, Chile, Colombia, Mexico, and Peru is now well-established as well.

For example, since Brazil's current competition law entered into force in 2012, the enforcement body CADE has issued guilty verdicts in approximately 50 investigations of anticompetitive conduct. It has conducted "dawn raids" in 15 cases since 2010. Defendants in cartel cases have been fined, on average, 15% of their annual gross revenues. Those found to have abused their dominant positions in the market have been fined roughly 5%. A record fine of USD 1.2 billion, coupled with structural sanctions, was imposed in connection with a cartel case adjudicated in 2014.

Similarly, Chile, Colombia and Mexico have initiated, respectively, 3, 2 and approximately 70 cases through leniency agreements. Peru has reportedly received various applications for its antitrust leniency program over the past years, while it has focused on dawn raids to uncover cartels.

These enforcement frameworks are only expected to mature against collusion and dominant position abuses.

Background. Various Latin American countries adopted laws in the 1990s during the broader reform promoted by Bretton Woods organizations as part of the Washington Consensus to "stabilize, liberalize, and privatize." Laws addressed areas like merger control, conspiracy between competitors, and abuse of dominant positions. For years, though, the bulk of enforcement activity was dedicated to a review of competitively innocuous mergers.

The landscape began to change in the early 2000s. Taking the lead, Brazil's antitrust authorities shifted priority to the prosecution of cartels and made use of leniency agreements to encourage disclosure of violations and dawn raids to collect evidence. To facilitate this approach, the Brazilian Government developed new procedural rules and a new law was passed in 2011. It also took steps to reduce inefficiencies in the merger review system and freed up staff to take on other enforcement responsibilities.

Today in Brazil, administrative and criminal authorities work in parallel to prosecute anticompetitive conduct. CADE enforces the competition law against companies, trade associations and individuals at the administrative level while state and federal prosecutors are in charge of criminal prosecution against individuals. Together with the criminal courts, they

enforce the criminal statute. CADE's cooperation with public prosecutors is essential to providing assurances to the legal and business communities that leniency will effectively shield individuals from prison sentences and other criminal sanctions. It also gives CADE the ability to tap into the different investigative tools and resources available through the police and prosecutors, like the use of wiretaps. CADE and prosecutors frequently cooperate on investigations and have conducted joint dawn raids together in several cases. This has served as a model for other countries in the region.

Chile, Colombia, Mexico and Peru have also introduced legal and/or procedural changes during the past decade to focus on the prosecution of cartels. These authorities are embracing sophisticated detection strategies, and are applying severe sanctions and transparency methods to bolster deterrence.

All such jurisdictions have adopted leniency programs through which cartel participants (usually the first-in) are shielded from prosecution in exchange for confession and cooperation with an investigation. This has become the preferred tool with which antitrust authorities, in Latin America and around the world, investigate cartels.

These developments represent a "new norm" of antitrust enforcement in the region, making it essential for companies to recognize and avoid risks before they grow into violations.

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