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Session II: Competition and Intellectual Property in Latin America and the Caribbean

This paper provides an overview of the interplay between competition and intellectual property (IP) law in Latin America and the Caribbean. It begins by outlining the objectives and pillars of each policy area, along with the main competition law principles and approaches to IP rights. The analysis then focuses on key competition enforcement issues related to IP that have emerged in the region, including anti-competitive practices and merger control. It also examines IP-related competition advocacy and co-operation between competition authorities and IP agencies. The paper concludes that the application of competition law to IP rights remains relatively recent and limited to a few jurisdictions, highlighting the potential for broader engagement across the region.

Keywords: competition law; intellectual property rights; innovation; competition enforcement; competition advocacy; Latin America and the Caribbean

JEL codes: K21, L4, O34

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Executive Summary

Competition and intellectual property (IP) law rely on different tools to pursue similar goals, notably the promotion of innovation, economic growth, and consumer welfare. However, because IP rights grant protection by allowing their holders to exclude or limit others from certain uses, they can create or reinforce market power, potentially incentivising rights holders to restrict access and hinder follow-on innovation.

The OECD Competition Committee has worked extensively on the interaction between competition and IP law. In particular, the OECD Recommendation on Intellectual Property Rights and Competition [OECD/LEGAL/0495] (2023[1]) outlines key principles applicable in competition enforcement cases involving IP-related business practices and provides guidance on how to assess such cases, to guarantee the proper functioning of markets and adequate incentives to innovate.

Competition authorities worldwide have taken enforcement actions involving IP rights, including investigations into anti-competitive practices and merger reviews, seeking to mitigate the anti-competitive effects of IP-related conduct without undermining the objectives of IP protection. Competition authorities have also engaged in advocacy efforts to promote more pro-competitive IP policies and processes.

The main findings of the paper are as follows:

- In Latin America and the Caribbean (LAC), the application of competition law to address IP-related conduct is relatively recent and concentrated in a few jurisdictions.
- Antitrust enforcement in LAC has focused primarily on pharmaceutical patents, though other IP rights and sectors (e.g. copyrights in the audiovisual sector and patents in the information and communications technology industry) have also come under scrutiny.
- IP rights have played a central role in merger control across the region, both in competition assessments and in the design of remedies, especially with regard to trademarks.
- Advocacy efforts by LAC competition authorities, particularly in the pharmaceutical sector, have proven to be an effective starting point for competition authorities to engage with IP-related issues.
- Co-operation between competition authorities and IP agencies can promote more pro-competitive IP regulation, as well as facilitate competition enforcement against IP-related conduct.
- Co-operation between competition authorities is also crucial, given the cross-border nature of many IP rights and related business practices.

In conclusion, there remains significant scope for broader engagement on IP-related matters across the LAC region, despite the challenges posed by limited resources, other priorities, and the high level of specialised expertise required to assess such a complex and technical domain as IP law.

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1 Introduction

1. Intellectual Property rights create exclusive rights – often limited in duration – which protect investments in research and some creative ideas. Innovation and technological progress are key drivers of economic growth in the industrialised world. As IP rights protect so much knowledge-based capital, it is unsurprising that they have taken on an increasingly important and extensive role in economic activity – and in market competition as well. In this context, the interaction between competition and IP law has been growing in prominence as the economy digitalises and the importance of intangible assets in the overall economy increases.

2. Competition authorities worldwide have taken enforcement actions that affect IP rights, with the aim of minimising the anti-competitive effects of IP rights while respecting their existence and the societal goals they are meant to promote. Examples of such competition enforcement actions include but are not limited to: pay-for-delay agreements and anti-competitive settlements in patent litigation relating to prospective entry by generic suppliers in the pharmaceutical sector; the possibility of anti-competitive conduct in the context of standard-setting processes; and IP-related issues assessed in merger reviews. Competition authorities have also been involved in IP processes and policy, mainly through advocacy efforts to ensure that IP law is more pro-competitive.

3. While some competition authorities, such as those in the European Union and the United States, have been very active in IP-related issues, others have less experience and could further develop their work in this area. This is particularly the case in most jurisdictions in LAC, which suggests that it is timely to address the topic in the OECD-IDB Latin American and Caribbean Competition Forum (LACCF).

4. This note builds on and complements past OECD work on the topic and related issues, focusing on LAC jurisdictions. Indeed, over the years, the OECD has conducted extensive work on the relationship between competition and IP. In particular, in June 2023 the OECD Council adopted the OECD Recommendation on Intellectual Property Rights and Competition [OECD/LEGAL/0495], which consolidated and replaced two earlier Recommendations adopted in 1978 and 1989. The Recommendation sets out the key principles applicable in competition enforcement cases involving IP-related business practices and provides guidance on how to assess such cases, to ensure a correct functioning of markets and adequate incentives to innovate. Several sessions held by the OECD Competition Committee have also discussed the matter, including the Roundtables on Competition and Innovation: A Theoretical Perspective (2023[2]), The Role of Innovation in Competition Enforcement (2023[3]), and Licensing of IP rights and Competition Law (2019[4]) as well as the Hearing on Intellectual Property and Standard Setting (2014[5]). In addition, various discussions have taken place on institutional arrangements and co-operation with other government bodies, such as the Roundtable on Interactions between Competition Authorities and Sector Regulators (2022[6]).

5. This note is organised as follows:

- **Section 2** provides an overview of the interplay between competition and IP law, highlighting the objectives and pillars of each policy area, key competition law principles and approaches to IP law, as well as the institutional set-up in which this interaction takes place.

- **Section 3** presents relevant competition enforcement issues related to IP that have emerged in LAC jurisdictions, covering both anti-competitive practices and merger control.
- **Section 4** examines IP-related competition advocacy and co-operation between competition authorities and IP agencies across the LAC region.
- **Section 5** sets out the key findings and conclusions.

2 Interplay between competition and IP law

6. This section provides an overview of the interplay between competition and IP law, focusing on the objectives and pillars of each policy area, key competition law principles and approaches to IP law, as well as the institutional set-up in which this interaction takes place.

2.1. Pillars and objectives of competition and IP law

7. While its objectives remain the subject of intense debate, competition law is often seen as a means to ensure rivalry between competitors, to maintain and encourage the process of competition, promoting the efficient use of resources while protecting the freedom of economic action of market participants (OECD, 2003[7]). Competition law is applicable across markets and intends to ensure that companies can compete on their merits and the business conduct does not hinder the competitive process. Although there are various competition law standards, each featuring its own advantages and disadvantages, the consumer welfare standard still seems to be prevalent in most jurisdictions. This means that competition enforcement focuses on maximising consumer welfare, which includes factors such as price, quality and innovation (OECD, 2023[8]).

8. In this vein, competition law aims to prevent mergers that have a detrimental effect on competition, anti-competitive agreements and unilateral conduct by dominant firms, in order to fully realise the typical benefits of competition, such as lower prices, greater chose and higher quality (Dunne, 2015[9]).

9. Competition also contributes to substantial benefits at the macro-economic level, such as productivity, growth, innovation and employment (OECD, 2014[10]). Moreover, while there is no clear consensus on the relationship between competition and innovation, it has been recognised that when markets are constable (i.e. with low entry barriers) and the innovation is appropriable (i.e. successful innovators can capture, at least temporarily, the benefit from innovation), firms have an incentive to innovate (OECD, 2023[2]).

10. Intellectual property refers to the legal rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields (WIPO, 2004[11]). Most jurisdictions worldwide have laws to protect IP, granting their owner (i.e. inventors and creators) an exclusive right to exploit their inventions and creations, often during a certain period. IP rights are private rights to exclude third parties from certain unauthorised uses of a protected subject matter. IP rights are not absolute rights, being limited in scope and often in time and granted only to those who met certain minimum conditions, according to the different IP rights (WIPO, 2004[11]; Dreyfuss and Pila, 2018[12]).

11. The various types of subject matter protected by IP rights are characterised by their intangibility, and their informational, expressive or technological nature (Dreyfuss and Pila, 2018[12]). They can be broadly categorised into two groups: authorial property (copyrights) and industrial property (patents and utility models, design rights, trade secrets, trademarks and geographical indications), as explained in the box below.

Box 1. Main types of Intellectual Property Rights

Copyrights

Copyrights protect and reward literary, artistic and scientific works (including, in some jurisdictions, computer software and databases), whatever may be their mode or form of expression. Copyrights stimulate creativity by assuring individuals and businesses that the original, expressive material they create will not be reproduced, adapted, communicated to the public, displayed, distributed or performed without their permission, or otherwise used in a manner that violates their exclusive rights. Copyright laws allow authors to obtain compensation, profit from, and take credit for the material they create. Copyright law's protections typically last 50-70 years after the death of the creator, or shorter periods for works whose term is established by reference to the date of fixation or communication to the public.

Patents and utility models

Patents protect products or processes that provide new ways of doing something or that offer new technical solutions to problems. Patents stimulate innovation by ensuring inventors that qualifying inventions will not be legally used or sold without their permission for a certain period (usually 20 years). This enables inventors (potentially) to recoup their investments and to profit from them, e.g. by licensing them. To obtain a patent, one must disclose the technical knowledge behind the invention, thereby creating the potential for further follow-on technological developments. Utility models are similar to patents but typically provide protection for a shorter term (usually between 7 and 10 years) and cover innovation of an incremental nature that may not meet all the patentability requirements.

Design rights

Design rights protect new and/or original ornamental or aesthetic aspects of articles rather than their technical features. By providing protection against unlicensed imitations, design rights promote investments in proprietary designs that create value for both consumers and businesses. Registered designs are generally valid for up to 15 years, but they are renewable up to a maximum of 25 years in some jurisdictions.

Trade secrets

Trade secrets comprise confidential business and technical information and know-how with economic value that a firm makes reasonable efforts to keep secret. Trade secrets do not have a fixed duration and can potentially last indefinitely. By providing protection for valuable information and reducing the need for costly security measures, trade secret laws may encourage businesses to invest in the development of such information. Trade secret laws may also encourage businesses to engage in wider, though limited, dissemination of information than they otherwise would, e.g. by sharing sensitive information with business partners (subject to confidentiality agreements), thereby increasing the likelihood of knowledge spillovers.

Trademarks

They are distinctive words, symbols and brand names that help customers identify and purchase products or services that meet their needs and expectations, e.g. in terms of quality or price. By protecting such words and symbols, trademark laws encourage businesses to invest not only in developing brand names, but also in building strong reputations associated with those brands. Trademarks can usually be renewed indefinitely.

Geographical indications

Geographical indications are signs used on goods having specific geographical origins and possessing qualities or reputations that are essentially attributable to their place of origin. Geographical indications differ from other types of IP rights in that they are a collective right rather than a unique right held by a particular individual or business. Geographical indication protection can be renewed indefinitely.

The table below summarises the duration of IP rights in selected LAC jurisdictions.

Table 1. IP right protection in selected LAC jurisdictions

Type of IP right	Argentina	Brazil	Chile	Colombia	Costa Rica	Mexico	Peru
Copyrights	70 years	70 years	70 years	80 years	70 years	100 years	70 years
Patents	20 years	20 years	20 years	20 years	20 years	20 years	20 years
Utility models	10 years	15 years	10 years	10 years	10 years	15 years	10 years
Design rights	5 years, renewable twice (maximum 15 years)	10 years, renewable 3 times (maximum 25 years)	10 years	10 years	10 years	5 years, renewable 4 times (maximum 25 years)	10 years
Trade secrets	Indefinitely	Indefinitely	Indefinitely	Indefinitely	Indefinitely	Indefinitely	Indefinitely
Trademarks	10 years, renewable indefinitely	10 years, renewable indefinitely	10 years, renewable indefinitely	10 years, renewable indefinitely	10 years, renewable indefinitely	10 years, renewable indefinitely	10 years, renewable indefinitely
Geographical indications	Indefinitely	Indefinitely	Indefinitely	Indefinitely	Indefinitely	Indefinitely	Indefinitely

Source: OECD (2019[4]), Licensing of IP Rights and Competition Law, https://www.oecd.org/en/publications/licensing-of-ip-rights-and-competition-law_6a74221e-en.html; WIPO (2016[13]), Understanding Industrial Property, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_895_2016.pdf; Law No. 11.723/1933, Decree-Law No. 6.673/1963 and Law No. 24.481/1995 (Argentina); Law No. 9.279/1996 and Law No. 9.610/1998 (Brazil); Law No. 17336/1970 and Law No. 19039/2006 (Chile); Andean Community Decision No. 486/2000 and Law No. 23/1982 (Colombia); Law No. 6867/1993, Law No. 6683/1982, Law No. 7978/2000, and Law No. 7975/2000 (Costa Rica); Federal Law on the Protection of Industrial Property/2020 and Federal Law on Copyright/2020 (Mexico); Andean Community Decision No. 486/2000 and Legislative Decree No. 822/1996 (Peru).

12. According to the World Intellectual Property Organization (WIPO), IP is protected for two main reasons. First, to give statutory expression to the moral and economic rights of creators in their creations, while recognising the rights of the public in access those creations. Second, to promote, as a government policy, creativity and the dissemination and application of innovation, thereby contributing to economic and social development (WIPO, 2004[11]).

13. Indeed, IP law aims at promoting innovation and facilitating its efficient exploitation by offering a reward to inventors in the form of exclusive rights, often for a limited duration, blocking unauthorised users and therefore preventing free riders. The exercise of such exclusive rights provides returns above the competitive level for a sufficient period of time that innovators can recoup their research and development costs. From this perspective, particularly under a static analysis, IP law may appear to conflict with competition law, as IP rights grant an exclusivity – albeit limited – that protects innovators from some kind of competition by blocking entry and raising access costs (Hemphill, 2018[14]; OECD, 2019[4]).

14. However, as discussed below, IP owners do not automatically obtain market power, as there will often be sufficient actual or potential close substitutes to prevent the exercise of market power. Even if this is not the case, consumers would be better off even at monopoly prices, as absent the IP protection the innovation could not even have emerged. This implies that although an IP right may result in a suboptimal

use of an innovation in the short term, this is a trade-off aimed at securing greater dynamic efficiency in the long run by encouraging more research and innovation (Hovenkamp, 2013[15]; OECD, 2019[4]).

15. Nevertheless, consumer harm may result when IP law confers exclusionary powers that go beyond what is necessary to develop a new product or process, or when such rights are granted without yielding any meaningful innovation (Hovenkamp, 2013[15]). Embedding competition considerations within IP law and its application can prevent such outcomes, as will be discussed in section 4.

16. Furthermore, the effects of exercising exclusive rights derived from IP can be mitigated through licensing arrangements, which contribute to the dissemination and use of protected innovations and creations, thereby promoting competition in their distribution even while IP rights remain in force. Licensing agreements are also a means of fostering follow-on or cumulative innovation during the period of exclusivity of an IP right. In general, licensing will only occur when licensing revenues exceed the profits the IP holder could obtain by excluding competitors. Thus, the possibility of licensing an IP right creates an additional incentive to invest in innovation in the first place (Padilla, Ginsburg and Wong-Ervin, 2019[16]; OECD, 2019[4]).

17. In this context, it is widely understood that the conflict between competition and IP law is more apparent than real, as both policies share the common purpose of promoting innovation, economic growth and consumer welfare, albeit through different tools (OECD, 2021[17]; Competition Bureau Canada, 2023[18]; New Zealand Commerce Commission, 2023[19]; U.S. Department of Justice; Federal Trade Commission, 2017[20]).

18. Nonetheless, as will be discussed below, IP rights may confer or enhance market power to such an extent that their holders may have incentives to constrain access to and/or retard further innovations, possibly with little economic benefit to society as a whole. In this vein, competition law is a valuable tool to ensure that IP rights do not inhibit the competitive process (Schmidt, 2025, p. 5[21]).

2.2. Competition law principles and approaches to IP rights

19. Approaches to the relationship between competition and IP law have evolved over time. In the past, IP-related practices were often considered beyond the scope of competition law, as the objective of IP rights was thought to be the provision of a temporary monopoly. In this regard, early cases[1] established an immunity for IP-related conducts, which allowed companies to circumvent competition law, for instance through cross-licensing agreements among competitors to fix prices (OECD, 2019[4]).

20. Nevertheless, competition authorities and courts have progressively moved ahead to limit the scope of the IP immunity doctrine, recognising that competition law can be enforced even when IP rights are at stake, particularly when IP holders exceed the boundaries inherent in their rights. Initially, a more formalistic approach emerged, with certain IP-related practices, such as vertical patent licensing, being treated as per se competition infringements.[2] However, in recent decades, jurisdictions have started acknowledging the potential pro-competitive effects of IP-related practices and now require an effects-based analysis, applying the rule of reason, before concluding that a behaviour is anti-competitive (OECD, 2019[4]).

21. Currently, it is widely accepted that IP rights do not relieve the holder from compliance with competition law when seeking or exercising these rights, as recognised by the OECD Recommendation on Intellectual Property Rights and Competition [OECD/LEGAL/0495]. The Recommendation also calls for effective enforcement of competition law against anti-competitive IP-related business practices, outlining key principles regarding the application of competition law to IP rights:

- ***The scope of IP rights can be different from that of the relevant market***: products enjoying different IP right protection or even products not benefitting from IP right protection can compete

in the same relevant market. Although IP rights create boundaries within which owners can exclude others, these do not automatically define completely distinct markets (Schmidt, 2025[21]). In fact, there will often be sufficient actual or potential close substitutes for the IP right-protected product and therefore the relevant market is generally larger than the specific IP right. Thus, a single firm's IP right typically does not constitute a relevant market on its own.

- ***Holding an IP right does not automatically equate to holding market power***: IP rights confer only a legal monopoly to prevent others from duplicating the specific product covered by the right, but this does not extend to other actual or potential close substitutes that may constrain the exercise of market power. Indeed, the power of IP rights is "boundary exclusion", but only seldom "market exclusion". Additionally, while IP rights allow their holder to capture the value of an existing asset, if the protected subject has low or no value, the IP right itself will not create any substantial value (Hovenkamp, 2012[22]). Therefore, IP rights are often too narrow to grant significant market power on their own, although they are one of several factors considered when determining the scope of a firm's market power, assessed on a case-by-case basis.
- ***IP-related business conduct should be subject to a competition effects-based analysis***: IP-related practices should be assessed under the rule of reason.[3] This means that IP-related practices, even when carried out by IP holders with market power, are regarded neither inherently anti-competitive nor automatically compliant with competition law, requiring instead a contextual evaluation of their effects (Anderson et al., 2018[23]). In other words, competition authorities and courts must prove that the business behaviour involving IP rights harmed competition and that such a harm was not outweighed by countervailing competitive benefits, including innovation incentives.

22. In this context, many jurisdictions worldwide, including in LAC, have enforced competition law to IP-related practices, as will be further discussed in section 3. In some cases, such as in Canada (Competition Bureau Canada, 2023[18]), the European Union (European Commission, 2014[24]), Japan (Japan Fair Trade Commission, 2016[25]), New Zealand (New Zealand Commerce Commission, 2023[19]), and the Unites States (U.S. Department of Justice; Federal Trade Commission, 2017[20]), competition authorities have developed and published guidelines on the main principles governing competition enforcement against IP-related practices. This is in line with the OECD Recommendation on Intellectual Property Rights and Competition and aims at enhancing transparency, predictability and legal certainty for effective competition enforcement. Guidelines are a relevant competition advocacy tool, helping business assess the legality of their IP-related conduct and therefore facilitating compliance with competition law. However, to date, LAC competition authorities have not issued such guidelines.

Box 2. The United States guidelines on competition enforcement in IP-related cases

The US Department of Justice and the Federal Trade Commission have issued joint guidelines to set up a framework to understand the interaction between antitrust and IP-related business practices, particularly regarding the licensing of IP rights. While the guidelines do not eliminate discretion for enforcement bodies, they provide a useful resource for both authorities and stakeholders, offering reasonable flexibility in their application.

The guidelines underline the complementarity of IP and antitrust laws, highlighting the common purpose of promoting innovation and enhancing consumer welfare. Nevertheless, while IP licensing agreements generally fulfil these aims, in certain cases they may harm competition among market participants.

Three overarching principles guide the analysis of potential anti-competitive effects arising from the licensing of IP right: (i) there is no distinction between conducts involving IP rights and other forms of property; (ii) the mere ownership of IP rights does not create a presumption of market power; and (iii)

IP licensing is generally considered pro-competitive, as it allows the combination of complementary factors of production.

The rule of reason typically applies to evaluate IP related restraints, requiring the agencies to inquire into the likely competitive effects of the conduct. However, in certain circumstances, the nature and necessary effects of a restraint are so clearly anti-competitive that the per se rule applies (e.g. naked price fixing, output restraints, market division among competitors, and certain group boycotts).

Additionally, the competition agencies have set up a "safety zone", which establishes a presumption that certain IP licensing arrangements meeting specified criteria will not be challenged. In particular, unless extraordinary circumstances are present, the agencies will not challenge a restraint in an IP licensing arrangement if the restraint does not appear anti-competitive and if, together, the licensor and its licensees hold no more than 20% of each relevant market significantly impacted by the restraint. This safe harbour is designed to promote certainty for businesses involved in licensing transactions, while not constituting a presumption of unlawfulness for agreements that fall outside its scope.

Finally, the Guidelines provide hypothetical scenarios illustrating the likely competitive assessment by the agencies when the interplay of IP rights and competition concerns is at stake.

Source: U.S. Department of Justice; Federal Trade Commission (2017[20]), Antitrust Guidelines for the Licensing of Intellectual Property, https://www.justice.gov/atr/IPguidelines/dl

2.3. Institutional set-ups of competition and IP authorities in LAC

23. In most jurisdictions worldwide, the enforcement of competition and IP law is entrusted to separate institutions, i.e. competition authorities and IP agencies, respectively. Under this commonly adopted framework, effective co-operation between these two entities is often necessary (as further discussed in section 4), though it can prove challenging in practice.

24. While this institutional set-up is also prevalent across most regimes in LAC, there are a few jurisdictions in the region where a single agency is responsible for enforcing both competition and IP law. Notably, this is the case in Colombia and Peru, where the same body (i.e. Superintendence of Industry and Commerce/SIC and Institute for the Defence of Competition and Intellectual Property/Indecopi, respectively) is both the competition authority and the IP agency.

25. Several discussions at the OECD Competition Committee have addressed the topic of multi-function authorities – that is, entities entrusted with multiple roles beyond competition, for instance consumer protection, sectoral regulation, public procurement control and/or IP. These debates have highlighted that integrating such functions within a single agency can present both challenges and opportunities (OECD, 2016[26]; 2022[6]).

26. While in most cases, establishing multi-function authorities aim at fostering coherence and co-ordination between competition and the different policy domains, in practice the institutional design does not automatically ensure effective collaboration and policy coherence. For instance, in Colombia and Peru, the authority's dual role as both competition and IP agency does not represent a significant departure from co-operation practices observed in other institutional set-ups across the region. In practice, the two areas are managed by separate units that largely operate in isolation, with co-operation between the competition and IP mandates remaining mostly informal and infrequent.

27. Other institutional arrangements also exist in LAC. In particular, in the Dominican Republic, the IP agency (INAPI) is the institution in charge of enforcing competition provisions, including concerning collusive practices and abuse of dominance, if they relate to IP rights, regardless of the sector in which the

practices occur. The competition authority (Pro-Competencia) does not have the powers to apply the competition act in these cases. Nevertheless, as there are specific competition law provisions governing IP-related practices which are not necessarily convergent with the general competition law framework, this may result in inconsistent competition enforcement, legal uncertainty and duplication of resources (OECD/IDB, 2024[27]).

28. In summary, there is no “one-size fits all” solution to the institutional design of competition and IP authorities. While each jurisdiction’s choice is shaped by its specific economic, social and legal context, it is important to weigh the advantages and disadvantages of each institutional model in light of these local circumstances, in order to determine the most effective way of promoting fairness and efficiency (OECD, 2016[26]).

3 Key competition and IP enforcement issues in LAC

29. As mentioned in the background information of the OECD Recommendation on Intellectual Property Rights and Competition, relevant competition enforcement actions have been pursued across the world against a broad range of practices involving IP rights. Without aiming to be exhaustive, this section focuses on a few competition issues that appear to be particularly relevant for LAC jurisdictions, based on observed enforcement efforts in the region.

3.1. Anti-competitive practices

3.1.1 IP licensing agreements

30. As mentioned in section 2, IP licensing agreements are a fundamental tool for diffusing innovation, promoting competition for its distribution, as well as stimulating follow-on innovation, even during an IP right's period of exclusivity. Most IP licensing agreements are vertical contracts between a firm operating in an upstream technology market (the licensor) and a firm operating in a downstream market (the licensee), enabling the integration of licensed property with complementary factors of production and resulting in a more efficient exploitation of IP, benefiting consumers through lower costs and new products. In this context, IP licensing agreements are generally regarded as pro-competitive (OECD, 2019, p. 14[4]). This is particularly relevant for developing countries, which tend to have lower levels of innovation and are therefore more reliant on access to foreign technology, typically through licensing agreements (Drago, 2015[28]).

31. Nevertheless, IP licensing arrangements can give rise to competition concerns. Globally, there are common areas of convergence on the treatment of IP licensing practices by competition law. These issues were further discussed at the Roundtable on Licensing IP Rights and Competition Law, held by the Competition Committee in 2019 (OECD, 2019[4]; 2019[29]), with the main conclusions summarised below.

32. Licensing agreements between actual or potential competitors that includes clauses setting prices (e.g. fixed prices or price lists with certain allowed maximum rebates) or restricting output (e.g. limitations on how much a party may produce or sell) amount to cartelisation and are considered per se/by object infringements. However, when such agreements do not involve competitors or do not comprise hard-core restrictions, potential restraints may be ancillary to pro-competitive agreements, being typically assessed under the rule of reason (OECD, 2019[4]).

33. Field-of-use, territorial or customer exclusivity raise competition concerns mainly if there is a horizontal relationship among licensors, among licensees, or between the licensor and its licensee(s). At the same time, it is widely accepted that such restraints may serve pro-competitive ends. Thus, a finding of whether such clauses infringe competition law must follow the rule of reason analysis (OECD, 2019[4]).

34. Exclusivity arrangements are also subject to an effects-based analysis. The likelihood that exclusive dealing may have anti-competitive effects relates, inter alia, to the degree of foreclosure created

by the exclusive dealing clause in the relevant market, the duration of the exclusive dealing arrangement, and other characteristics of input and output markets – such as concentration, barriers to entry, and the responsiveness of supply and demand to changes in price in the relevant markets (OECD, 2019[4]).

35. Grant-back clauses make it less risky for a firm to license its technology by ensuring that it will be able to use or appropriate any improvements developed by the licensee. However, exclusive grant-back clauses can reduce the incentives to a licensee to develop a competing technology, while also maintaining or increasing the market power of the licensor – leading some jurisdictions to look at them suspiciously. Non-exclusive grant-back clauses are unlikely to result in harm to innovation or the competitive process (OECD, 2019[4]).

36. No-challenge clauses impose direct or indirect obligations not to challenge the validity of the licensor's IP right. Such clauses may be anti-competitive when they are adopted for the sake of ensuring the continued existence of invalid IP rights. The anti-competitive effects of no-challenge clauses are likely to be greatest in the context of non-exclusive licensing arrangements, where they may have the effect of stifling innovation and restricting the diffusion of technologies not protected by IP rights. Non-challenge clauses and termination clauses with similar effects are less likely to be anti-competitive in the context of exclusive licensing agreements (OECD, 2019[4]).

37. Patent pools (i.e. a combination of patents from multiple IP rights' holders that are then licensed to third parties) and cross-licences (i.e. where two or more parties grant each other the rights to use their respective IP) are also common licensing practices. These arrangements may benefit both IP owners and consumers, provided they are limited to complementary and/or blocking patents – i.e. situations where each of two or more patents cannot be effectively practiced without infringing the other(s). When patents are substitutes, however, there are increased risks of anti-competitive outcomes, such as collusive arrangements, reducing competition in horizontal technology markets foreclosing competing technologies, and reducing incentives to innovate (OECD, 2019[4]).

38. One particular area where competition authorities have looked closely is the licensing of standard essential patents (SEPs). Standards are a common set of characteristics for a good or service, facilitating the adoption of a technology, achieving economies of scale and improving firms' incentives to innovate and invest. Standards enable products to interoperate, making networks (such as the internet) more valuable to users and firms. Standards often rely on proprietary technology protected by patents. In this context, SEPs are patents that are declared by standard-setting organisations as necessary to the implementation of a standard. SEPs raise a tension, as patents protect the owner's exclusionary right to exploit an innovation, while standards are intended for widespread use in the market (OECD, 2014[5]).

39. On the one hand, SEPs can promote competition by ensuring that patented technologies are widely accessible to third parties, thereby supporting interoperability and encouraging further innovation. On the other hand, they may pose competition risks. The most common competition concern regards the potential for "hold-up" by a SEP owner, excluding other firms from using its patented technology and therefore from implementing a given standard.[4] This could occur, for example, by refusing to licence, by refusing to license on reasonable terms or by seeking an injunction forcing implementers to stop using SEPs until a licence has been negotiated. Given these risks, standard-setting organisations often require participants to disclose and license their SEPs free of charge or on fair, reasonable and non-discriminatory (FRAND) terms. However, there is often ambiguity over what constitutes FRAND terms, which usually leads to disputes between SEP holders and standard implementers (OECD, 2019[4]; 2014[5]).

40. There is no consensus on what role should competition law play in such disputes. Some jurisdictions have considered that injunctions regarding SEP licensing can amount to competition harm, although only in exceptional circumstances. In those cases, the competition assessment has focused on the behaviour of the negotiating parties, establishing that the recourse to injunctions may be anti-competitive where a prospective licensee is willing to negotiate a licence on FRAND terms and to pay royalties that have been determined to be FRAND by a neutral party. Nonetheless, other jurisdictions have

been more reluctant to intervene under competition law in SEP licensing matters, considering that the potential concerns extend beyond competition and would be more appropriately addressed through IP or contract law (OECD, 2019[4]; 2015[30]).

41. While discussions on the licensing of SEPs are still incipient in LAC, CADE has recently examined a landmark case on the topic (see box below). The Brazilian experience underscores the growing importance of this issue and may be informative for other LAC jurisdictions, which could also face similar challenges in the future.

Box 3. Competition approach to SEP licensing in Brazil: Motorola and Lenovo v. Ericsson

In May 2024, Motorola and Lenovo filed a complaint with CADE against Ericsson for abuse of dominance in the 5G network market, requesting the imposition of interim measures. The complainants alleged that Ericsson had refused to license its 5G SEPs in Brazil independently, instead requiring the signature of a global licensing agreement under unfair and discriminatory conditions, which would effectively exclude them from the Brazilian smartphone market.

In December 2024, CADE's investigative arm (the General Superintendence) rejected the request for interim measures. The complainants appealed the decision to CADE's Tribunal. However, the parties ultimately signed a global licensing agreement, leading to the withdrawal of the appeal.

In April 2025, CADE's Tribunal examined the case and ordered the General Superintendence to open a formal investigation. It found preliminary evidence of price discrimination and the imposition of potentially abusive contractual conditions that could exclude competitors from the 5G network market. The Tribunal noted that the private settlement between the parties did not preclude CADE from proceeding with the investigation, given the broader public interest at stake, particularly in the context of SEPs and interoperability standards, in order to ensure that licensing practices do not impede market entry or hinder innovation.

The Tribunal concluded that SEP holders' licensing strategies may constitute a competition infringement, especially when the patents in question cover essential technologies like 5G and are held by firms with a dominant position. This decision marks a shift in CADE's approach, as previous cases involving SEPs treated licensing disputes as private matters that did not raise competition concerns.

Source: CADE (2025[31]), CADE investigates Ericsson for antitrust violations, https://www.gov.br/cade/en/matters/news/cade-investigates-ericsson-for-antitrust-violations; CADE's Administrative Proceeding No. 08700.010219/2024-17, reasoning of the Commissioner-Rapporteur Mr. Gustavo Augusto Freitas de Lima of 29 April 2025.

3.1.2 Copyright collecting societies

42. Copyright collecting societies[5] are typically private, not-for-profit entities with the function of licensing and managing copyrighted works (such as music, literary, audio-visual and graphic works) on behalf of their owners and holders, collecting and distributing royalties. Such societies, however, do not commercially exploit the copyrighted works, but rather license them to others, such as publishers or broadcasters (Gervais, 2019[32]; Yaghi, 2024[33]).

43. The economic rationale for collecting societies lies in the fact that exercising copyrights on an individual basis may be impossible, if not very costly and therefore highly impractical. For instance, it is not feasible for an author, performer, or producer to negotiate licenses and payment with every individual radio station that plays their music. Likewise, a radio station cannot be expected to obtain permission from each rights holder for every song it broadcasts. Thus, owners of copyrights authorise collecting societies to

exercise their rights on their behalf, in particular to grant licences, to monitor uses, and to collect and distribute the corresponding remuneration (WIPO, 2004[11]; WIPO, 2025[34]).

44. On the one hand, collecting societies may achieve relevant economies of scale and scope in managing, licensing and enforcing copyrights, thereby reducing transaction costs and improving efficiency. On the other hand, they have raised competition concerns in several jurisdictions. The main concern identified by competition authorities relates to the exploitation of copyright owners and users. This is because collecting societies often function as essential intermediaries for accessing copyrights (New Zealand Commerce Commission, 2023[19]), giving them significant market power (and sometimes *de facto* or even *de jure* monopoly position) that can allow them to impose licensing terms and conditions in ways that may distort competition. For example, this may be the case when collecting societies require copyright owners to assign all their rights as an exclusive bundle covering all uses (e.g. public performance, mechanic reproduction, TV and radio broadcasting, internet); prohibit individual negotiations between copyright owners and third parties; or apply unfair, non-transparent charges that discriminate among different categories of rights holders or users.

45. Another related concern is the potential foreclosure of competition by preventing the emergence of alternative licensing models, such as competing collecting societies or independent rights management platforms. For instance, individual copyright holders may be prohibited from licensing their rights on their own or from using other collecting societies or licensing arrangements.

46. This is particularly relevant in the context of the digital economy, which has provided copyright holders with new ways to manage and negotiate their rights. Indeed, the emergence of digital platforms and social networks, on-demand access services and search engines has substantially changed the commercialisation of cultural content, reducing production and distribution costs for artists and easing consumer access. While artists previously depended on agreements with large studios and production companies, today independent production and distribution are more accessible. Digital tools such as blockchain, non-fungible tokens (NFTs) and smart contracts have further reduced costs of tracking and process automation, and introduced new monetisation models, enabling artists to more easily manage rights and negotiate directly. As a result, the efficiencies traditionally associated with copyright collective management (e.g. reduction of high transaction costs and information asymmetry) may be less prominent in this new context. Nevertheless, this evolution may also incentivise incumbent copyright collecting societies to extend their market power into the digital space, potentially hindering the development of alternative licensing models and new market entrants (Cabello, Rivero and Viecens, 2022[35]).

47. Several competition authorities, such as in Argentina[6] and Colombia, have investigated and sanctioned collecting societies for abusing their dominant position.[7] The box below illustrates the Colombian experience.

Box 4. SAYCO cases in Colombia

SIC investigated *Sociedad de Autores y Compositores de Colombia* (SAYCO) for abusing its dominant position in the market for copyright management. SAYCO, the only authorised collective management organisation for copyrights in Colombia, was accused of restricting competition by obstructing independent management of copyrights and tying the administration of certain rights to the acceptance of broader mandates.

The investigation revealed that SAYCO required copyright holders to assign all public communication rights to its management, preventing them from selectively managing certain rights independently. Moreover, it allegedly imposed contractual terms that made individual management impractical and hindered the entry of alternative rights management organisations. SIC also found that SAYCO's

agreements forced users to acquire comprehensive copyright packages, even when they only required specific rights, thereby limiting consumer choice and increasing costs.

In November 2016, SIC found SAYCO guilty of anti-competitive conduct and ordered it to modify its contractual practices to allow copyright holders to manage their rights individually, if they chose to, and to eliminate the obligation to assign all rights collectively. Additionally, SIC imposed a fine totalling USD 1.02 million on SAYCO and one of its former executives for facilitating these restrictive practices.

In 2022, SIC opened a new investigation against SAYCO for similar practices, focusing on persistent barriers to individual rights management. According to SIC, SAYCO only apparently complied with the 2016 order, employing a series of practices and tools that ultimately made access to alternatives to collective management overly burdensome.

Although the statement of objections echoes the previous case, the new investigation has a broader scope, encompassing digital and multi-sided market dynamics and recognising the emergence of innovative business models for individual management. It highlights how SAYCO allegedly continued to obstruct individual licensing by using rigid, pre-designed contracts that left no room for flexible management. Moreover, SIC flagged misuse of information that allegedly helped SAYCO strengthen its position in the market segment in which it participates.

Source: SIC, Resolución No. 76278, of 3 November 2016, https://www.sic.gov.co/sites/default/files/estados/RESOLUCION_76278_SAYCO.pdf; SIC, Resolución No. 1079, of 19 January 2022, https://www.sic.gov.co/sites/default/files/boletin-juridico/Resolucion.pdf

48. Furthermore, although collecting societies are often also entrusted with setting license fees and other licensing conditions – typically justified on the grounds of efficiency – such practices could also be regarded as a collusive behaviour, particularly when they involve standardising prices. In fact, by establishing uniform prices on behalf of competing rights holders, collecting societies may effectively engage in horizontal price-fixing. This can undermine competition among copyright holders and restrict the free negotiation of prices and other key licensing terms, which should ideally be shaped by market dynamics. This concern has been particularly relevant in Brazil, as illustrated in the box below.

Box 5. Copyright collecting societies in Brazil

In 2013, CADE sanctioned the Central Office of Collection and Distribution (ECAD) and six associations representing copyright holders for engaging in cartel conduct. Although ECAD is legally responsible for overseeing the collection and distribution of copyrights in Brazil, the legislation does not grant it the authority to set copyright fees or to impose standardised rates through fixed price lists. In fact, the associations, which represent copyright holders, should negotiate license fees independently from ECAD and from competing associations. CADE concluded that ECAD and the associations had jointly set fees for the public performance of musical works, literary musical works and phonograms, resulting in anti-competitive effects. According to CADE, market-based price negotiations would better reflect users' needs and enhance economic efficiency.

CADE also found that ECAD's internal regulations imposed disproportionate and unfair conditions for the affiliation of new associations, such as minimum percentages of members and IP rights ownership, amounting to an abuse of dominance. CADE highlighted that these barriers hindered the establishment and operation of competing associations representing copyright holders.

CADE imposed fines totalling around USD 19 million and required reforms to ECAD's governance structure to incorporate stronger competition principles in the collective management of copyrights in Brazil.

In February 2025, CADE opened a new investigation against the collective management organisation Ubem for similar anti-competitive behaviour. Ubem is allegedly engaging in collective negotiations and enforcing uniform price charts in the market for musical synchronisation in audiovisual projects. CADE imposed an interim measure prohibiting Ubem from collectively negotiating licensing prices and contractual terms on behalf of its main affiliated members, and from using or imposing standardised price charts.

Source: CADE (2013[36]), The Central Office of Collection and Distribution and Copyrights associations are condemned for Cartel formation, https://www.gov.br/cade/en/matters/news/the-central-office-of-collection-and-distribution-and-copyrights-associations-are-condemned-for-cartel-formation; CADE (2025[37]), CADE launches administrative proceeding to impose interim measure in music licensing market, https://www.gov.br/cade/en/matters/news/cade-launches-administrative-proceeding-to-impose-interim-measure-in-music-licensing-market

3.1.3 Misuse of IP regulatory system

49. Competition concerns may also be raised when IP holders exploit the IP regulatory system to prevent or hinder new entry. Indeed, firms may subvert the intended function of the IP framework, turning it into a tool for distorting competition – a practice often referred to as regulatory gaming (Dogan and Lemley, 2009[38]).

50. In particular, this is the case of so-called evergreening, where IP holders use various strategies to extend expiring IP rights in order to maintain their exclusivity powers over products subject to IP protection. If the IP owners hold market power, such conduct may amount to an abuse of dominance, allowing them to preserve their market position and block or delay the entry of potential competitors.

51. Common evergreening strategies include practices by dominant pharmaceutical companies aimed at delaying or preventing the entry of generic products into the market, thereby avoiding competition with their branded drugs. For example, patent holders with market power may extend their market exclusivity by obtaining subsequent patents for minor modifications to existing medications, typically without relevant therapeutic improvements (e.g. changes in the colour or shape of a tablet, or the introduction of a capsule form when only a tablet version was previously available), just before the expiration of the original patent. Additionally, pharmaceutical companies may launch follow-on or second-generation medicines, while discontinuing the first-generation medicines or adopting advertising tactics to push patients and prescribing physicians onto the new version, making it very difficult or impossible the commercialisation of generic medicines (Lawrance and Hunt, 2017[39]; Feldman and Lemley, 2022[40]). It should be noted that these practices may also be associated with the use of misleading information to IP agencies, in order to support the obtention or extension of their exclusive rights.

52. The introduction of new products or incremental innovation is not in itself anti-competitive, nor is it prohibited by IP law. Indeed, applying for patents is a lawful right, and the development of new or improved products can bring significant benefits to consumers. In addition, it may be legitimate business behaviour to employ strategies aimed at limiting the impact of generic competition. Nevertheless, such practices cannot be acceptable when they depart from competition standards, for instance if their sole objective is to prevent consumers from accessing alternatives, such as a generic version of a branded drug. Thus, it is not the introduction of a new product that renders the conduct anti-competitive, but rather the strategic exploitation of the IP regulatory framework with an anti-competitive objective (Lawrance and Hunt, 2017[39]; Leurquin, 2021[41]). The fact that such practice is associated with the provision of misleading information to IP agencies reinforces its anti-competitive nature, although this behaviour may also constitute a distinct but related competition infringement.

53. Competition authorities have remained vigilant against anti-competitive behaviour involving the misuse of the IP regulatory system. In some jurisdictions, such as the European Union and the United States, competition law has already been enforced to tackle such practices. For instance, in a landmark case, the European Court of Justice has confirmed a decision issued by the European Commission that found that a patent holder had abused its dominant position to exclude from the market competing manufacturers of generic products by making use of regulatory procedures to delay the authorisation of competing generic products and by using misleading statements to extend its exclusivity of patented medicines.[8]

54. Although still relatively uncommon in the LAC region, Chile has been at the forefront by investigating and settling a case involving anti-competitive patent strategies, as described in the box below.

Box 6. Anti-competitive manipulation of the IP system: the GD Searle case in Chile

In June 2016, the Chilean National Economic Prosecutor's Office (FNE) initiated legal action against G.D. Searle LLC, a subsidiary of Pfizer, alleging that the company engaged in anti-competitive practices to delay the entry of generic competitors into the market for Celecoxib-based pharmaceuticals. FNE argued that Searle strategically manipulated the patent system to prolong its exclusivity over Celecoxib, initially benefiting from a first patent and subsequently obtaining a second patent that further extended its market power. The authority claimed that Searle employed delaying tactics, failed to disclose key information to Chile's patent office, and used legal threats to discourage generic competition. The company sent warning letters to competitors, filed an unfair competition lawsuit against Synthon Chile Ltda., and secured exclusive agreements with a major pharmacy chain to block rival products. According to FNE, these conducts significantly hindered competition, leading to a limited reduction in drug prices – between 6% to 13% – compared to the typical sharper declines observed following the entry of generics.

Searle initially defended its actions, arguing that its secondary patent had been legitimately obtained and that its business strategies were commercially justified. However, after negotiations, the parties reached a settlement approved by the Competition Tribunal (TDLC) in November 2016. Under the agreement, Searle committed to granting a free, non-exclusive, irrevocable, and sublicensable license to any competitor seeking to manufacture or sell Celecoxib-based products in Chile. Additionally, Searle agreed to withdraw its lawsuit against Synthon Chile Ltda.; terminate its exclusive contract with Laboratorios Saval S.A., which authorised the marketing of Celecoxib-based products in exchange for a royalty; cease promotional activities for its secondary brands for two years; and publicly disclose the settlement terms. The TDLC approved the agreement, emphasising that it would foster competition by enabling other laboratories to enter the market without facing legal uncertainty.

Source: TDLC approving the settlement between FNE and G.D. Searle LLC (Case 310-16), 10 November 2016.

55. However, the assessment of such practices is not straightforward. It requires competition authorities and courts to understand the complexities of the IP system and determine whether the patent framework has been instrumentalised to produce anti-competitive outcomes, balancing harm to competition and pro-competitive benefits. In this connection, addressing these concerns may be more effective through IP law, by ensuring innovation is legitimately protected without unduly extending exclusive rights beyond what is necessary. Co-operation between competition authorities and IP agencies is therefore crucial to prevent anti-competitive practices stemming from the misuse of the IP regulatory system, both in the enforcement of competition law and in the design of more pro-competitive IP regulations, as discussed in section 4.

3.1.4 Sham litigation

56. As a general principle encompassed by the rights of petition and access to justice, anyone can petition governmental or judicial authorities to defend their rights. Such conflicts typically result from genuine disputes between parties, for instance regarding the interpretation or application of the law. Accordingly, the use of litigation processes (whether judicial or administrative) is typically not subject to competition law scrutiny. Nevertheless, litigation processes can be used for purposes other than those for which they were originally intended. In particular, dominant firms may abusively use litigation processes to maintain or extend their market power and hinder competition, leading to higher prices, restricted output, and reduced innovation. While such practices arise from private disputes between competitors, their effects extend beyond the litigants, impacting competition more broadly, including suppliers, distributors, purchasers, and consumers. This unorthodox use of litigation solely to impose costs on competitors can constitute an anti-competitive behaviour, referred to as sham or vexatious litigation (Lianos and Regibeau, 2017[42]; Hovenkamp, 2005[43]).

57. However, distinguishing between legitimate and abusive use of litigation processes is not straightforward. There are two main approaches to define the boundaries of sham litigation. A narrower approach characterises sham litigation as a series of unfounded legal actions or a single baseless claim, i.e. situations in which the litigant is not motivated by succeeding on the legal merits. Under this view, a lack of reasonable basis for the lawsuit arises in cases of misrepresentations of facts or law to tribunals, perjury, fraud or bribery, but also when the litigation actions are objectively baseless or lack probable cause (i.e. no reasonable litigant could realistically expect success on the merits). By contrast, a broader approach focuses on the underlying economic purpose of the litigation. It seeks to assess whether the plaintiff's primary goal is to use the legal process as a tool to supress competition (Lianos and Regibeau, 2017[42]).

58. Competition authorities have developed specific legal tests to assess sham litigation cases, often mixing both approaches mentioned above. For instance, the United States adopts a two-part test, combining both an objective and a subjective approach. First, the lawsuit must be objectively baseless. Only if the first condition is met a court may assess the litigant's subjective motivation in order to determine "whether the baseless lawsuit conceals an attempt to interfere directly with a competitor's business relationships, through the use of the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon".[9] Similarly, in the European Union, two cumulative conditions are required to identify a sham litigation behaviour: (i) the undertaking in a dominant position brings a lawsuit "which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party" and (ii) the lawsuit "is conceived in the framework of a plan whose goal is to eliminate competition".[10]

59. Although sham litigation can arise in various contexts, most cases involve IP disputes. Indeed, such cases often refer to patent and copyright litigation (e.g. attempts to block the entry of potential competitors), where meritless rights are deliberately used in legal proceedings for strategic purposes aimed at suppressing competition (Lianos and Regibeau, 2017[42]). Several factors help explain this, including the relevance of IP rights in key sectors of the economy – such as the pharmaceutical and information and communications technology (ICT) industries; the presumption of validity typically granted to IP rights, which allows rights holders to exclude third parties from using their inventions and creations; and the complexity of IP law, which often demands a high level of expertise to properly assess such cases.

60. LAC jurisdictions generally treat sham litigation as a potential form of abuse of dominance,[11] although there are relatively few precedents. For instance, the Andean Community has addressed the matter by providing an analytical framework that outlines the criteria to be assessed in determining the existence of an anti-competitive infringement through sham litigation.[12] The box below describes some IP-related sham litigation cases in Brazil, where the topic has been frequently discussed, and a jurisprudence has developed, largely influenced by the US approach.

Box 7. Sham litigation cases involving IP rights in Brazil

Shop Tour

In 2010, CADE imposed a fine of over BRL 1.7 million on Box 3 Vídeo e Publicidade for abusing its IP rights through sham litigation aimed at excluding competitors. The companies, which operated a televised tourism sales platform (Shop Tour), filed a series of lawsuits against a rival for alleged copyright infringement. CADE found that the lawsuits were objectively baseless and formed part of a broader strategy to eliminate a competitor from the market. Applying the bad-faith standard from civil procedural law, CADE concluded that the lawsuits were not intended to succeed on the merits but rather to harm a rival through the legal process itself.

Eli Lilly

In 2015, CADE fined Eli Lilly BRL 36.6 million for abusing the judicial system to improperly extend its monopoly on the cancer drug Gemzar (gemcitabine hydrocholoride). The company filed contradictory and misleading lawsuits seeking to delay or expand its patent protection beyond the originally claimed production process. Eli Lilly also omitted essential information about the patent's expanded scope and related administrative proceedings before the Brazilian IP agency (INPI), thereby misleading the courts. These tactics resulted in an injunction that blocked generic competitors from entering the market between July 2007 and March 2008, leading to significantly higher prices.

Ediouro

In 2016, CADE settled an investigation with Ediouro Publicações S/A, which was accused of engaging in sham litigation related to its IP rights and entering into restrictive judicial agreements that effectively hindered competitors in the magazine market. As part of the settlement, Ediouro committed to cease the investigated practices, implement measures to prevent further occurrences, and pay a financial contribution of BRL 1.7 million.

Source: CADE's Administrative Proceeding No. 08012.004283/2000-40; CADE (2015[44]), Eli Lilly fined in BRL 36.6 million for sham litigation, https://www.gov.br/cade/en/matters/news/eli-lilly-fined-in-brl-36-6-million-for-sham-litigation; CADE (2016[45]), CADE signs six Cease and Desist agreements in the midst of investigations on anticompetitive practices, https://www.gov.br/cade/en/matters/news/cade-signs-six-cease-and-desist-agreements-in-the-midst-of-investigations-on-anticompetitive-practices

61. Unlike Brazil, Chile has adopted a stricter approach to sham litigation involving IP rights. Although the Competition Tribunal (TDLC) has sanctioned other sham litigation cases, those related to IP rights have been dismissed on the grounds that the competition authority lacks the competence to assess the technical plausibility of a patent claim, which falls within the jurisdictions of the civil courts (Irarrázabal, 2025[46]; Iglesias, 2024[47]).

3.2. Merger control

62. IP rights are often a crucial element considered by competition authorities and courts when reviewing mergers. The sub-sections below explore how these rights are examined during the analysis of the competitive effects of the merger and in the design of remedies.

3.2.1 Competition analysis

63. As mentioned in section 2, IP rights can be relevant in the definition of relevant markets and the assessment of the competitive effects of a merger. IP rights play a key role in merger review particularly when they are core assets driving the transaction, which is often the case in highly technological sectors, such as pharmaceuticals and information and communications technology (ICT).

64. In general, IP rights may be considered when assessing barriers to entry (e.g. whether having access to IP is essential to enter the market) and the potential for anti-competitive effects arising from the merger.

65. On the one hand, mergers involving IP rights may be pro-competitive, improving economic efficiency, enabling integration of complementary technologies and leading to more efficient exploitation of IP, ultimately benefiting consumers through lower prices and the development of new products (U.S. Department of Justice; Federal Trade Commission, 2017[20]).

66. Nevertheless, such transactions may also raise competition concerns. For instance, in horizontal mergers, competition may be substantially lessened if the transaction is likely to eliminate incentives for innovation. This may be the case in mergers primarily aimed at eliminating a future competitive threat (so-called “killer acquisitions”) or in transactions between major competitors that result in high market concentration and anti-competitive unilateral effects (OECD, 2023[3]; 2020[48]).

67. When it comes to vertical mergers, the assessment often focuses on whether the merged firm has both the ability (i.e. whether it controls an important or unique asset and there are no alternative sources of supply) and the incentive (i.e. whether it stands to profit) to foreclose downstream rivals that compete with the acquired company, thereby maintaining or increasing its market power by eliminating competitive constraints. This may occur by denying downstream competitors access to an essential IP right (total foreclosure) or by significantly deteriorating the conditions under which such an input is provided, for example by increasing prices or lowering quality (partial foreclosure) (OECD, 2019[49]).

68. An illustrative example where both types of concerns were raised is the Bayer/Monsanto transaction, which was reviewed by several LAC jurisdictions. This merger led to a higher concentration of IP rights, particularly in seeds and crop protection products. Given that the merging parties operated in multiple overlapping markets, the transaction raised significant concerns about a potential reduction of innovation in biotechnology. In addition, it gave rise to vertical concerns related to the integration of complementary assets across the agricultural value chain. The box below outlines how competition authorities in the region addressed these concerns when designing remedies.

69. IP rights may also be considered when merging parties invoke efficiency gains. In this regard, it is necessary to assess whether and to what extent the transaction is expected to enhance the parties’ ability to innovate. It is equally necessary to evaluate whether such an outcome could be achieved through other less restrictive means, such as IP licencing arrangements. Competition authorities and courts have rejected claims related to R&D and innovation where parties could have gained access to know-how and IP to develop an alternative independently, especially through licensing arrangements (OECD, 2025[50]). As discussed below, this is a common remedy adopted in merger cases involving IP rights.

3.2.2 Remedies

70. IP-related remedies are commonly imposed by competition authorities in merger review when IP rights are a critical asset or the key barrier preventing competition post-merger. Indeed, according to the OECD Recommendation on Intellectual Property Rights and Competition, it is crucial to design effective and appropriate competition law remedies in IP-related competition cases.

71. In this this context, the merged firm may be required to provide one or more market participants with all relevant and necessary IP rights, either by sale or licensing. The sale of IP rights is typically

favoured over licensing, as it entails the full divestiture of the asset, being considered a structural remedy that enables a competitor or new entrant who acquires the divested assets to exert competitive pressure effectively post-merger. Licensing of IP may also be considered a structural remedy when it is exclusive, irrevocable, and non-terminable with no ongoing royalties. In such cases, the licensee has more incentives to differentiate its products and engage in investment and marketing, presenting a stronger competitive force in the market. However, in some circumstances the merged firm may need to retain the IP rights to realise efficiencies from the transaction, especially when such rights cover a broad range of products. In these cases, a non-exclusive licence can be foreseen as a way of preserving competition. When licensing arrangements establish an ongoing relationship between the licensor and the licensee in a way that the licensee's competitive behaviour may be influenced by the licensor (for instance, in relation to upgrades or supplies), the remedy is more likely to be characterised as a structural/behavioural hybrid form of remedy, as it requires some degree of monitoring. In such circumstances, disputes between the licensor and the licensee may also arise, for example when the licensed IP rights cover products outside the relevant market in question or when the remedy involves licensing on FRAND terms (ICN, 2016[51]).

72. Requiring merged companies to license on FRAND terms is indeed a common remedy, particularly in vertical mergers, where the transaction may raise entry barriers for competing firms operating in downstream or upstream markets. This remedy aims to prevent post-merger foreclosure by ensuring rivals are not denied access or subjected to discriminatory licensing conditions (OECD, 2019[49]). However, implementing such a remedy can be challenging in practice, for instance when it comes to defining what constitutes "fair", "reasonable" and "non-discriminatory" terms, and setting appropriate royalty rates (OECD, 2019[29]; 2014[5]).

73. When designing IP-related remedies, competition authorities should co-operate with IP agencies in order to ensure information exchange and understanding of the markets. Co-operation with IP agencies may also be valuable to ensure the effective implementation of the remedies. Likewise, as highlighted by the OECD Recommendation on Intellectual Property Rights and Competition, co-operation with other competition authorities may be necessary, particularly when IP rights have a multijurisdictional nature, in which cases the remedies will have an impact in another jurisdiction.

74. In LAC, the design of remedies is the dimension where competition authorities have been more active related to IP rights in merger control. Competition authorities have focused particularly on trademarks, given the degree of customer loyalty associated with competitors' trademarks and the potential anti-competitive effects arising from the concentration of such IP rights within a single company following the transaction (Leurquin, 2021[41]). Nevertheless, remedies involving other IP rights, particularly patents, have also been imposed on a few occasions. The box below highlights some relevant cases in this regard.

Box 8. Examples of IP-related merger remedies in LAC

Bayer/Monsanto in LAC (2018)

The acquisition of Monsanto by Bayer in 2017 was reviewed by several competition authorities worldwide, including in Latin America, with IP-related remedies imposed to address competition concerns, both in the global and local markets.

For instance, in Brazil, CADE approved the transaction subject to conditions, as competition concerns were identified in relation to horizontal overlaps and the strengthening of vertical integrations in the markets for soybean seeds and transgenic cotton. The main remedy consisted of divestiture of all Bayer assets related to its soybean seeds and cotton business, including patents and trademarks. Behavioural remedies were also imposed, requiring the merged firm to licence IP rights on FRAND terms and prohibiting the use of exclusive sales channels, tying or bundling.

In Chile, FNE imposed similar structural remedies (including those related to IP rights) to address horizontal concerns identified in the vegetable seed market (specifically in watermelon, melon, onion, pepper, lettuce, and cucumber seeds). Additionally, in light of conglomerate risks identified in the market for non-selective herbicides based on ammonium glufosinate, FNE imposed behavioural remedies, preventing the merged entity, for a period of five years, from establishing exclusive arrangements for the commercialisation of its brand, as well as from engaging in tying and bundling practices.

Nidera/Syngenta merger in Argentina (2023)

In January 2023, CNDC recommended the Secretariat of Trade to approve the acquisition of Nidera Seeds Argentina by Syngenta Crop Protection subject to the divestment of several assets, as CNDC found that the merger would significantly increase concentration in the Argentine sunflower seed market, raising the risk of unilateral anti-competitive effects. The Secretariat of Trade ultimately ratified CNDC's recommendations.

The merged entity was required to divest a range of assets related to the sunflower seeds market, including inventories of several hybrid seeds, IP associated with their production, as well as relevant trademarks. CNDC considered this divestiture package sufficient to enable Nuseed S.A. to emerge as a vigorous and effective competitor to the merged firm, thereby preserving competition in the sunflower seeds market.

Chema/Sika merger in Peru (2024)

In October 2024, Indecopi conditionally approved the acquisition of Grupo Chema by Sika Peru. Indecopi identified a few relevant markets where horizontal overlaps between both parties raised serious competition concerns, such as chemical additives for mortar, bonding agents, concrete products, and premixed tile mortars.

In order to mitigate such competition concerns, Indecopi imposed a series of conditions, including: (i) the permanent divestiture of some Chema trademarks; (ii) the licensing of other Chema trademarks for a seven-year period to an independent third-party that could effectively compete in the markets where the competition risks were raised; and (iii) the authorisation to use the Chema brand logo and the commercial image of the licensed brand's products for a period of five to seven years. In addition, the merged firm was prohibited from commercialising products of the licenced brands for an additional period of three years, to ensure the new company can consolidate itself as an effective competitor in the market without Sika's direct competition. The merged entity was also prohibited from changing the prices of the affected products during the divestiture and licensing process.

Source: CADE (2018[52]), CADE approves with restrictions Bayer's acquisition of Monsanto, https://www.gov.br/cade/en/matters/news/cade-approves-with-restrictions-bayer2019s-acquisition-of-monsanto; FNE (2018[53]), FNE aprueba con medidas adquisición de Monsanto por parte de Bayer, https://www.fne.gob.cl/fne-aprueba-con-medidas-adquisicion-de-monsanto-por-parte-de-bayer/; CNDC (2023[54]), Desconcentración en el mercado de semillas de girasol – Operación Syngenta / Nidera, https://www.argentina.gob.ar/noticias/desconcentracion-en-el-mercado-de-semillas-de-girasol-operacion-syngenta-nidera; Indecopi (2024[55]), El Indecopi autoriza con condiciones una operación de concentración empresarial en el mercado de materiales de construcción, https://www.gob.pe/institucion/indecopi/noticias/1041735-el-indecopi-autoriza-con-condiciones-una-operacion-de-concentracion-empresarial-en-el-mercado-de-materiales-de-construccion

4 Competition advocacy and co-operation in the region

75. As mentioned in section 2, although competition and IP law seek to achieve common objectives, including the promotion of innovation, economic growth and consumer welfare, some tensions may emerge in this interaction. This is because IP rights typically limit competition in the short term in order to encourage greater dynamic efficiency and innovation in the long run. It is therefore essential to strike the right balance in this trade-off, by taking competition effects into account when designing and applying IP law. In this context, competition law can serve as an effective tool to ensure that IP rights promote competition to the greatest extent possible.

76. Section 3 described several areas where competition concerns may arise in relation to IP rights. Beyond enforcement, competition authorities can also contribute to promoting competition in the exercise of IP rights through competition advocacy. In fact, advocacy can be a powerful tool for integrating competition principles into IP law, often serving as the initial avenue through which competition authorities engage in this domain.

77. Competition authorities have undertaken advocacy initiatives with IP agencies and other governmental bodies to raise awareness of competition-related issues. For instance, in many jurisdictions such efforts have focused on promoting the integrity of patent systems and preventing the granting of ill-founded rights that could harm competition or hinder follow-on innovation without delivering legitimate countervailing benefits (OECD, 2018[56]).

78. In particular, some LAC competition authorities have carried out market studies in IP-intensive sectors, especially the pharmaceutical industry, to identify limitations in the IP legal framework and its application by IP agencies and suggest potential improvements to strengthen competition in these markets. The box below summarises some of these advocacy efforts.

Box 9. Market studies in the pharmaceutical market in Chile and Mexico

Supplementary Patent Protection System in Chile (2016)

FNE, in collaboration with the Chilean National Institute of Industrial Property (INAPI), conducted a market study on the impact of the supplementary patent protection system introduced by Law No. 20.160 of 2007. This law was designed to compensate for administrative delays in patent approvals, but in practice it has resulted in unintended competition concerns.

The market study found that the system allowed unjustified extensions of market exclusivity, delaying generic drug entry and increasing healthcare costs. FNE highlighted that the approval process was merely formal and lacked a substantive evaluation, leading to excessive extensions beyond the intended compensation for delays. As a result, competition in the pharmaceutical sector was restricted, preventing the price reductions typically associated with the entry of generics. The study recommended the adoption of a new law to clarify the interpretation and scope of the existing legislation in order to

ensure that supplementary protection is granted only when administrative delays genuinely impact the effective patent term.

Expired-Patent Drug Markets in Mexico (2017)

The Federal Economic Competition Commission (COFECE) conducted a market study on competition in the market for expired-patent drugs in Mexico. It found that generics typically entered the market an average of two years after patent expiration, which is considerably slower than in the United States and the European Union. In this context, COFECE identified competition concerns related to failures from both the government and the market itself, including regulatory barriers, strategic patenting behaviours, and weak demand for generics.

To strengthen competition in the market for drug products with expired patents, the study recommended several modifications to the regulatory framework and the development of more pro-competitive public policies. In particular, COFECE recommended establishing clear rules for the linkage system to limit discretion and minimise opportunities for incumbents to abuse judicial processes aimed solely at extending their market exclusivity and delaying the entry of generic drugs. Moreover, COFECE suggested that the regulations of the Industrial Property Law should restrict the granting of certain types of patents that are prone to abusive use for blocking market entry.

Pharmaceutical Market in Chile (2019)

FNE also conducted a comprehensive market study on the pharmaceutical market, from the production of medicines to their sale. It identified regulatory and structural barriers that restrict competition. One key issue highlighted by FNE was the lack of transparency in patent expiration dates, which creates uncertainty for generic manufacturers seeking market entry. The study found that the Chilean Public Health Institute (ISP) did not provide publicly accessible information on the expiration of primary and secondary patents, forcing laboratories to conduct costly patent studies and increasing uncertainty. According to FNE, this lack of information raised entry costs and delayed competition, as potential generic producers struggle to determine the best timing for launching alternative drugs.

Among its recommendations, FNE proposed regulatory reforms to improve transparency in patent data, streamline the approval process for generics, and remove unnecessary regulatory obstacles that restrict competition in pharmaceutical distribution.

Source: FNE (2016[57]), Estudio sobre el Sistema de Protección Suplementaria de Patentes en Chile y sus Efectos en Materia de Libre Competencia, https://www.fne.gob.cl/wp-content/uploads/2016/02/FNE-Proteccion-suplementaria.pdf; COFECE (2017[58]), Study on free market and competition in the expired-patent drug markets in Mexico, https://www.cofece.mx/wp-content/uploads/2017/11/Studies-drug-markets_vF-BAJA.pdf; FNE (2019[59]), Estudio de Mercado sobre Medicamentos, https://www.fne.gob.cl/wp-content/uploads/2019/11/Informe_preliminar.pdf

79. Advocacy can also arise from competition enforcement actions, even if not successful. For instance, Argentina has recently introduced a new legal framework to govern copyright collecting societies, providing for a more competitive and transparent system for the management of copyrights, both for IP holders and users. In particular, the new regime gives rights holders the option to manage their rights individually or through collecting societies, abolishing the legal monopoly that existed under the previous system (Rivero and Viecens, 2025[60]). One of the reasons for this reform was an investigation carried out by CNDC,[13] which sanctioned the society that collectively managed the copyrights for music works, even though the decision was ultimately overturned by the courts.[14]

80. In this context, it is crucial that competition authorities and IP agencies collaborate closely to leverage the benefits of technical co-operation, even outside the context of enforcement actions, so as to maximise the synergies between the protection of IP rights and the promotion of competition (Saavedra et al., 2019[61]). The OECD Recommendation on Intellectual Property Rights and Competition also stresses

the relevance of establishing procedures to allow effective policy co-operation between competition authorities and IP bodies.

81. In LAC, Memoranda of Understanding (MoUs) between competition authorities and IP agencies exist in several jurisdictions, typically covering exchange of information and technical expertise, as well as capacity-building initiatives for their staff, including joint events, seminars and studies.[15] While the existence of MoUs does not guarantee that co-operation will occur in practice, they generally serve as a strong starting point, offering a more formal framework for collaboration and signalling a willingness of the authorities to engage in dialogue. Nonetheless, informal co-operation remains common even in the absence of MoUS (OECD, 2022[6]).

5 Conclusions

82. Competition and IP law use different tools to pursue similar goals, particularly the promotion of innovation, economic growth and consumer welfare. In this regard, both policies are generally complementary and share synergies. However, tensions may arise in practice, as IP rights can confer or reinforce market power for their holders, potentially incentivising them to restrict access and hinder follow-on innovation.

83. As highlighted in the OECD Recommendation on Intellectual Property Rights and Competition, IP rights do not relieve their holders from compliance with competition law. Jurisdictions should therefore ensure the effective enforcement of competition law against anti-competitive IP-related business practices.

84. While competition authorities in some jurisdictions, such as the EU and the US, have long been active in addressing IP-related issues, in LAC this is more recent and has been concentrated in a few countries. Indeed, as illustrated in the examples mentioned in this note, some LAC competition authorities have enforced competition law to IP-related conduct. Antitrust actions have primarily focused on pharmaceutical patents, although other IP rights and sectors (such as copyrights in the audiovisual sector and patents in the ICT sector) have also come under competition scrutiny. Moreover, IP rights have played a central role in merger control, both in competition assessments and in the design of remedies, particularly in relation to trademarks.

85. Nevertheless, there is still room for other jurisdictions in the region to become more actively engaged in this area, despite the challenges posed by limited resources, other priorities, and the high level of specialised expertise required to assess such a complex and technical domain as IP law. The OECD Recommendation on Intellectual Property Rights and Competition can provide valuable guidance in this regard.

86. Furthermore, competition advocacy has proven to be an effective starting point for competition authorities to engage with IP-related issues. Advocacy can help shape a more pro-competitive IP legal framework and also pave the way for future enforcement actions. In fact, experiences from LAC jurisdictions, especially in the pharmaceutical sector, suggest that market studies and advocacy opinions submitted to IP agencies and legislators can play a key role in ensuring that IP regulation and its application are more aligned with competition principles.

87. In this context, co-operation between competition authorities and IP agencies can help integrate competition principles into IP law through advocacy efforts. This interaction is also essential when competition authorities investigate anti-competitive practices involving IP rights or review mergers in which IP rights are key assets. Moreover, co-operation between competition authorities is crucial, as IP rights often raise cross-border issues, which means that actions taken in one jurisdiction can have impact in others, requiring deeper co-ordination to avoid inconsistent outcomes.

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Notes

[1] For instance, Bement v. National Harrow Co., 186 US 70 (1902); Henry v. A.B. Dick Co., 224 US 1 (1912); Carbice Corp. v. Am. Patents Dev. Corp., 283 US 27 (1931).

[2] For example, the US DoJ's prohibition of "Nine No-No's", resulting in an overall condemnation of vertical patent licensing practices as per se illegal. Likewise, The European Union also adopted a strict approach to IP licensing in the 1970s, classifying conduct into "white", "grey", and "black" lists based on their permissibility (OECD, 2019[4]).

[3] Except for restrictions that are subject to per se/by object treatment, such as hard-core cartels.

[4] Other competition concerns include facilitating exclusion and quantity constraints, promoting co-ordinated prices, picking a winner that would not maximise social welfare, picking a winner through deceit (so-called patent ambush), and yielding asymmetric cost impacts (OECD, 2014[5]).

[5] Also called collective management organisations (CMOs) or authors' societies (WIPO, 2004[62]).

[6] In 2018, the Secretariat of Trade, following the recommendations of the National Commission for the Defence of Competition (CNDC), imposed a fine of ARS 42.7 million (approximately USD 1.5 million) on the Argentinian Society of Music Authors and Composers (SADAIC) for abusing its dominant position by charging excessive and discriminatory fees to certain hotels for the secondary reproduction of music (Secretariat of Trade decision No. RESOL-2018-371-APN-SECC#MP of 26 June 2018, based on CNDC opinion No. 43 of 17 May 2017). However, this decision was overturned by the Federal Civil and Commercial Court of Buenos Aires, and this ruling was subsequently upheld by the Supreme Court (Peña and Rossi, 2018[64]; Toom and Ortiz, 2018[65]).

[7] For cases in Europe, see (Yaghi, 2020[63]).

[8] Case C-457/10-P (AstraZeneca v. Commission), judgement of the European Court of Justice (First Chamber) of 6 December 2012.

[9] Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993).

[10] Case T-111/96 (ITT Promedia v. Commission), judgement of the Court of First Instance (Fourth Chamber, Extended Composition) of 17 July 1998.

[11] For example, Peru explicitly includes sham litigation in the list of abuse of dominance prohibited by the Law on the Repression of Anticompetitive Conducts (Legislative Decree No. 1034 of 2008, article 10.2.f).

[12] Andean Community Court of Justice, decision of 11 December 2020, process 02-IP-2019. In particular, the court has ruled that sham litigation is a form of abuse of dominance, consisting of the abusive exercise of the right to legal regulatory proceedings. In order to assess such anti-competitive practices, national

competition authorities should examine the purpose, motivation, or intent behind the legal actions, in order to determine whether they were conceived as part of a plan aimed at restricting competition.

[13] Secretariat of Trade decision No. RESOL-2018-371-APN-SECC#MP of 26 June 2018, based on CNDC opinion No. 43 of 17 May 2017.

[14] Another example comes from Brazil. In 2018, CADE dismissed an investigation into abuse of dominance by IP holders, concluding that the investigated parties were exercising their legal exclusive rights as provided for in the IP legislation, despite the impact on competition. Nonetheless, CADE forwarded its decision to the IP agency to consider potential regulatory reforms that could address the identified issues (CADE's Administrative Proceeding No. 08012.002673/2007-51, decision of 14 March 2018).

[15] For instance, this is the case in Brazil (MoU between CADE and INPI from 2018 and renewed in 2024), Chile (MoU between the FNE and INAPI from 2011), the Dominican Republic (MoU between Pro-Competencia and ONAPI from 2014), and Paraguay (MoU between CONACOM and DINAPI from 2024).