# Latin America

**An Evolving and Increasingly Important Region for Merger Control**

| **The landscape is changing: Argentina and Chile are enacting new merger control regimes** |
| **Competition enforcement in LATAM is becoming far more sophisticated and playing a major role in global enforcement** |
| **M&A Activity in LATAM is up greater than 10% year-on-year** |
| **Merger control in LATAM has the potential to significantly delay deal closing and can present uncertainty if not properly managed** |
| **Regulators are working together now more than ever, and cross-border coordination in LATAM is becoming key to a successful merger control review** |
| **As some of the merger control regimes are modelled from U.S. and EU antitrust rules, parties should expect investigations to be as rigorous and remedies as demanding as other more developed regimes.** |
ARGENTINA
THE CURRENT REGIME

1. Mandatory filing if jurisdictional thresholds are met

2. Jurisdictional thresholds:
   - **Change of control** where transaction results in acquisition of control of a business as a consequence of a merger or acquisition of capital or shares that allow control or substantial influence
   - **Minority interests** May be caught if control test is satisfied
   - **Turnover/assets/market share/local presence**
     - Transaction has effects in an Argentinean market
     - Either party or both parties have an aggregate Argentinean turnover greater than ARS200 million (approx USD13.2 million) (that is one party can meet the threshold)
     - Transaction price and the assets acquired in Argentina exceeds ARS 20million (approx USD1.3 million).

3. Timeline for filing:

   - There are 3 phases of filings, starting from a standard form of basic information regarding a transaction to a more detailed and targeted information request in Phase III
   - The rules require a Phase III filing to be reviewed within 45 business days however the regulator may stop the clock at any time by requesting additional information
   - Stopping the clock is common practice, with the current average review timeframe being 3 years
   - The current regime is non suspensory

* EXEMPTIONS APPLY FOR CERTAIN ACQUISITION STRUCTURES APPLY (E.G, A FOREIGN ENTITY ACQUIRING A SINGLE ARGENTINEAN COMPANY WITHOUT ANY OTHER ASSETS OR INTERESTS IN ARGENTINA)
4. Past trends in enforcement

- Merger control is a lengthy process and review outcomes can sometimes be driven by factors outside of competition law
- The regulator has ordered a range of structural and behavioural remedies as well as fines for failure to make a required filing.
ARGENTINA
THE LANDSCAPE FOR REFORM

• Competition law in Argentina is undergoing a political sea change.

• The President has called for tougher enforcement and a transformation of the competition regime to be in line with more mainstream merger control models.

• The Commission has been restructured with the appointment of 5 new commissioners and a new head of the enforcement agency.

The new draft bill to change the competition regime will:

– Provide for a more independent agency
– Include suspensory merger control with
  – new thresholds tied to a more inflation resistant metric;
  – new decision timeframes;
  – a fast track mechanism;
– Include leniency
– Impose higher fines (30% of Argentine turnover for the first offense and potentially double that for a second violation).

• The draft bill underwent a public consultation process and is currently before the Argentine congress.

• The bill seeks to address feedback calling for a more detailed process for leniency applications, greater protection of parties’ confidentiality and more concrete timelines and definitions under the pre merger notification process.
CHILE
A NEW MERGER CONTROL REGIME

• Chile’s new mandatory filing regime came into force on 1 June 2017.

• Following announcement of thresholds, a 6-9 month grace period applies before the mandatory regime will take effect.

For mergers closing on or after 1 June 2017:

– **New filing thresholds apply**: Mandatory filing if the new turnover thresholds are satisfied
  – the parties’ combined turnover in Chile is 1.8 million Chilean units of account (UF) or more (approx US$70 million); **AND**
  – At least two of the parties have individual turnover in Chile of 290,000 UF or more (approx US$11.3 million).

– **A new minority stake reporting obligation**: filing within 60 days of completion where the acquisition is of a minority interest of more than 10% in a competitor and
  – both firms compete in Chile; **AND**
  – they each have Chilean turnover of more than 100,000 UF (approx US$ 4 million)

– **Transactions falling below the thresholds**: The regulator is authorized to investigate transactions invoking control but falling below the thresholds for a one year period.

– **There are no filing fees**
CHILE

A NEW MERGER CONTROL REGIME (CONTINUED)

The new regime also includes the following:

- an obligation to suspend closing prior to clearance
- a two-phase review period of 30 business days (for initial review) and 90 business days (where in-depth review is required)
- fines for failure to notify of approximately US$15,000 per day
- an outright prohibition for interlocks between members of the board and “relevant executives” of competing firms
- the ability for parties to pull and re-file when co-ordinating timing for multi-jurisdictional filings.

In the meantime:

- the regulator may open an investigation in relation to any transaction (although only likely for transactions involving significant market concentration(s) which are made public before the closing), however such investigation does not suspend the closing of the transaction
- the regulator or a third party with interest may also initiate an action in Court alleging that a transaction would create substantial damage to free competition. The Court will not suspend closing of a pending transaction unless it determines that prima facie it would result in significant damage to free competition.
**COLOMBIA**

**THRESHOLDS AND PROCESS**

1. Mandatory filing if jurisdictional thresholds are met

2. Jurisdictional thresholds:
   - **Change of control** the definition of control is very broad so that even a minority stake of capital in a company may be caught if it enables acquirer to materially influence the decision making process of the target in its commercial and corporate activities
   - **Turnover/assets/market share/local presence**
     - Parties have horizontally or vertically related activities in Colombia (conglomerate mergers not subject to pre-merger control) **AND**
     - Either party or both parties have an aggregate Colombian turnover or total assets greater than 60,000 minimum legal monthly wages during the preceding year; the minimum monthly wage for 2016 is COP 737,717 (making the threshold approx USD 14.5 million) **AND**
     - The parties have a combined Colombian market share of 20% or more **AND**
     - *if the first two criteria are met, but the third is not, the transaction is deemed to be cleared, but the parties must nonetheless communicate the transaction to the Authority and should not close until they have made that filing and have allowed the Authority 10 business days to consider whether a filing should be made.*

3. Timeline for filing:

<table>
<thead>
<tr>
<th>![Timeline Diagram]</th>
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</thead>
<tbody>
<tr>
<td>![Description](Filing must be made before completion)</td>
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<tr>
<td>![Description](Phase I A fast track stage in which the transaction will be cleared within 30 business days if there are no competition issues)</td>
</tr>
<tr>
<td>![Description](Phase II A secondary in depth investigation which can take from 3 – 6 months from the time parties provide all additional information)</td>
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<tr>
<td>![Description](The current regime is suspensory, RFIs will restart the clock)</td>
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Additional guidance:

- **Foreign investors**
  - If participation in the Colombian market happens only through imports to Colombia, and there is no entity in Colombia that operates at least part of the relevant business of the foreign parent companies, then the parents' global turnover and assets will be subject to scrutiny for the calculation of turnover/assets thresholds.
  - This means that even companies with no direct presence in Colombia, but that indirectly participate in the Colombian market (for example through third party distributors), may have to satisfy the merger control regulation if their global turnover meets the required thresholds.

- **There are no filing fees**
1. Mandatory filing with CADE if jurisdictional thresholds are met

2. Jurisdictional thresholds:
   - **Change of control** majority of voting rights, ability to elect board members and officers, approval/veto rights
   - **Minority interests**
     - Conglomerate merger > 20% or greater interest
     - Horizontal/vertical merger > 5% or greater interest
   - **Turnover/assets-market share/local presence**
     - Transaction has effects in Brazil (a target’s subsidiary, branch or even exports to Brazil will satisfy this test)
     - One party to the transaction has Brazilian gross revenue of R$750 million (approx USD 229 million)
     - Another party to the transaction has Brazilian gross revenue of R$75 million (approx USD 22.9 million)

3. Timeline for filing:

   - **File at any time, preferably after execution of formal binding document**
   - **Fast track process available for mergers without substantial concerns – an average of 30 days**
   - **Regulator required to conclude review within 240 days with a maximum review period of 330 days**
   - **Others average review period of 60-90 days, varying according to complexity**

* A PARTY TO A TRANSACTION INCLUDES THE ECONOMIC GROUP, WHICH IN TURN INCLUDES ALL ENTITIES FOR WHICH THERE IS AT LEAST 20% OWNERSHIP
4. Trends in enforcement

- For the past three years, CADE has been a very active regulator and has implemented diverse remedies including not only structural and behavioural remedies but also blocking proposed mergers.

- In January 2016, CADE fined Cisco a ~USD 7.2 million gun jumping penalty and in doing so rejected carve-out agreements in cross border transactions that seek to close a transaction pending antitrust approval in jurisdictions like Brazil.

- While CADE’s merger guidelines focus on the likelihood of new entry in assessing problematic mergers, in practice the regulator has also accepted pro-competition factors such as persistent strong rivalry in concentrated markets.

- Brazil is becoming an increasingly attractive jurisdiction for Chinese investment (as of 2014, China was the top import/export partner with Brazil, closely followed by the United States and Argentina).

- An exemption may apply for deals involving a public bid for government-owned assets; however there are a number of important carve outs for this exemption, including where the target has already executed the concession agreement and won the public bid.
ECUADOR
THRESHOLDS AND PROCESS

1. Mandatory filing with Superintendency of Market Power Control if jurisdictional thresholds are met

2. Jurisdictional thresholds:
   - **Change of control** majority of voting rights, ability to elect board members and officers, approval/veto rights
   - **Turnover/assets/market share/local presence EITHER**
     - total annual turnover in Ecuador of all parties to transaction exceeds USD1,132,800,000 for transactions related to banking, USD 75,756,000 for mergers where the targets are insurance companies and USD 70,800,000 for all other mergers; OR
     - transaction results in parties acquiring 30% or greater market share in relevant product market

3. Timeline for filing:

   - File within 8 days of execution of formal binding document
   - Regulator then has an initial review period of 60 business days (the regulator can extend by another 60 days in the event further information is required)
   - Regulator must request further information or certify the filing as complete within 10 business days
   - Current average review period is 4 – 6 months
   - No fast track option for mergers that do not raise obvious competition concerns
   - The transaction only has effect upon approval or fulfilment of any conditions

   Current average review period is 4 – 6 months
4. Trends in enforcement

- The regulator is considering possible reforms to the law that would create an expedited process for transactions that do not pose competitive risks.
- There are currently no guidelines for merger assessment, the regulator is also currently working on drafting merger analysis guidance.
1. Mandatory filing required if jurisdictional thresholds are met

2. Jurisdictional thresholds:

- **Change of control** no control test, notification is mandatory if economic threshold satisfied, regardless of whether control is acquired
- **Turnover/assets/market share/local presence**
  - Consideration involved in transaction exceeds 18 million times the current daily general minimum wage in the Federal District (MXP 1,314,720,000.00 – approx. USD 73,040,000.00), OR
  - The transaction results in an accumulation of 35% or more of the assets or stock of an Economic Agent, whose annual sales/assets in Mexico exceeds MXP 1,314,720,000.00 – approx. USD 73,040,000.00; OR
  - The transaction results in an accumulation of assets or capital stock in excess of MXP 613,536,000.00 – approx. USD 34,085,333.33 and two or more of the parties to the transaction have annual sales/assets in Mexico in excess of MXP 3,505,920,000.00 – approx. USD 194,773,333.00

3. Timeline for filing:

- **File before completion or before acquiring de factor or legal control of target**
- **MCC required to conclude review within 60 business days of either receiving filing or parties answering any second request. In complex cases, this review could take up to 40 additional business days**
- **Fast track process available for mergers without substantial concerns – if the transaction qualifies for fast track filing, MCC must issue decision within 15 business days**
- **Average timeframe for review varies between 3 to 8 months depending on complexity**
4. Trends in enforcement

While the regulator has not blocked any recent deals, it has ordered a range of structural and behavioural remedies as well as fines for failure to make a required filing.
1. Filing is mandatory after closing if jurisdictional threshold is met

2. Jurisdictional thresholds:
   - **Change of control** majority of voting rights, ability to elect board members and officers, approval/veto rights
   - **Minority interests** these are caught if they give rise to control over the board of directors (by veto, removal or designation of its members)
   - **Turnover/assets/market share/local presence**
     - the transaction increases to, or exceeds 45% of the relevant Paraguayan market for a specific good or service; **OR**
     - the transaction exceeds 100,000 minimum monthly salaries according to the latest fiscal year figures (PYG 182.4 billion – approx USD 36.2 million)

3. Timeline for filing:

   - **The parties must notify the merger within 10 business days after completion**
   - **Phase 1 review CONACOM has 30 days to either clear or reject the merger or proceed to a Phase II investigation**
   - **CONACOM must complete its review within 90 days of the filing however RFI process stops the clock for fixed duration**
   - CONACOM has 5 days to issue an RFI, parties then have 5 days to respond, CONACOM then has an additional 5 days to determine if it has complete information before initiating Phase I review
   - Phase 2 review CONACOM has 60 days to issue final decision or issue a further RFI. Merger is deemed approved if no decision or RFI within 60 days
4. Trends in enforcement

- There are currently no guidelines for merger assessment, the regulator is working on drafting merger analysis guidance
- The first merger control filing in Paraguay occurred in 2016
- CONACOM has minimal merger control experience and adapts the rules as the process evolves; thus, the timelines set forth in the statute appear to be more theoretical than actual
PERU
THRESHOLDS AND PROCESS

1. Mandatory filing with Free Competition Commission only for transactions in the electric sector that meet the jurisdictional thresholds

2. Jurisdictional thresholds:
   - **Change of control** majority of voting rights, ability to elect board members and officers, approval/veto rights
   - **Minority interests** caught if they give rise to control over the board of directors (by veto, removal or designation of its members).
   - **Turnover/assets/market share/local presence**
     - Transaction involves parties jointly or separately holding a Peruvian market share of 15% or greater for horizontal mergers; OR
     - Transaction involves parties jointly or separately holding a Peruvian market share of 5% or greater for vertical integration; OR
     - The parties’ overlapping or competing activities must have an effect on an enterprise of the electric sector

3. Timeline for filing:

4. Trends in enforcement
   - A law proposing the introduction of a general mandatory merger control regime is being discussed
URUGUAY
THRESHOLDS AND PROCESS

1. Mandatory filing with the Antitrust Commission ("Comision de Promoción y Defensa de la Competencia") if jurisdictional thresholds are met

2. Jurisdictional thresholds:
   - **Change of control in terms of control structure** (e.g., majority of voting rights, ability to elect board members and officers, approval/veto rights)
   - **Turnover/assets/market share/local presence**
     - transaction results in the acquisition of at least 50% or higher market share of the relevant market in Uruguay; **OR**
     - the combined annual Uruguayan turnover of all parties to the transaction, in any of the last three fiscal years, amounts to UI 750,000,000 -approximately USD 88,500,000 or more

3. Authorization vs. Notification:
   - Unless the transaction creates a de facto monopoly (100% of the relevant market), the filing – if requested – is a mere notification (with no suspensory effect), and no clearance is required

4. Timeline for filing
   - Filing to be made 10 days before closing
   - For authorizations, the Commission is required to issue a decision within 90 days of filing
   - There is currently no timeframe for review, the average duration is approximately 6 months

* EXEMPTIONS MIGHT APPLY FOR CERTAIN ACQUISITION STRUCTURES (E.G., A FOREIGN ENTITY ACQUIRING A SINGLE URUGUAYAN COMPANY WITHOUT ANY OTHER PREVIOUS ASSETS OR INTERESTS IN URUGUAY); THAT IS A COMPANY MAKE A FIRST LANDING IN URUGUAY LIKELY HAS NO FILING.
4. Trends in enforcement

- There is some discussion for reform to a clearance procedure however nothing has been officially proposed.
- The CPDC may request information that has little relevance to merger control.
• While many of the LATAM regimes are modelled from the US and EU merger control law, many of the jurisdictional frameworks are relatively new and the body of case law and review precedents is still developing
• Undeveloped law and inexperienced regulators do not equate to low risks for non-compliance, parties should still undertake appropriate diligence to ascertain whether a merger filing is required
• Some regulators offer informal guidance (for example Brazil in fast track cases) on potential transactions which parties may take advantage of on a non binding basis
• Most jurisdictions require a filing fee, though the fees are not exorbitant (excepting Brazil – $25,000)
• In some jurisdictions merger control reform is either being implemented (Chile and Argentina) or hot on the legislative agenda (Peru) and parties should keep a close eye on how developments will impact on future deals
• LATAM merger control regimes also have fines and penalties for gun jumping.
**OUR RECENT EXPERIENCE**

**ADVISING ON SIGNIFICANT AND COMPLEX CROSS BORDER TRANSACTIONS**

- **International Airlines Group** on its joint business agreement with LATAM Airlines (filings in Chile, Brazil and Colombia)

- **Fortune 100 company** in their agreement to acquire the LATAM business of a large consumer goods manufacturer, including the first merger control filing in Paraguay (filings in Paraguay, Uruguay, Argentina, Colombia, Mexico, and Brazil)

- **Abbott** on its acquisition of CFR Pharmaceuticals (filings in Argentina, Chile, Colombia, Costa Rica and Ecuador)

- **CVC** on its acquisition of ParexGroup from Materis (filings in Brazil and Argentina)

- **CVC** on the sale of Flint Group (11 filings, including Brazil)

- **Temasek** on its acquisition of remaining shares in Olam (filing in Brazil)

- **Iberia** in relation to its transatlantic alliance with American Airlines and British Airways (3 filings including Mexico) and in relation to its merger with British Airways (12 filings including Argentina, Brazil and Mexico)

- **GE** on competition law aspects of acquisition of divestment business of Thermo Fisher, including market investigation, purchaser approval and merger control (filing in Brazil)

- **Pfizer** on the acquisition of Baxter’s portfolio of marketed vaccines, consisting of NeisVac-C (a meningitis C vaccine) and FMSE-IMMUN/Tivicovac (a tick-borne encephalitis vaccine) (filing in Brazil)

- **Multi-jurisdictional merger control advice regarding Antofagasta’s purchase of a 50% stake in Barrick Gold’s Zaldivar copper mine in Chile (filing in Brazil)**

- **Pfizer** on antitrust considerations relating to its acquisition of King Pharmaceutical Inc.

- **Mitsubishi Corporation** on the merger control aspects of its acquisition of a 20% stake in Ipanema Coffee for (coordinated Brazil filing)

- An international cosmetic company on the acquisition of **Yves Saint-Laurent Beauté** (filings in Argentina, Brazil, Chile and Colombia)

- **Wendel and Stahl** on the acquisition of Clariant’s leather services division (filings in Brazil and Uruguay)

- **Vivendi and NBC** on the selling to NBC of its majority stake in Universal studios notification, on behalf of both parties (filing in Brazil)

- **Banco Santander** on the creation of a renewable power JV with two Canadian pension funds (filing in Brazil and Mexico)

- The Argentine Competition Commission on its proposed merger control regulations
### GETTING THE DEAL THROUGH

#### HOW WE CAN HELP

| All the resources of a global firm with the niche and targeted expertise for local filings |
| The experience and relationships to co-ordinate filings and advocacy across jurisdictions |
| An extensive and integrated network of offices sharing expertise across borders so that all dimensions of the deal are anticipated and covered |
| Keeping management informed through a single point of contact |
| Managing the cross-border process in the most efficient and cost effective way possible |
| Strong relationships with local counsel |
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