

A nighttime cityscape featuring a prominent cable-stayed bridge on the right, with its lights reflecting in the water below. The background shows a dense urban skyline with various buildings, some of which are brightly lit. The sky is a mix of deep blue and purple hues, suggesting dusk or dawn. The overall scene is vibrant and modern.

CLIFFORD
CHANCE

MERGER CONTROL IN LATIN AMERICA
THRESHOLDS AND GUIDANCE FOR ANTITRUST FILINGS

2019

LATIN AMERICA

AN EVOLVING AND INCREASINGLY IMPORTANT REGION FOR MERGER CONTROL

- The landscape is changing: Argentina and Chile passed new merger control regimes in 2018 and 2017, respectively
- In some jurisdictions, merger control reform is hot on the legislative agenda (Peru and Uruguay) and parties should keep a close eye on how developments will impact on future deals
- 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 EU and US antitrust rules, parties should expect investigations to be as rigorous and remedies as demanding as other more developed regimes



ARGENTINA

NEW COMPETITION ACT – CURRENTLY UNDERGOING A TRANSITION PHASE



1. Mandatory filing after closing if jurisdictional thresholds are met

2. New 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 ARS 2,640 million – approx. USD 57.5 million (that is if one party can meet the threshold)

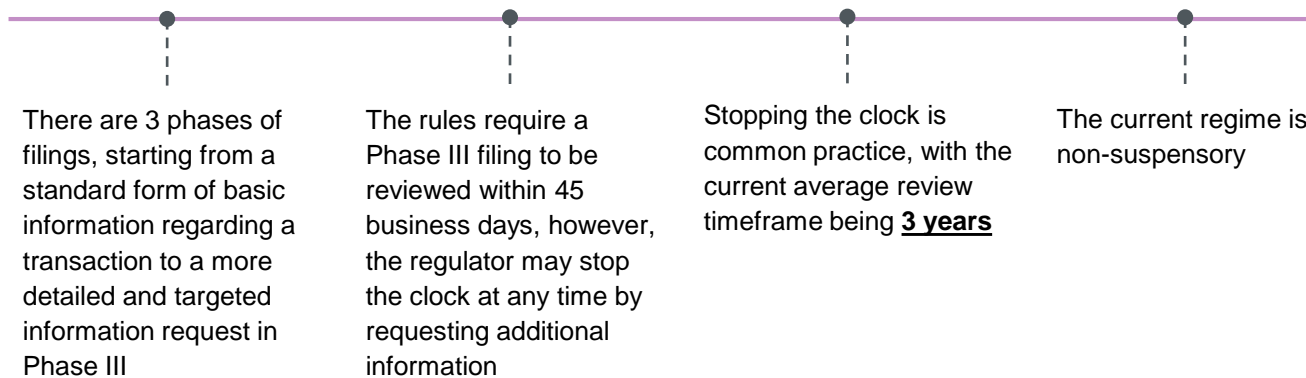
The *minimis* threshold has also been increased and concentrations would be exempted from notification if the total local assets of the target and the domestic portion of the transaction would each not exceed ARS 528 million – approx. USD 11.5 million

* 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)

ARGENTINA

NEW COMPETITION ACT – CURRENTLY UNDERGOING A TRANSITION PHASE (CONTINUED)

3. Timeline for filing (post-closing regime):



4. Pre-merger control regime (transition phase):

- The New Competition Act introduces a pre-merger control regime and thus abandons the current post-closing obligation
- The pre-merger control regime shall enter into force one year after the Authority is effectively established (the new authority is expected after summer 2019)
- Review periods:
 - The Authority must issue a decision within 45 business days from the filing of the completed notification
 - In a case where the transaction has the potential to restrict competition, the term can be extended for up to an additional 120 business days

ARGENTINA

NEW COMPETITION ACT – CURRENTLY UNDERGOING A TRANSITION PHASE (CONTINUED)

5. Trends & others

- Argentina is also working in new Guidelines for Merger Control Review
- New gun jumping fines: 0.1% of the offender's (economic group) consolidated domestic turnover or, if the former method is not viable, up to ARS 19.8 million per day – approx. USD 440,979
- Filing fee for reportable transactions which range between ARS 132,000 and ARS 528,000 - approx. USD 2,900 to USD 11,900
- Merger control is a lengthy process and review outcomes can sometimes be driven by factors outside of competition law (4 months on average to conclude merger reviews in 2018)
- The regulator has ordered a range of structural and behavioural remedies as well as fines for failure to make a required filing



CHILE

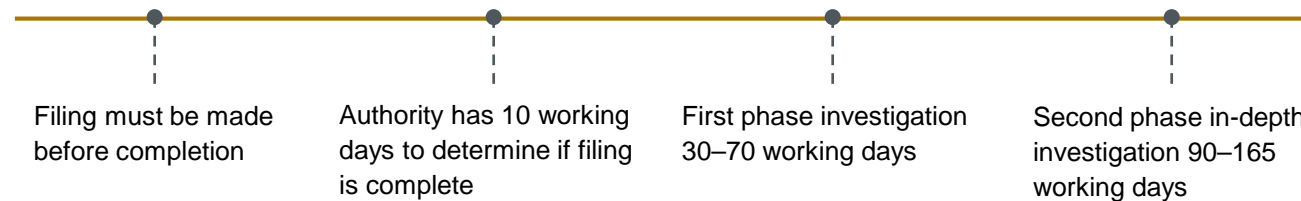
NEW MERGER CONTROL REGIME SINCE 2017

1. Mandatory filing before closing if jurisdictional thresholds are met

2. Jurisdictional thresholds:

- **Change of control** occurs when 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
- **Turnover/assets/local presence**
 - The parties' combined turnover in Chile is 2.5 million Chilean units of account (UF) or more (approximately USD 107 million); **AND**
 - At least two of the parties have individual turnover in Chile of 450,000 UF or more (approximately USD 19 million)
- **Minority interests** 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 (approximately USD 4.3 million)

3. Timeline for filing:



- ✓ The investigation can be suspended for a further period of 10–15 working days if the parties offer commitments
- ✓ The investigation can be also suspended for a certain period of time with the parties' and Authority's joint consent

CHILE

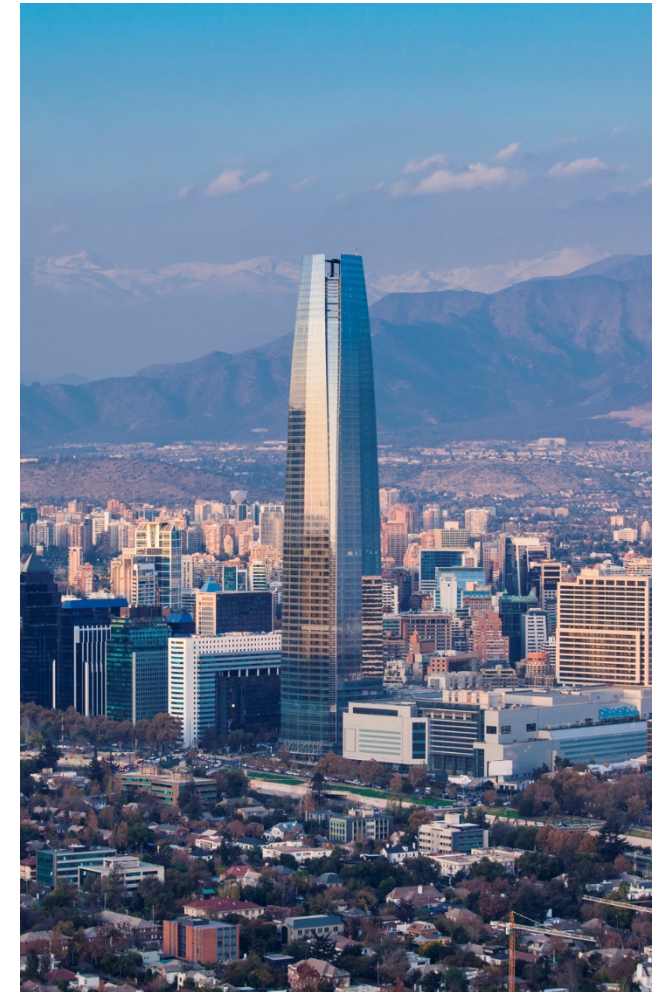
NEW MERGER CONTROL REGIME SINCE 2017 (CONTINUED)

4. Other relevant information:

- The authority offers an “informal” pre-merger control stage
- Joint filing and no filing fees
- Fines for failure to notify of approximately USD 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 coordinating timing for multi-jurisdictional filings
- The regulator may open an investigation in relation to any transaction (in which there is a change of control), however such investigation does not suspend the closing of the transaction

5. Trends:

- The Authority has been a very active regulator and has implemented diverse remedies, including not only structural and behavioral remedies but also blocking proposed mergers
- The Authority has also already imposed several fines for gun-jumping



COLOMBIA

THRESHOLDS AND PROCESS



1. Mandatory filing before closing if jurisdictional thresholds are met

2. Jurisdictional thresholds:

- **Change of control**

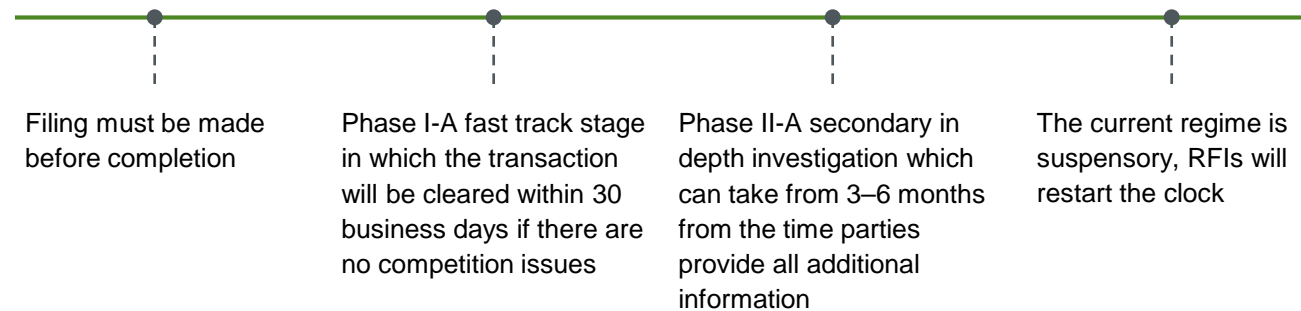
- The definition of control is very broad so that even a minority stake of capital in a company may be caught if it enables acquirer to materially influence the decision-making process of the target in its commercial and corporate activities

- **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 2018 is COP 781,242 (making the threshold approximately USD 16 million); **AND**
- The parties have a combined Colombian market share of 20% or more
- *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*

COLOMBIA THRESHOLDS AND PROCESS (CONTINUED)

3. Timeline for filing:



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**



BRAZIL

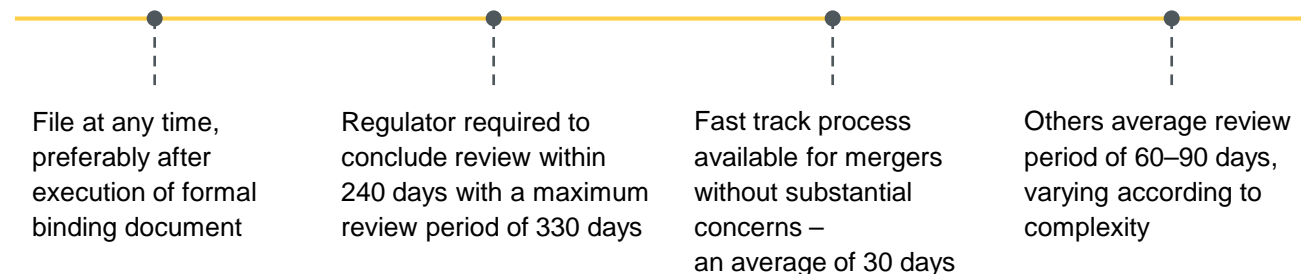
THRESHOLDS AND PROCESS

1. Mandatory filing required before closing 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 BRL 750 million (approximately USD 195 million)
 - Another party to the transaction has Brazilian gross revenue of BRL 75 million (approximately USD 19.5 million)

3. Timeline for filing:



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

BRAZIL

THRESHOLDS AND PROCESS

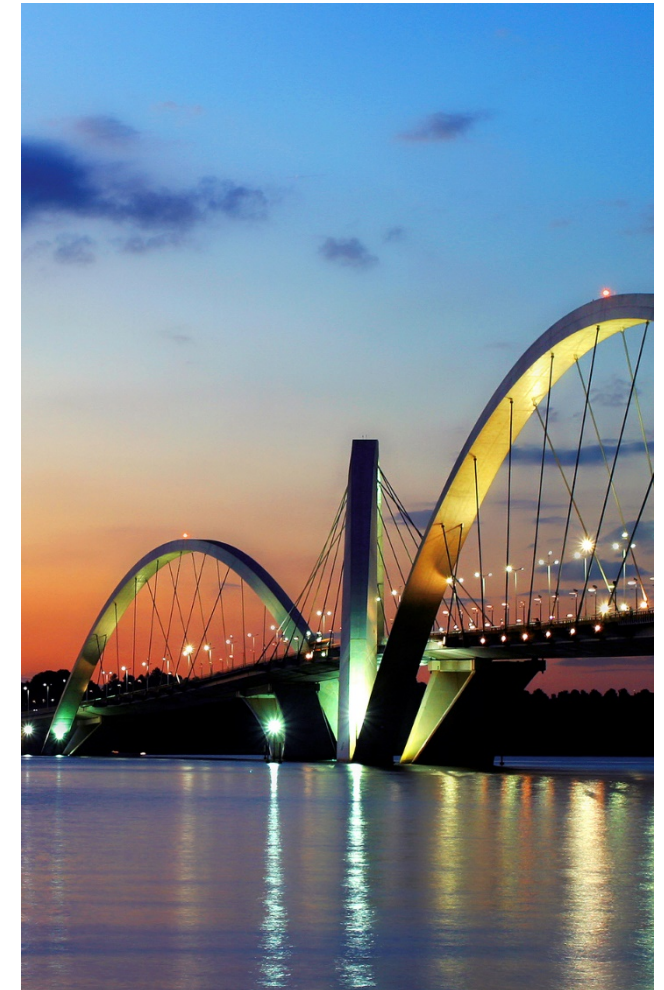
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4. Other relevant information

- Associative Agreements are also notifiable if thresholds are met
- Fines for gun jumping up to BRL 60 million (USD 15.4 million)
- Gun jumping also includes exchange of sensitive information prior to clearance and any provision that can result in premature integration between the parties
- Filing fees are BRL 85,000 (USD 21,936)
- Unconditional clearance: predominance (over 90%)
- Restrictions: settlements (behavioral and/or structural measures) – CADE is open to negotiate solutions
- 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

5. Trends

- CADE is becoming more interventionist, with a growing number of blocking decisions. A more careful analysis shows that the authority has, in fact, been facing more complex merger filings in the past two years
- Closer cooperation among CADE and foreign authorities is also seen as a trend, especially with the US, Europe and China, vis-à-vis global transactions in which remedies should be jointly negotiated to reach a feasible decision in all jurisdictions reviewing the matter
- Rules preventing the early consummation of a merger – gun jumping – have also been a top priority to which the country's corporate culture has had to adapt



ECUADOR

THRESHOLDS AND PROCESS



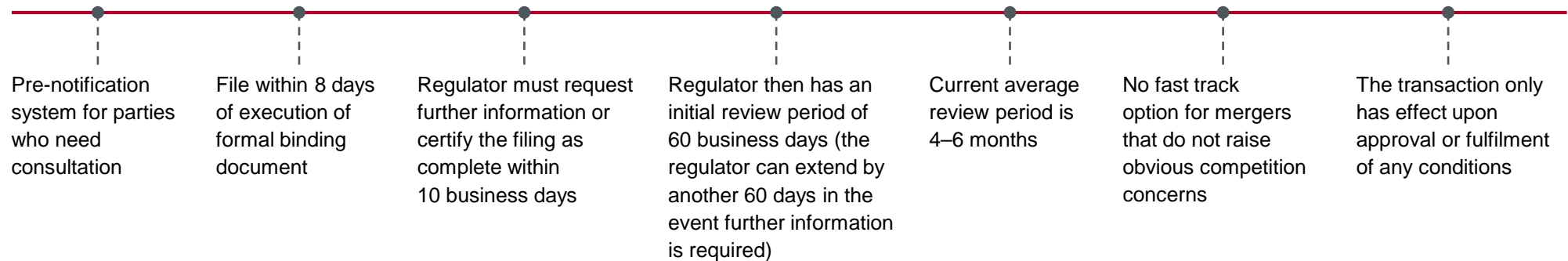
1. Mandatory filing before closing with Superintendency of Market Power Control if jurisdictional thresholds are met

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 USD 1.23 billion for transactions concerning companies active in the financial system or in the stock market, and USD 82.6 million for mergers where the targets are insurance or reinsurance companies and USD 78.8 million for all other mergers; **OR**
 - Transaction results in parties acquiring 30% or greater market share in relevant product market in Ecuador

ECUADOR THRESHOLDS AND PROCESS (CONTINUED)

3. Timeline for filing:



4. Trends in enforcement

- The regulator is considering possible reforms to the law that would create a fast track 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
- The implementation of gun jumping fines
- The reform of the Andean Competition Authority and the proposal of a merger control regime in this community

MEXICO

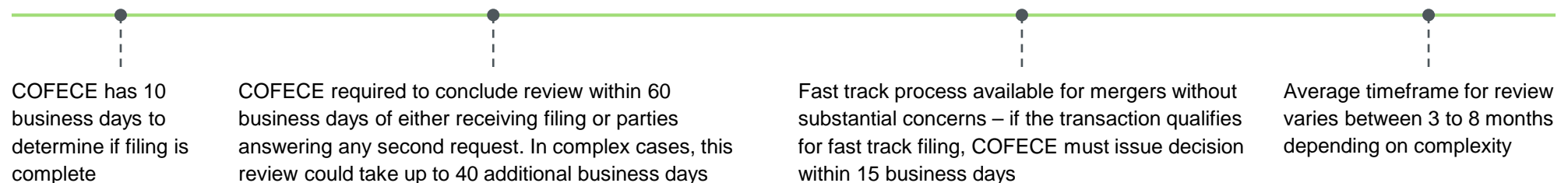
THRESHOLDS AND PROCESS

1. Mandatory filing required before closing 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 1,520,820,000.00 – approximately USD 80 million); **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 1,520,820,000.00 – approximately USD 80 million; **OR**
 - The transaction results in an accumulation of assets or capital stock in excess of MXP 709,716,000.00 – approximately USD 37 million **and** two or more of the parties to the transaction have annual sales/assets in Mexico in excess of MXP 4,055,520,000.00 – approximately USD 213 million

3. Timeline for filing:



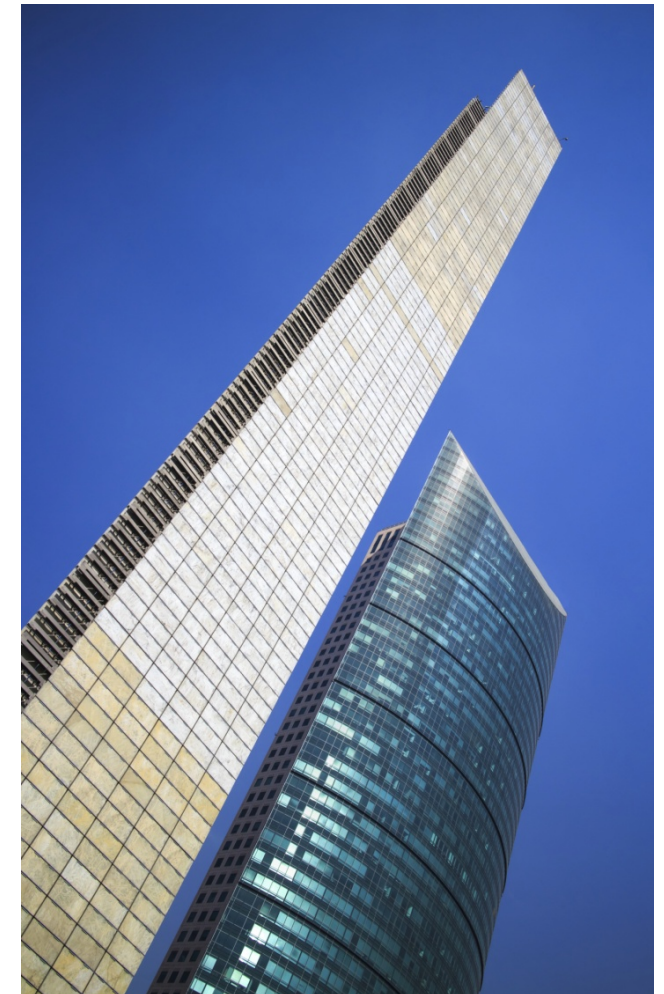
MEXICO THRESHOLDS AND PROCESS (CONTINUED)

4. Other relevant information

- Fines for failure to notify up to 5% of entity's revenue
- Fines for providing false information up to approx. USD 780,000
- Filing fees are approx. USD 9,800

5. Trends

- COFECE has been rejecting all fast track applications
- Complex mergers may take 6 to 9 months review and require a significant amount of paperwork
- Merger control cases in specific sectors will be reviewed in more detail – these sectors are energy, public health, public tenders, transportation, banking and finance and agro-food
- As of mid-July, 2019, mergers must be filed through a digital system
- In 2018, COFECE blocked three mergers and imposed several fines for gun jumping



PARAGUAY

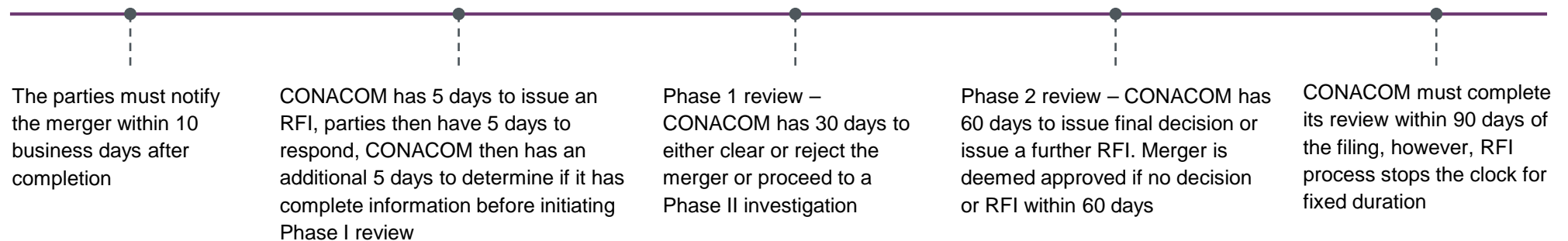
THRESHOLDS AND PROCESS

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 – approximately USD 36.2 million)

3. Timeline for filing:



PARAGUAY THRESHOLDS AND PROCESS (CONTINUED)

4. Trends in enforcement

- There are currently no guidelines for merger assessment, the regulator is working on drafting merger analysis guidance
- 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

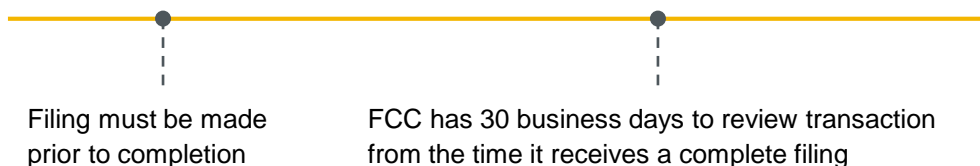
THRESHOLDS AND PROCESS

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:



PERU

THRESHOLDS AND PROCESS (CONTINUED)

4. Trends in enforcement

- New merger control regulation in Congress:
 - EU concentration model
 - All economic sectors
 - Threshold: USD 127 million – USD 150 million combined gross sales
 - Voluntary during first year
- The Peruvian Competition Authority (Indecopi) will set up a merger control division with at least 35 staff

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 91 million or more

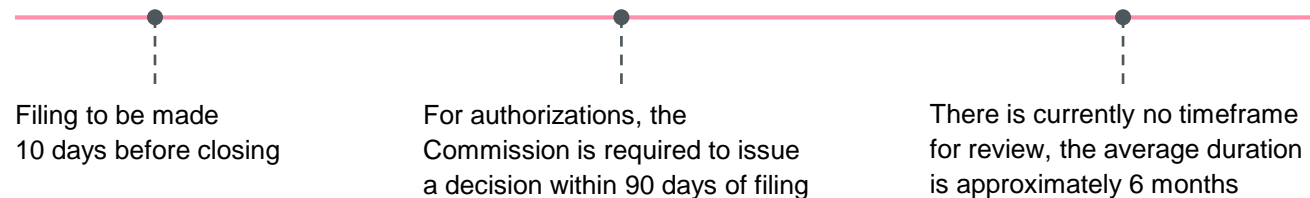


* EXEMPTIONS MIGHT APPLY FOR CERTAIN ACQUISITION STRUCTURES (E.G., A FOREIGN ENTITY ACQUIRING A SINGLE URUGUAYAN COMPANY WITHOUT ANY OTHER PREVIOUS ASSETS OR INTERESTS IN URUGUAY); THAT IS A COMPANY MAKE A FIRST LANDING IN URUGUAY LIKELY HAS NO FILING.

URUGUAY THRESHOLDS AND PROCESS (CONTINUED)

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
- Timeline for filing



4. Trends in enforcement

- The CPDC may request information that has little relevance to merger control
- The legislative body is working on a draft bill that will implement a new premerger control (suspensory effect until clearance) regime with new thresholds
 - Concentrations where the combined annual Uruguayan turnover of all parties to the transaction, in any of the last three fiscal years, amounts to UI 600,000,000 – approximately USD 73 million or more



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/Ticovac (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 coordinate 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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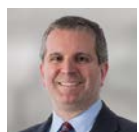
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