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
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 AR$ 2,000 million – approx. USD 45 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 AR$ 400 million – approx. USD 8.8 million
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

- Thresholds will be updated again soon
- 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 AR$ 15 million per day
- Filing fee for reportable transactions which range between AR$ 100,000 and AR$ 400,000
- 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
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:

   - **Filing must be made before completion**
   - Authority has 10 working days to determine if filing is complete
   - First phase investigation 30–70 working days
   - Second phase in-depth investigation 90–165 working days

   ✓ 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
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
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*
3. Timeline for filing:

- Filing must be made before completion
- Phase I-A fast track stage in which the transaction will be cleared within 30 business days if there are no competition issues
- Phase II-A secondary in depth investigation which can take from 3–6 months from the time parties provide all additional information
- The current regime is suspensory, RFIs will restart the clock

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 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:

| File at any time, preferably after execution of formal binding document | Regulator required to conclude review within 240 days with a maximum review period of 330 days | Fast track process available for mergers without substantial concerns – an average of 30 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
BRAZIL
THRESHOLDS AND PROCESS
(CONTINUED)

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
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
3. Timeline for filing:

- Pre-notification system for parties who need consultation
- File within 8 days of execution of formal binding document
- Regulator must request further information or certify the filing as complete within 10 business days
- 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)
- 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

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
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:
   - COFECE has 10 business days to determine if filing is complete
   - COFECE 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, COFECE must issue decision within 15 business days
   - Average timeframe for review varies between 3 to 8 months depending on complexity
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
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:

   The parties must notify the merger within 10 business days after completion.

   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 1 review – CONACOM has 30 days to either clear or reject the merger or proceed to a Phase II investigation.

   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.

   CONACOM must complete its review within 90 days of the filing, however, RFI process stops the clock for fixed duration.
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
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:

   - Filing must be made prior to completion
   - FCC has 30 business days to review transaction from the time it receives a complete filing
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
1. Mandatory filing with the Antitrust Commission (“Comision de Promoción y Defensa de la Comptencia”) 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.
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

| 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 |

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 (suspending 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.
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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
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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BRUSSELS/MADRID
OUR ANTITRUST PRACTICE

MERGER CONTROL IN LATIN AMERICA
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