CLIFFORD

CHANCE

MERGER CONTROL IN LATIN AMERICA

THRESHOLDS AND GUIDANCE FOR ANTITRUST FILINGS

JANUARY 2020

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
  - Uruguay and Peru have passed new merger control regulations that will enter into force in the second and third quarter of 2020
- 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 after 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**: filing required where transaction results in the 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$ 2,640 million – approximately USD 45 million (in other words the turnover of one party can satisfy the threshold)

The *de minimis* threshold has also increased and concentrations will be exempt from notification if the total local assets of the target and the domestic portion of the transaction would each not exceed AR$ 528 million – approx. USD 8.8 million

**EXEMPTIONS APPLY FOR CERTAIN ACQUISITION STRUCTURES (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):

- There are 3 phases of filings – ranging from a standard form requiring basic information about the 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

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 in 2020)
- Review periods:
  - the Authority must issue a decision within 45 business days from the filing of the completed notification
  - in the 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 in 2020
- Argentina has drafted and published 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$ 19.8 million per day
- filing fee for reportable transactions which ranged between AR$ 132,000 and AR$ 528,000
- 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

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 the transaction results in and 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 (approx. USD 107.6 million); **AND**
     - At least two of the parties have individual turnover in Chile of 450,000 UF or more (approx. USD 19.4 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**
     - Each has Chilean turnover of more than 100,000 UF (approx. USD 3.9 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

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 the 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 are not subject to pre-merger control); **AND**
     - Either party or both parties have an aggregate Colombian turnover or total assets greater than 60,000 times the minimum legal monthly wages during the preceding year; the minimum monthly wage for 2020 is COP 877,803 (making the threshold COP 52.6 million – approx. 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:

- 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
  - The above means that even companies with no direct presence in Colombia, but who 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 (approx. USD 195 million)
  - Another party to the transaction has Brazilian gross revenue of BRL 75 million (approx. 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
- For non fast track transactions, the average review period is 60–90 days and varies 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*

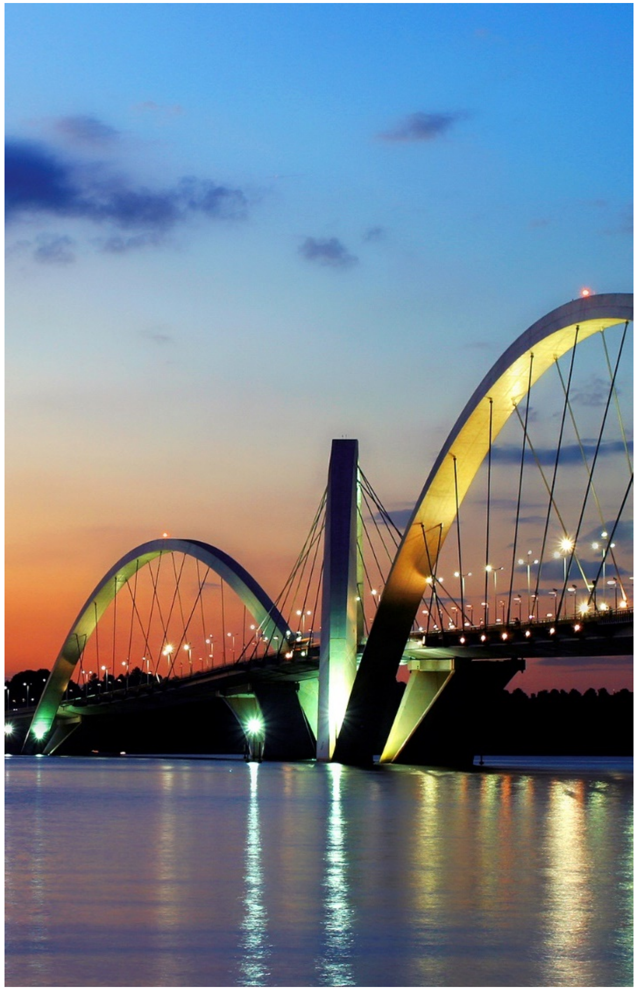
BRAZIL
THRESHOLDS AND PROCESS (CONTINUED)

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 is common (over 90% of reviewed transactions)
- 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 1.26 billion for transactions concerning companies active in the financial system or in the stock market, and USD 84.3 million for mergers where the targets are insurance or reinsurance companies and USD 78.8 million for all other mergers; **OR**
     - The transaction involves parties active in the same economic activity and it results in at least a 30% share in the national market

ECUADOR
THRESHOLDS AND PROCESS (CONTINUED)

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 drafting merger analysis guidance
- The implementation of gun jumping fines (up to 10% of the group's turnover)
- 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 – approx. 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 – approx. USD 80 million; **OR**
     - The transaction results in an accumulation of assets or capital stock in excess of MXP 709,716,000.00 – approx. 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 – approx. USD 208 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

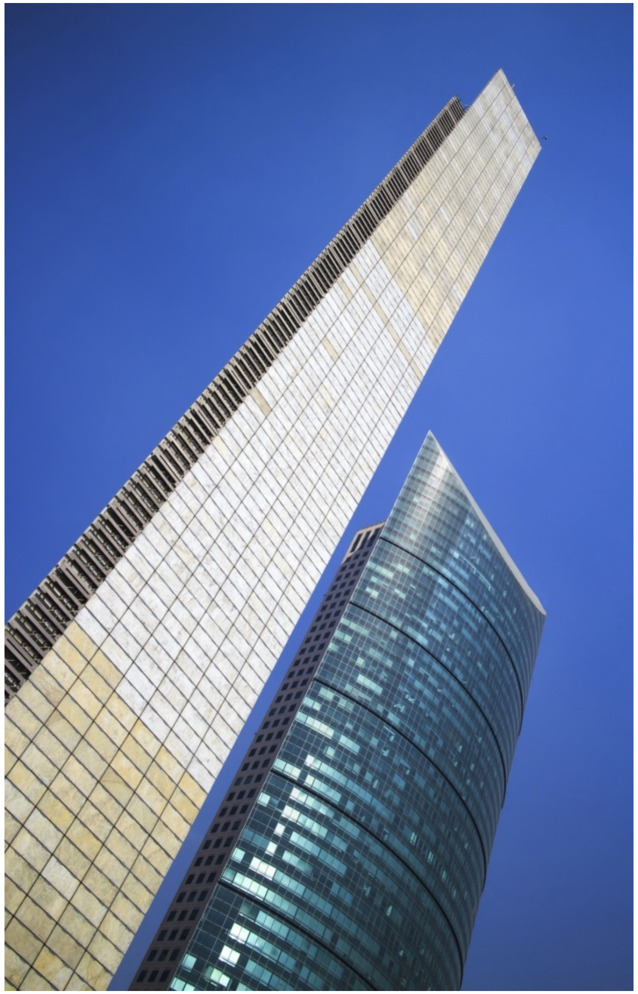
MEXICO
THRESHOLDS AND PROCESS (CONTINUED)

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
- In 95% of the cases, COFECE issues an initial information request
- 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
- Since mid-July 2019, mergers must be filed through a digital system
- COFECE has recently blocked various 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** 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 219.2 billion – approx. USD 35 million)

3. Timeline for filing:

The parties must notify the merger within 10 business days after completion	CONACOM has 5 days to issue an information request, 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, request for information process stops the clock for fixed duration

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
- CONACOM has never blocked a transaction but has imposed contractual remedies

PERU
THRESHOLDS AND PROCESS

1. **Mandatory filing with INDECOPI 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

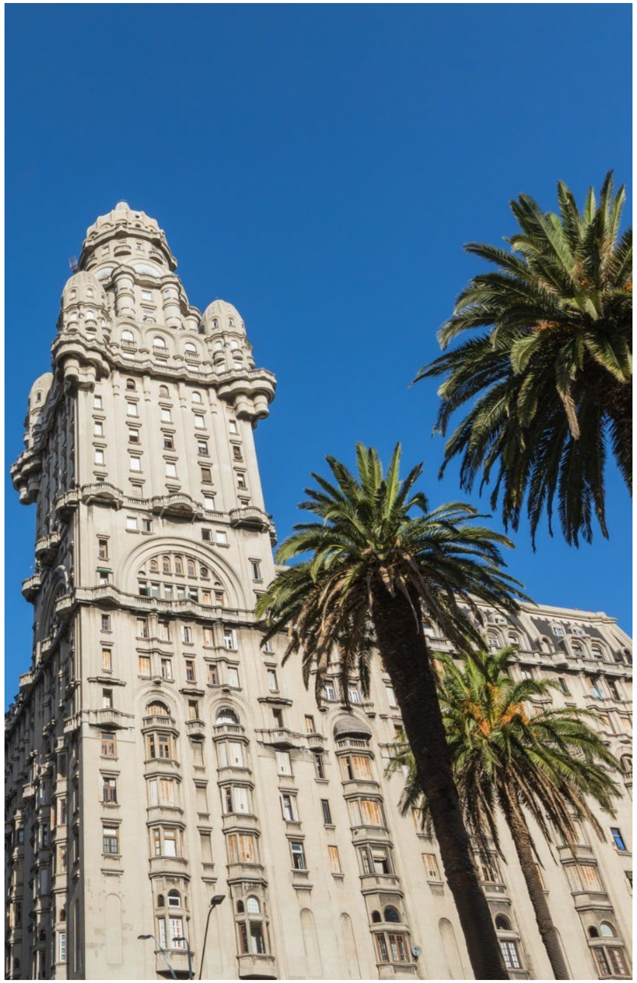
INDECOPI has 30 business days to review transaction from the time it receives a complete filing

PERU
THRESHOLDS AND PROCESS (CONTINUED)

4. Trends in enforcement

- New merger control regulation enters into force in August 2020:
  - **Scope** – the new regime will apply to concentrations occurring in all fields of economic activities, except for concentrations involving failing banks and insurance companies that endanger the stability of the financial system, which will only require clearance from the Superintendence of Banking and Insurance
  - **Suspensory Regime** – reportable concentrations must be notified and cannot be implemented unless and until INDECOPI grants clearance
  - **Thresholds** – the new regime has two concurrent financial thresholds: (i) the parties to the transaction must have a combined turnover of at least PEN 495,6 million (approx. USD 150.2 million) in Peru and (ii) two of the parties to the transaction must each have a turnover of at least PEN 75.6 million (approx. USD 22.9 million) in Peru
  - **Gun Jumping fines** – up to 12% of gross revenue of the offender or its economic group. INDECOPI may also seek to void and breakup the unauthorized concentration

URUGUAY
THRESHOLDS AND PROCESS



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**: 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)*

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

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
- New merger control regulation enters into force in April 2020 that will implement a new premerger control (suspensory effect until clearance) regime and 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

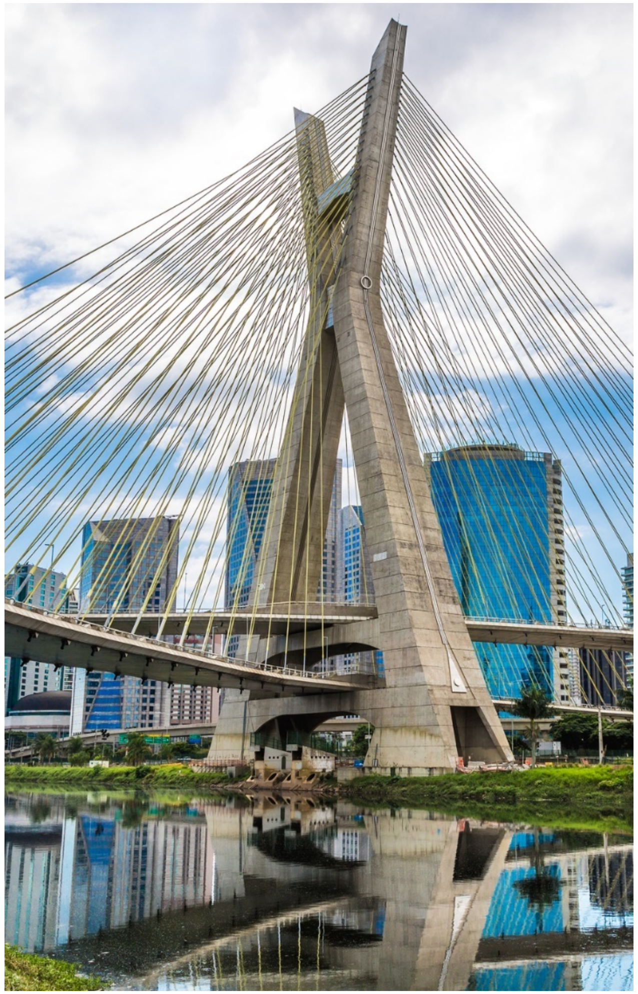
OUR RECENT EXPERIENCE

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



KEY CONTACTS

SHARIS POZEN
Partner, Co-Chair, Global Antitrust Group Washington, D.C.

T +1 202 912 5226
E sharis.pozen@cliffordchance.com

TIMOTHY CORNELL
Partner, Chair of U.S. Antitrust Group
Washington, D.C.

T +1 202 912 5220
E timothy.cornell@cliffordchance.com

SANTIAGO ROCA ARRIBAS
Special Legal Consultant, Washington, D.C.

T +1 202 912 5183
E santiago.rocaarribas@cliffordchance.com

MICHAELA SPERO
Associate, Washington, D.C.

T +1 202 912 5413
E michaela.spero@cliffordchance.com

ISA HERRERA MOYA
Law Clerk, Washington, D.C.

T +1 202 912 5179
E isa.herreramoya@cliffordchance.com

OUR US ANTITRUST TEAM

SHARIS POZEN

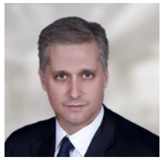
Partner, Co-Chair, Global Antitrust Group, Washington, D.C.

T +1 202 912 5226
E sharis.pozen@cliffordchance.com

TIMOTHY CORNELL

Partner, Chair of U.S. Antitrust Group Washington, D.C.

T +1 202 912 5220
E timothy.cornell@cliffordchance.com



ROBERT HOUCK

Partner, Washington, D.C.

T +1 212 878 3224
E robert.houck@cliffordchance.com

BRIAN CONCKLIN

Counsel, Washington, D.C.

T +1 202 912 5060
E brian.concklin@cliffordchance.com

JOSHUA FITZHUGH

Counsel, Washington, D.C.

T +1 202 912 5090
E joshua.fitzhugh@cliffordchance.com

MICHAEL VAN ARSDALL

Counsel, Washington, D.C.

T +1 202 912 5072
E michael.vanarsdall@cliffordchance.com

ABIGAIL CESSNA

Associate, Washington, D.C.

T +1 202 912 5452
E abigail.cessna@cliffordchance.com

JOHN FRIEL

Associate, New York

T +1 212 878 3386
E john.friel@cliffordchance.com

ISA HERRERA MOYA

Law Clerk, Washington, D.C.

T +1 202 912 5179
E isa.herreramoya@cliffordchance.com

EVA KURBAN

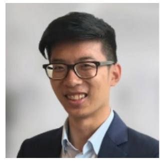
Associate, Washington, D.C.

T +1 202 912 5072
E eva.kurban@cliffordchance.com

ESTHER LEE

Associate, Washington, D.C.

T +1 202 912 5561
E esther.lee@cliffordchance.com



JULIUS PAK

Law Clerk, Washington, D.C.

T +1 202 912 5128
E julius.pak@cliffordchance.com

JORDAN PASSMORE

Law Clerk, Washington, D.C.

T +1 202 912 5081
E jordan.passmore@cliffordchance.com

SANTIAGO ROCA ARRIBAS

Special Legal Consultant, Washington, D.C.

T +1 202 912 5183
E santiago.rocaarribas@cliffordchance.com

LAUREN SILLMAN

Law Clerk, Washington, D.C.

T +1 202 912 5089
E lauren.sillman@cliffordchance.com

MICHAELA SPERO

Associate, Washington, D.C.

T +1 202 912 5413
E michaela.spero@cliffordchance.com

BRIAN YIN

Associate, New York

T +1 212 878 4980
E brian.yin@cliffordchance.com

OUR ANTITRUST PRACTICE

DAVE PODDAR
Australia
T +61 28922 8033
E dave.poddar
@cliffordchance.com

TONY REEVES
Belgium
T +32 2533 5943
E tony.reeves
@cliffordchance.com

THOMAS VINJE
Belgium
T +32 2533 5929
E thomas.vinje
@cliffordchance.com

DIETER PAEMEN
Belgium
T +32 2533 5012
E dieter.paemen
@cliffordchance.com

ANASTASIOS TOMTSIS
Belgium
T +32 2533 5933
E anastasios.tomtsis
@cliffordchance.com

BAI YONG
China
T +86 10 6535 2286
E yong.bai
@cliffordchance.com

ALEX COOK
Czech Republic
T +420 222 55 5212
E alex.cook
@cliffordchance.com

MICHEL PETITE
France
T +33 14405 5244
E michel.petite
@cliffordchance.com

KATRIN SCHALLENBERG
France
T +33 14405 2457
E katrin.schallenberg
@cliffordchance.com

DAVID TAYAR
France
T +33 1 4405 5422
E david.tayar
@cliffordchance.com

MARC BESEN
Germany
T +49 2114355 5312
E marc.besen
@cliffordchance.com

MICHAEL DIETRICH
Germany
T +49 2114355 5542
E michael.dietrich
@cliffordchance.com

JOACHIM SCHÜTZE
Germany
T +49 2114355 5547
E joachim.schuetze
@cliffordchance.com

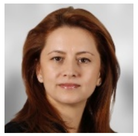
RICHARD BLEWETT
Hong Kong
T +852 2826 3517
E richard.blewett
@cliffordchance.com

LUCIANO DI VIA
Italy
T +39 064229 1265
E luciano.divia
@cliffordchance.com

MASAFUMI SHIKAKURA
Japan
T +81 3 6632 6323
E masafumi.shikakura
@cliffordchance.com

FRANS MULLER
Netherlands
T +31 20711 9318
E frans.muller
@cliffordchance.com

IWONA TERLECKA
Poland
T +48 22429 9410
E iwona.terlecka
@cliffordchance.com



NADIA BADEA
Romania
T +40 216666 102
E nadia.badea
@cliffordchance.com

TORSTEN SYRBE
Russia
T +7 495725 6400
E torsten.syrbe
@cliffordchance.com

ELIZABETH KONG
Singapore
T +65 6661 2028
E harpreet.singh
@cliffordchance.com

MIGUEL ODRIOZOLA
Spain
T +34 91 590 9460
E miguel.odriozola
@cliffordchance.com

ITIR ÇIFTÇI
Turkey
T +90 212339 0077
E itir.ciftci
@cliffordchance.com

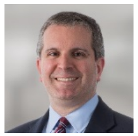
JENINE HULSMANN
United Kingdom
T +44 20 7006 8216
E jenine.hulsmann
@cliffordchance.com

NELSON JUNG
United Kingdom
T +44 20 7006 6675
E nelson.jung
@cliffordchance.com

ELIZABETH MORONY
United Kingdom
T +44 20 7006 8128
E elizabeth.morony
@cliffordchance.com

ALEX NOURRY
United Kingdom
T +44 20 7006 8001
E alex.nourry
@cliffordchance.com

GREG OLSEN
United Kingdom
T +44 20 7006 2327
E greg.olsen
@cliffordchance.com



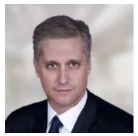
MATTHEW SCULLY
United Kingdom
T +44 20 7006 1468
E matthew.scully
@cliffordchance.com

LUKE TOLAINI
United Kingdom
T +44 20 7006 4666
E luke.tolaini
@cliffordchance.com

SAMANTHA WARD
United Kingdom
T +44 20 7006 8546
E samantha.ward
@cliffordchance.com

SHARIS POZEN
United States
T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

TIMOTHY CORNELL
United States
T +1 202912 5220
E timothy.cornell
@cliffordchance.com



ROBERT HOUCK
United States
T +1 212878 3224
E robert.houck
@cliffordchance.com

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Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

Clifford Chance US LLP

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