The Fundamentals of Latin American Merger Control Regimes (Brazil, Chile & Colombia)

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On February 5, 2025, the International Committee of the American Bar Association's Section of Antitrust Law hosted a webinar on the mechanics of the merger control process in Brazil, Chile, and Colombia. This was the fifth of a seven-session "Crash Course in Global Merger Control" organized by the International Committee and co-sponsored by the section's Mergers and Acquisitions Committee. The series, which will run through the end of February 2025, is designed for junior lawyers and economists interested in international merger control. The sessions tackle the basics of merger control and review process in general, as well as outline information specific to various jurisdictions around the globe.

This session explored the details of the merger control regime in Brazil, Chile and Colombia, including the conditions under which a transaction must be submitted to and reviewed by the competition authority, the merger review procedure, and the consequences of failing to notify the competition authority of a transaction subject to mandatory antitrust review. Moderated by Mélanie Perez of Covington & Burling in Brussels, the panel featured three speakers: Luiz Antonio Galvão of BMA Advogados in São Paulo, Brazil; Catalina González Verdugo of Cariola Díez Pérez-Cotapos in Santiago, Chile; and Pablo Onofre of ECIJA in Bogotá, Colombia.

Brazil

Mr. Galvão started by describing the functions and organizational structure of the Brazilian Competition Authority, known as Conselho Administrativo de Defesa Econômica (CADE) in the context of merger control in Brazil. CADE is responsible for protecting competition in both a preventive (e.g., merger review) and repressive manner (e.g., investigation of and punishment for anticompetitive conduct). CADE is comprised of a General Superintendence, an Administrative Tribunal for Economic Defense, an Economic Studies Department, and Specialized Federal Attorney's Office. All antitrust analyses in Brazil begin with the General Superintendence (SG), composed of one General Superintendent and two Deputy Superintendents. Only mergers that the SG considers deserving antitrust scrutiny, that are appealed by third-parties, or that a commissioner asks to further review are reviewed by CADE's Administrative Tribunal. The Tribunal is composed of one president and six commissioners. Finally, the Economic Studies Department and Specialized Federal Attorney's Office do not decide cases, but issue technical opinions to support the SG and CADE's Tribunal.

Mr. Galvão explained that there are three criteria for a transaction to require CADE's prior notification and antitrust review. These three criteria are cumulative and independent. First, the transaction must qualify as a "merger case" under the Brazilian competition law. Overall, merger cases include mergers, incorporations, associative agreements, joint ventures, consortia, and acquisitions of control (sole or joint) or part of a company. Acquisition of minority interests also qualify as a merger case if it is an acquisition or increase of a 20% interest or more, or an acquisition or increase of a 5% or more interest in competitors, clients or suppliers. Acquisitions by the sole controller are exempted from merger review. Importantly, CADE has the power to order the submission of mergers that are not subject to mandatory notification, within one year of consummation.

Second, the transaction must satisfy a turnover threshold. The threshold is that at least one of the involved economic groups registered gross revenues in Brazil exceeding BRL 750 million (approximately 129 million USD) in the previous year, and another involved

group registered gross revenues of at least BRL 75 million (approximately 12.9 million USD) in the same period. The turnover of the whole economic group (and not only the party directly involved in the transaction) must be considered. The groups involved must be on opposite sides of the transaction. For example, if two buyers meet the turnover thresholds but the seller and the target do not, then the transaction may not satisfy the turnover threshold because the parties satisfying the threshold are not on opposite sides of the transaction. There are also specific rules for defining the economic group involving investment funds.

Third, the transaction must have effects in Brazil. However, there is no clear guidance on how to assess actual or potential effects in Brazil. CADE generally considers the transaction to have effects in Brazil if (i) relevant market is defined as global or international and/or (ii) target company has activities in Brazil or sales to clients in Brazil. Different from other jurisdictions, there is no exception or *de minimis* rule in terms of the transaction effects in Brazil.

Mr. Galvão explained that there are two merger review procedures before CADE: the fast-track and the ordinary procedure.

The fast-track procedure has a review time of up to 30 calendar days from the filing date and is less information-demanding than the ordinary procedure. The criteria to qualify for a fast-track procedure are the following: (i) if the merging parties have a horizontal overlap, their combined shares must be lower than 20%; (ii) if the merging parties have a vertical relationship, the market shares in either vertically related market must be lower than 30%; (iii) if the variation in the HHI is less than 200 points and the combined market shares are less than 50%; and, finally, (iv) if there is no horizontal or vertical overlap (even potential) between the parties. The decision on whether a transaction is eligible for the fast-track procedure is discretionary, that is, meeting the above criteria does not guarantee treatment under the fast-track procedure. The parties must wait a 15-day deadline after the publication of the General-Superintendence's decision approving the transaction before closing.

The ordinary procedure includes all merger cases that are not eligible for the fast-track procedure. The ordinary procedure has a pre-filing phase that can take several months. The review time in the ordinary procedure is up to 330 calendar days from the filing date after the pre-filing is concluded. The exact review time depends on the complexity of the case. It can take from 90 to 150 days when there is no substantial antitrust issue, no complaints by third parties, no detailed discussion on the definition of relevant markets, and no review by CADE's Tribunal. It can take between 150 and 330 days when the combined market shares are high (e.g., more than 40%), a detailed assessment of the

market is necessary, or the parties are negotiating remedies, which require CADE's Tribunal's approval.

Finally, Mr. Galvão explained the consequences of failing to notify CADE of a transaction subject to mandatory antitrust review. First, the most common consequence is a pecuniary fine for gun-jumping. The fine may range from BRL 60,000 to BRL 60MM (approximately 10,000 USD to 1o million USD). The exact fine amount depends on different factors such as the value of the transaction and the parties' turnovers. All the parties involved in the transaction are responsible for potential gun-jumping fines. Second, all acts performed by the parties may be declared void. Mr. Galvão pointed out that this sanction has only been applied by CADE once. Third, the parties may be subject to investigations of anticompetitive behavior. Mr. Galvão mentioned that CADE has never imposed such a sanction. Mr. Galvão concluded his talk explaining that carve-out is not allowed in Brazil. As a result, the parties must wait for the CADE's approval before closing the transaction, even if the transaction has already been approved in other jurisdictions.

Chile

Ms. Catalina Gonzalez of Cariola Díez Pérez-Cotapos provided an overview of the merger control regime in Chile, focusing on the legal framework, notification requirements, and penalties for non-compliance. The primary statute governing mergers in Chile is Decree Law 211 (DL 211), which outlines the obligation to notify mergers, the thresholds for notification, and the penalties for failing to comply with these requirements. The Chilean Competition Authority, known as the Fiscalía Nacional Económica (FNE), plays a crucial role in investigating and approving or prohibiting mergers. Additionally, Chile's Competition Tribunal or Supreme Court can intervene when there are disputes over the FNE's decisions.

A merger, as defined by DL 211, involves any act or convention that results in two or more previously independent economic agents to lose their independence. This can occur through mergers, acquisitions of control or decisive influence, joint ventures, or asset acquisitions. The FNE adopts a broad interpretation of control, similar to the European approach, encompassing both positive and negative control. Positive control allows an entity to determine the competitive behavior of another, while negative control involves veto rights that can influence market behavior. Transactions that meet these criteria must be notified to the FNE.

The notification process is triggered when two conditions are met: the transaction qualifies as a concentration, and certain sales thresholds are surpassed. The thresholds are based on the combined sales of the entities involved in the transaction, with a collective threshold of approximately $101.7 million USD and an individual threshold of

18.3 million USD. The calculation of sales varies depending on whether the transaction is a merger, acquisition of control, or acquisition of assets. If both thresholds are exceeded, notification to the FNE is mandatory.

There are three types of notifications: ordinary, simplified, and simplified with no overlaps. The type of notification affects the amount of information required but not the investigation process itself. The choice between these forms depends on factors such as market share and the presence of vertical or horizontal overlaps. The ordinary form is used when post-merger market share exceeds 20% for horizontal overlaps or the vertical overlap exceeds 30% of the market share.

The filing process involves several steps, starting with the preparation of the notification, which can take at least four weeks due to the extensive information required. Once submitted, the FNE has 10 business days to issue a completeness resolution. If the filing is incomplete, the parties have additional time to provide the necessary information. The investigation then proceeds in two phases, with the first phase lasting 30 business days and the second phase up to 90 business days. A pre-evaluation request can be made to the FNE to determine if a transaction constitutes a concentration, but this does not protect against changes in the conditions of the transaction.

Gun jumping, as well as failing to notify a mandatory transaction, can result in significant penalties, including large fines. The FNE can investigate and bring cases before the Competition Tribunal if parties fail to notify. Internal documents related to the transaction must be submitted as part of the notification process, and failure to do so can lead to penalties. The FNE also audits compliance with remedies imposed on approved transactions, and post-transaction non-compliance can result in further claims and fines. Ms. Gonzalez emphasized the importance of understanding these concepts to avoid enforcement actions and penalties.

Colombia

Mr. Pablo Onofre, from ECIJA Colombia, provided an overview of the merger control framework in Colombia. He explained that, according to the Colombian Competition Authority, known as the Superintendence of Industry and Commerce (SIC), a merger is defined as any mechanism, regardless of the legal structure of the transaction, used to acquire control over one or more companies. This definition extends beyond traditional legal structures and encompasses any transaction that results in the acquisition of control, whether positive or negative, over another company. Control is understood as the ability to influence a company's market behavior, directly or indirectly, including its business policies and economic activities, or any kind of competitive behavior.

Mr. Onofre outlined the criteria for determining whether a merger is reportable, which in Colombia relies on two criteria: subjective and objective. The subjective criterion involves assessing whether the companies are engaged in the same economic activity or value chain, indicating horizontal overlaps or vertical effects. The objective criterion examines whether the joint operational revenues or total assets of the intervening parties exceed a certain threshold, currently set at 7.07 million Basic Value Unites, which corresponds to approximately 18.6 million USD. If both criteria are met, the merger must be informed to the SIC. Transactions where the parties are within the same business group or are under the same control unit are exempt from merger control.

Mr. Onofre also described the procedural thresholds for merger control, distinguishing between a pre-evaluation request and a notification. If the parties involved hold less than 20% of each of the affected relevant markets, the process is a simplified notification. However, if they hold more than 20% in any relevant market, a full filing, known as a pre-evaluation request, is required. The notification process is straightforward, with the SIC issuing an acknowledgment of receipt within (10) ten business days. However, Mr. Onofre noted that it has become common for the SIC to request additional information, which may extend the review process beyond the prescribed ten-business-day period for evaluation and the formal acknowledgment of receipt.

Conversely, the pre-evaluation form is a more detailed document that must adhere to the requirements and include all the information specified in Annex 9.1 of Resolution 2751 of 2021. Third parties may submit relevant information for the analysis of the proposed transaction within ten (10) business days following its publication on the SIC's website. Within thirty (30) business days from the date of filing, the SIC may either grant approval for the merger or escalate the review to Phase 2. The Phase 2 review entails a more comprehensive analysis and may extend up to three calendar months from the date of submission of the Phase 2 information (as set forth in Annex 9.2 of Resolution 2751 of 2021). The SIC reserves the discretion to extend this period by an additional three months, for a maximum total review period of six months.

Regarding penalties for gun jumping, Mr. Onofre highlighted that significant fines could be imposed on both legal entities and individuals involved in a merger that proceeds without proper notification. Legal entities can face penalties of up to 100,000 times the minimal legal monthly wages, while individuals can be fined up to 2,000 times the minimal legal monthly wages. He emphasized that companies cannot cover fines for individuals, who must pay from their own resources. Additionally, although not yet enforced, the SIC has the power to order the reversal of a transaction as a penalty for gun jumping.

The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.

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