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Navigating Merger Control in Latin America: A Strategic Guide for Global M&A

WSG

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Introduction

In recent years, competition authorities across Latin America have been shaping their own frameworks for merger control, drawing inspiration from advanced jurisdictions like the United States, the United Kingdom, and the European Union. Through this evolving process, they have set key precedents that are defining the landscape for M&A transactions in each country. However, despite the surge in cross-border deals, the lack of a unified regional approach to merger control presents challenges for businesses operating internationally.

In multi-jurisdictional transactions, navigating the merger control regimes of multiple countries simultaneously can be a complex and time-sensitive task. This publication offers a comprehensive overview of the latest trends and discussions shaping merger control in Latin America, providing crucial insights for businesses looking to expand or invest in the region.

Understanding the regulatory landscape of different Latin American countries can greatly enhance the coordination and execution of international M&A transactions. It also aids in ensuring the proper application of antitrust regulations, minimizing risks, and maximizing opportunities.

Leveraging the robust network of WSG, this publication brings together expert perspectives from the WSG Latam Antitrust and M&A Groups, offering a deep dive into the merger control regulations in key jurisdictions, including Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay.

The focus is on the most critical merger control topics, such as gun jumping, imposed remedies, clean team agreements, antitrust risk allocation in SPAs, and strategies to mitigate potential delays caused by antitrust regulations.

On behalf of the WSG Latam Antitrust and M&A Groups, we trust that this publication will serve as a valuable resource for navigating the complexities of merger control across Latin America, empowering your business to seize new opportunities with confidence.

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Argentina

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INTRODUCTION

Is merger control regulation in force?

N/A

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

Not applicable in Argentina.

Although Argentina's Competition Act includes a suspensory merger control regime, it is not yet in force. Until it enters into force, filing can be made until a week after closing, so there is no gun jumping and therefore no precedents involving gun jumping.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

In the context described above, the main risk from a practical perspective is that the Argentine Competition Commission or a court issue an injunction ordering the parties to refrain from integrating, or to separate certain parts of the integrated business or to reverse integration altogether; in all cases while the analysis is ongoing.

In cases where such a risk is anticipated, the parties may refrain from implementing the transaction while the antitrust analysis is ongoing, or until it reaches a certain level of progress that allows risk mitigation. In some scenarios where this is very costly or just not possible, the parties plan ahead the potential reversal of the transaction, and implement it in a way such that it minimizes potential costs of total or partial reversion.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

See above.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

As in other jurisdictions, the Argentine Competition Commission tends to prefer structural remedies when possible, since they provide permanent solutions and do not require

In the most recent precedent involving a JV between Arcor and Ingredion (September, 2024) the Argentine Commission subordinated clearance to the adoption of a "bundle" of structural remedies that included (i) the transfer of production capacity through the transfer of assets; (ii) the availability of production capacity for third parties on a RAND terms (iii) charging prices similar to transfer princes to third party buyers; (iv) Refrain from adopting refusals to deal and obligation to provide a similar level of service to third parties and affiliates; (v) implementation of compliance program in association where parties to the transaction interact; (vi) Refraining from non hiring employees and executives from competitors; and (vii) Exporting certain volumes.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

3 to 5 years. Remedies ii); iii); iv) and vii) included in the above mentioned precedent involved a 5-year term, and remedy (vi) a three year term.

3. What are the consequences of breaching the agreed/imposed remedies?

N/A

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

They are not. There is considerable flexibility.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

No. See answers above.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

No.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Yes (see below).

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

The standard is that the antitrust risk is assumed by buyer entirely. This is due to several reasons, including the fact that so far filing has been post closing (See above) and the long terms for the Competition Commission's analysis along the years.

3. How do parties typically regulate a middle ground in risk allocation?

In the context described above, middle ground allocation is rather infrequent.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

See answers above and below. Such scenarios are not frequent at all.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

See above. The standard is that the antitrust risk is assumed by buyer entirely. In the worst case scenario (outright rejection), the standard is that the buyer assumes the obligation to divest target and assumes any value loses.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

No.

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INTRODUCTION

Is merger control regulation in force?

There is no specific law or regulations related to merger control in Bolivia.

The general scope is provided by the Bolivian Constitution, which sets out the legal framework for competition, prohibition of monopolies and private oligopolies and any kind of association or agreement between national or foreign individuals or legal entities, that are meant to exercise control or be exclusive manufacturers o suppliers of goods or services in the country.

Certain regulations regarding mergers and joint ventures can be found in Electricity Law, Telecommunications Law, Hydrocarbons Law, Bank and Financial Institutions Law and Insurance Law.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

Mergers and acquisitions in non-regulated sectors are not subject to merger control rules. Mergers of Bolivian corporations are regulated by the Bolivian Commercial Code, which requires that the companies involved in the merger give notice to their creditors and shareholders regarding the proposed merger, and such creditors and shareholders may object through a judicial procedure before a civil court.

Regulated sectors are subject to merger control. Law 1600 dated October 28, 1994, which prohibits carrying out of economic concentration operations that have the effect of establishing, promoting and consolidating a dominant position within a relevant market, contemplates a pre-merger voluntary consultation regime to allow agents to ensure that a prospective transaction is not prohibited.

Regarding Banking and Finance, mergers are subject to a pre-approval regime granted by the Financial System Supervisory Authority (ASFI for its acronym in Spanish), which assesses the potential formation of a private monopoly or oligopoly. However, and as stated in relevant regulation, there is neither triggering threshold nor a specific notification procedure.

If the merger will result in a foreign direct investment into Bolivia, then such investment must be registered with the Bolivian Central Bank as a result of the recently approved Investment Promotion Law.

No party is obliged to notify any authority about a specific transaction there is no notification term and there is no approval required before closing any transaction.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

As discussed above, the mergers that will be subject to regulatory scrutiny and, in certain cases, prior authorization, are dependent on sector specific regulations.

Regarding Banking and Finance, mergers are subject to a pre-approval regime granted by the ASFI, which assesses the potential formation of a private monopoly or oligopoly. However, and as stated in relevant regulation, there is neither triggering threshold nor a specific notification procedure. Companies will simply not be allowed to implement the transaction as they would need clearance from sectorial regulator.

Within 30 administrative business days counting from the signing date of the Merger Commitment, the supervised entities must file with the ASFI an authorization request for the authorization to sign the Definitive Merger Agreement.

If there are observations, a term will be established so that the supervised entities that participate in the merger process can correct them.

The ASFI may request any additional documentation it deems pertinent, in order to evaluate the application for authorization to sign the Final Merger Agreement.

The only sanction indicated by the competent authority is that of rejection of the application for authorization to subscribe to the Definitive Merger Agreement, and it is specifically given in the event that the supervised entities do not amend the observations raised by the ASFI within the period established for it, and that the Plan for the merger by integration of the supervised entities does not support the viability-convenience of the project.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

To trigger regulatory intervention, mergers must typically involve the change of effective control over the relevant regulated company.

There are no provisions in Bolivian regulation about mergers which prohibits or allows “ordinary course of business” clauses.

In practice, an “ordinary course of business” clause that prevents the target company from taking decisions outside the course of its ordinary business until the closing date is generally considered acceptable.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

During 2023-2024, the Financial System Oversight Authority (ASFI) and the Bolivian Competition Authority have focused their efforts on strengthening competition and combating anti-competitive practices. Among the most commonly used resources, economic sanctions and corrective measures stand out to promote a more competitive environment.

A relevant case is that of an investigation into collusion practices in the telecommunications sector, where significant fines were imposed on companies that had agreed on prices. This type of action reflects the authority's commitment to ensuring transparency and free competition in the Bolivian market.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

Within 30 administrative business days counting from the signing date of the Merger Commitment, the supervised entities must file with the ASFI an authorization request for the authorization to sign the Definitive Merger Agreement.

If there are observations, a term will be established so that the supervised entities that participate in the merger process can correct them.

3. What are the consequences of breaching the agreed/imposed remedies?

The only sanction indicated by the competent authority is that of rejection of the application for authorization to subscribe to the Definitive Merger Agreement, and it is specifically given in the event that the supervised entities do not amend the observations raised by the ASFI within the period established for it, and that the Plan for the merger by integration of the supervised entities does not support the viability-convenience of the project.

The corrective measures may consist, among others, in the cessation of the practice within a certain period, the imposition of certain conditions or obligations or fines, on the offender.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

In Bolivia, the legal framework governing Clean Team Agreements (CTAs) is not as explicitly defined as in some other jurisdictions. However, these agreements are generally governed by principles of contract law and confidentiality.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

The existence of a Clean Team Agreement (CTA) can be a significant factor in assessing whether "gun jumping" has occurred, but it is not necessarily a decisive factor on its own. "Gun jumping" refers to the premature exchange of sensitive information between merging parties before a transaction has been cleared by competition authorities, which can potentially distort competition and breach antitrust laws.

While a Clean Team Agreement can help demonstrate efforts to manage and control sensitive information, it is not a guaranteed safeguard against gun jumping. The effectiveness of the CTA, combined with actual conduct and adherence to regulatory requirements, will be crucial in determining whether competition authorities consider that gun jumping has occurred.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

Identifying information that is "strictly necessary" for a transaction and may be shared through a Clean Team Agreement (CTA) is crucial for ensuring compliance with antitrust and competition laws. While specific guidance may vary depending on jurisdiction and regulatory authority, general principles can help in determining what constitutes "strictly necessary" information.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

The acceptance and application of "hell or high-water" clauses in the context of antitrust risk allocation in Share Purchase Agreements (SPAs) are not explicitly addressed in local legislation. However, these clauses are increasingly recognized and used in international transactions, and their acceptance in Bolivia largely depends on the specific transaction, market practices, and negotiation between parties.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

In Bolivia, the negotiation and structuring of Share Purchase Agreements (SPAs) often involve specific terms regarding buyers' obligations, particularly concerning material adverse impacts.

Common Practices in Bolivia:

Material Adverse Effect (MAE) Clauses:

Limitation of Obligations, Negotiation of Terms, Common SPA Clauses, Pre-Closing Covenants, Material Adverse Effect Definition.

Local Practices:

Market Norms, Legal Advice.

Regulatory and Compliance Considerations:

Regulatory Impact.

3. How do parties typically regulate a middle ground in risk allocation?

As in many jurisdictions, parties to a Share Purchase Agreement (SPA) or other major contracts often seek to find a middle ground in risk allocation to balance the interests of both buyers and sellers. This typically involves negotiating terms that address various risks while ensuring fairness and practicality for both sides.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

In Bolivia, antitrust clearance can significantly impact the structuring of long stop date provisions in Share Purchase Agreements (SPAs) and other contracts. A long stop date is the deadline by which a transaction must be completed, often including provisions for what happens if this date is not met.

Parties typically address these impacts through extended deadlines, conditional extensions, termination provisions, and risk management strategies.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

The inclusion of walkaway clauses (or termination clauses) in Share Purchase Agreements (SPAs) and other major contracts is becoming increasingly relevant, especially in the context of regulatory complexities, including antitrust review. These clauses provide a mechanism for parties to exit the transaction if certain conditions, such as regulatory approvals, are not met within a specified timeframe. Their use is growing as transactions become more complex and as parties seek to manage the uncertainties associated with regulatory processes.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

In Bolivia, reverse termination fees (also known as breakup fees or reverse break fees) are not as commonly used or well-established as they are in some other jurisdictions, such as the United States. However, they are becoming more recognized and may be used in complex transactions involving significant investments or regulatory hurdles.

Brazil

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INTRODUCTION

Is merger control regulation in force?

Yes. Law No. 12,529/11, the Brazilian Antitrust Law, establishes the Brazilian merger control. Previously, Law No. 8,884/94 was the Brazilian Antitrust Law, which had an ex-post merger control regime.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

Yes. In exceptional situations, the Reporting Commissioner of the Administrative Council for Economic Defense ("CADE"), the Brazilian antitrust authority, may authorize, in a temporary and provisional manner, the execution of a transaction subject to merger control before final approval. In any event, in these cases, CADE imposes conditions aimed at preserving the reversibility of the transaction.

Accordingly, this is an exceptional measure, and the Parties are required to demonstrate (i) that there are no risks of irreparable harm to the competition; (ii) that the measures for which the preliminary authorization is requested are fully reversible; and (iii) the imminent occurrence of substantial and irreversible financial losses for the acquired company if the preliminary authorization is not granted.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

The implementation of a transaction subject to merger control without CADE's approval may result in (i) fines ranging from BRL 60 thousand to BRL 60 million, (ii) nullity of the transaction, and (iii) initiation of an Administrative Process to investigate potential anticompetitive conduct.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. The mere exchange of commercially sensitive information may be considered gun jumping, as well as an antitrust infringement. According to CADE's Guidelines on Gun Jumping, activities that may generate gun jumping concerns "can be divided into three major groups: (i) the exchange of information between economic agents involved in a merger; (ii) the definition of contractual clauses governing the relationship between economic agents; and (iii) the activities of the parties before and during the implementation of the merger".

b. According to Law No. 12,529/11, the closing and implementation of transactions subject to merger control before CADE's approval constitutes gun jumping. The rationale of the legal provision is to preserve the Parties' structures, which must behave in an independent manner until the authority concludes its assessment and grants the approval. For instance, CADE's Guidelines on Gun Jumping indicates that the definition of certain contractual clauses governing the relationship between the Parties may generate concerns.

According to CADE, among the clauses that demand greater attention are the ones that can result in a premature integration of the activities of the Parties, such as (i) anteriority clauses related to the term of effectiveness of the contract in relation to the date of its execution; (ii) prior non-compete clause; (iii) clauses for full or partial payment, non-reimbursable, in advance, in consideration for the target (except for typical down payments, deposits in escrow accounts, or breakup fees); (iv) clauses allowing direct interference by any party in the other party's business strategies (that do not constitute mere protection against deviation from the normal course of business); and (v) in general terms, any clause providing for activities that cannot be reversed or which imply the expenditure of a significant amount of resources.

Therefore, the agreements that formalize such transactions must have clear provisions establishing that the effectiveness of the deal shall remain suspended until CADE concludes its assessment.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

According to CADE's Guidelines on Remedies, structural remedies should be prioritized, since a restriction such as divestiture "is usually more effective as it drives the cause of the competitive harm more directly. Besides, structural remedies provide less monitoring costs and fewer risks of market distortions due to the remedies imposed in the transaction".

However, looking into the decisions during 2023 and 2024, one can identify that behavioral remedies were more widely used by CADE, albeit in some cases there was a mix between behavioral and structural remedies.

Recently, for instance, CADE approved with restrictions the acquisition of Terphane by the Oben Group, a transaction involving the market for the production of BOPET films (biaxially oriented polyethylene terephthalate films), which are inputs used in the production of flexible packaging. Terphane was the only manufacturer of BOPET films in Brazil. In October 2024, CADE approved the transaction with restrictions, which essentially comprised the following obligations:

- Prior to the closing, Terphane Brasil should file a submission with the trade authorities requiring the immediate termination of antidumping duties applicable to the imports of BOPET films from Peru, Bahrein, United Arab Emirates and Mexico.
- The Parties undertook to not request the renewal of antidumping duties applicable to the imports of BOPET films from China, India and Egypt.
- The Parties undertook to not request the opening of new antidumping investigation against imports of BOPET Films from (i) India and Egypt, for a period of 5 years counted from the first business day after the termination of the antidumping duties established by GECEX

Resolution No. 203/2021; (ii) Peru and Bahrein, for a period of 5 years counted from the first business day after the termination of the antidumping duties established by SECINT Ruling No. 473/2019; (iii) United Arab Emirates and Mexico, for a period of 5 years counted from the first business day after the termination of the antidumping duties established by GECEX Ruling No. 554/2019; and (iv) any other countries, including China, for a period of 5 years counted from the closing of the transaction.

- The Parties undertook, for 5 years counted from the closing of the transaction, to not file or request, directly or indirectly, any submission that may result in changes of tariff or non-tariff mechanisms that may impose difficulties to the imports of BOPET films.
- The Parties committed, for a period of 5 years counted from the closing of the transaction, to not request, demand or impose any exclusivity to distributors of BOPET films operating in Brazil.
- Within 30 days counted from the closing of the Transaction, Oben will terminate any obligation of exclusivity or non-compete with Solé Filmes Importação Distribuição e Logística Ltda.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

There is no clear standard for the duration/term of a behavioral or hybrid remedies, as this will largely depend on the peculiarities of the case.

3. What are the consequences of breaching the agreed/imposed remedies?

According to CADE's Guidelines on Remedies, penalties for breaching the agreed/imposed remedies should be divided into (i) sanctions for failing to comply with principal obligations (e.g., the ones designed to address the competitive issues with the transaction), and (ii) sanctions for failing to comply with accessory obligations (e.g., the filing of reports demonstrating the fulfilment of the remedies).

In this sense, the Guidelines establish that Settlement Agreements (*Acordos em Controle de Concentrações – ACC*) shall provide for the possibility of reviewing the approval of the transaction, as well as the imposition of fines in case of failure or delay in the compliance of the remedies. The penalties shall be proportional to the severity of the violation – and, in case of fines, shall use as a parameter the revenues registered by the companies involved.

Therefore, essentially, the consequences of breaching the agreed/impose remedies vary from the imposition of fines until the review of the approval.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

In September 2016, CADE issued its Guidelines on Gun Jumping, according to which the exchange of competitively sensitive information may result in gun jumping. Generally, competitively sensitive information is specific (e.g. non-aggregated) and directly related to the performance of the players' core business, and may contain data about, among others: (i) costs; (ii) capacity level and plans for expansion; (iii) marketing strategies; (iv) pricing (prices and deductions); (v) main customers and deductions; (vi) wages; (vii) main suppliers and the terms of the contracts signed with them; (viii) non-public information on brands and patents, and Research and Development (R&D); (ix) plans for future acquisitions; and (x) competition strategies.

To avoid such risks, the execution of an Antitrust Protocol may be recommended, with the creation of Clean Teams and Executive Committees, depending on the characteristics of the specific transaction. CADE's guidelines provide certain standards, such as:

- Clean Teams shall be responsible for reviewing competitively sensitive information.
- Clean Teams can be composed of employees, independent consultants or both. Although the guidelines do not provide details on the matter, it is highly recommended that employees empowered to take decisions on strategic and commercial aspects (or are at least able to influence such decisions) are not included in the Clean Team – or, if they are, that they go through a quarantine period after terminating their activities in the Clean Team.
- The members of the Clean Team are advised to sign a confidentiality agreement, undertaking to strictly comply with the Antitrust Protocol and Antitrust Law.
- Competitively sensitive information should be disclosed to the Clean Team members only, which shall review such information and sanitize it (i.e., aggregating detailed information, redacting sensitive information etc.) before preparing reports to the Executive Committee.
- Clean Team members cannot participate in the Executive Committee or vice versa.
- The competitively sensitive information shall be processed and handled by the Clean Team, which shall convert it into aggregated and/or historical information, within a recommended periodicity of at least 3 months of its occurrence. Only after the Clean Team sanitizes the relevant information may it share such information with the Executive Committee.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

The existence of a Clean Team Agreement (or Antitrust Protocol, as defined by CADE's Guidelines on Gun Jumping) is a very important factor, but not decisive, especially because there may be situations in which the Clean Team fails to comply with the Agreement and with Antitrust Law. Should that be the case, CADE may conclude for the existence of gun jumping and impose penalties.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

Although there is no specific and express guidance from CADE, information that is strictly necessary for the transaction is the data required to assess the viability, negotiations and conclusion of the deal. If there is no causal link between the transaction and the information required, the data may be considered unnecessary. This assessment is usually done on a case-by-case basis.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

This largely depends on the specificities of the case. Upon reviewing a transaction subject to merger control, CADE may approve it without restrictions, approve it with restrictions (negotiated with the Parties or imposed unilaterally) or reject the deal.

Therefore, before signing the correspondent agreements for transactions which tend to be more complex, Parties usually conduct a review from an antitrust perspective to assess the likelihood of remedies or even a rejection. It is common, for instance, for the parties to negotiate clauses in which they undertake to close the transaction should the authority not require remedies that go beyond certain limits previously defined by them. In addition, it is possible for the Parties to create "fix-it-first" remedies and file the transaction with the proposed remedies to assure a faster approval.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

As indicated above, before signing the correspondent agreements for transactions which tend to be more complex, the Parties usually conduct a review from an antitrust perspective to assess the likelihood of remedies or even a rejection. It is common, for instance, for the parties to negotiate clauses in which they undertake to close the transaction should the authority not require remedies that go beyond certain limits previously defined by them. In addition, it is possible for the Parties to create "fix-it-first" remedies and file the transaction with the proposed remedies to assure a faster approval.

3. How do parties typically regulate a middle ground in risk allocation?

Please refer to the answers to questions 1 and 2 above.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

The majority of cases filed with CADE are approved without restrictions under the fast-track procedure, in which the authority has up to 30 days (counted from the filing or response to a request for amendment) – after the approval from the General Superintendence, a 15-day waiting period applies for potential challenges to the approval (from third parties and/or the Tribunal). For cases not subject to the fast-track procedure, CADE has up to 240 days (counted from the filing or response to a request for amendment) to render a decision, which can be extended for additional 60 or 90 (as requested by the Parties or CADE) – i.e., CADE has up to 330 days.

On average, in 2023, CADE issued decisions in 12.6 days in fast-track procedures, and 116.7 days in non-fast-track procedures.

Therefore, and considering that the antitrust culture in Brazil has been consolidating after several years of efficient operation from CADE, antitrust clearance usually does not significantly impact long-stop provisions. In any event, any agreement subject to CADE's approval must clearly indicate such approval as a Condition Precedent of the deal.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

Although these kinds of clauses and agreements remain confidential, we can say it is not unusual to include walkaway clauses in Brazil due to potential antitrust and regulatory risks in more complex transactions.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

Although these kinds of clauses and agreements remain confidential, we can say it is not unusual to include reverse termination fees.

Chile

/Carey

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INTRODUCTION

Is merger control regulation in force?

Yes, Law No. 20,945 published on August 30, 2016, amended the Chilean Antitrust Regulation (Law Decree No. 211 – "DL 211") incorporating, among other modifications, an ex-ante mandatory merger control regime.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No, Article 3bis of DL 211 establishes sanctions for the implementation of a concentration operation without prior authorization of the Chilean Antitrust Agency (Fiscalía Nacional Económica – "FNE"). The standstill obligation has no exceptions.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

In case the parties to a concentration implement the transaction without clearance, the Chilean Competition Court (Tribunal de Defensa de la Libre Competencia – "TDLC") may impose the sanctions established in Article 26 of DL 211, which are: (i) modification or termination of anticompetitive agreements; (ii) dissolution or modification of any legal entity involved in the infringement; (iii) fines up to (a) 30% of the offender's sales corresponding to the product line associated with the infringement, during the period of such infringement; or (b) double of the economic benefit obtained from the infringement. In case sanctions (a) or (b) cannot be practicable, fines up to UTA 60,000 (up to approx. USD 51.6 million) can be imposed. The TDLC has the power to unwind a transaction.

Also, the DL 211 envisages a specific gun jumping fine, amounting up to USD$17,000 for each day of delay counted from the completion of the concentration.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

Regarding case (a) even though DL 211 does not make a specific reference to the exchange of commercially sensitive information when regulating gun jumping, the FNE in the only gun jumping case it has prosecuted (JBS/Minerva Case, case docket No. C-346-2017 before the TDLC) mentioned Minerva's access to sensitive and strategic information of the JBS business group, gaining knowledge of customer data and disaggregated information related to prices and sales volumes as a relevant factor to be considered in order to support its claim. Regarding case (b) the FNE has stated that mere possibility of exercising decisive influence qualifies as early implementation/gun jumping. In fact in the JBS/Minerva case - already quoted - the FNE indicated: "(...) Minerva acquired the possibility of exercising decisive influence in the management of the Target Companies, with respect to Chile, and the Operation was deemed to have been implemented, without any prior pronouncement by the FNE and, therefore, the alleged infringement (...) the implementation of a concentration operation is related to the possibility of exercising decisive influence on a previously independent economic agent (...)".

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

According to the Remedies Guidelines issued by the FNE, structural remedies consisting of divestiture of assets to a suitable buyer are generally preferred in horizontal concentrations. However, the FNE may consider other remedies (e.g., of a behavioral nature) when any of the following assumptions are verified: (i) it is demonstrated to the FNE that the remedy other than divestiture is equally effective; (ii) the risks generated by the operation are temporary, according to market characteristics; (iii) there are efficiencies that will not be achieved if the divestiture is verified; or (iv) the divestiture or prohibition is not feasible to prevent the risks. A recent case in which the FNE assessed different kinds of remedies was Entel's assets acquisition by OnNet Fibra (case docket No. F340-2023). Also, in this case the FNE accepted a post-closing suitable buyer identification, not requiring a fix-it-first remedy.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

According to the FNE, behavioral or hybrid remedies must be extended for the duration of the particular risk. The FNE gives as an example of limitation, the fact that the behavioral remedy is governed by easily auditable parameters (e.g., having less than a certain market share). As reference, in the Bimbo/Nutra Bien case (case docket No. RRE-1-2018) the TDLC reversed the FNE's decision to prohibit the operation and accepted behavioral remedies for 3 years.

3. What are the consequences of breaching the agreed/imposed remedies?

In the event of a remedy breach, the FNE may file a claim before the TDLC and request any of the sanctions described in the answer to question No. 1 of this section. In the Oxxo/OK Market claim (case docket No. C-475-2022) the FNE filed a lawsuit against the parties for failing to comply with the remedies to which the clearance was conditioned and, in addition, for submitting false information during the merger control investigation. In terms of fines, the FNE requested a fine of approximately USD$860,000 for the remedies' breaching. The parties with the FNE reached a partial settlement (i.e., only regarding the remedies' breaching), paying a fine of approximately USD$430,000, and continuing the trial regarding the submission of false information.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

Although there is no legal standard regarding a Clean Team Agreement, the FNE in its Guidelines for Trade Associations provides criteria for what is considered as commercially sensitive information, defining it as "all strategic information of a company that, if known by a competitor, would influence its behavioral decisions in the market". It then gives examples of cases that fall under this definition: pricing policies, cost structures, production volumes, expansion and investment plans, import policies, market shares, customer lists, discount policies, payment policies, commercial strategies, techniques for designing bids in tenders, etc. Consequently, these criteria can be used as a basis for the preparation of a Clean Team Agreement.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

Although there is no explicit case law from competition authorities to affirm whether the existence of a Clean Team Agreement is a decisive factor, the fact that in the Minerva/JBS case, the FNE considered the transfer of sensitive information as a relevant circumstance for gun jumping, leads to the conclusion that Clean Team Agreements are relevant to prevent this type of infringement.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

As explained in answer to question No. 1 of this section, there is no legal standard or explicit guidelines from the antitrust authorities on this matter, however the criteria provided in the FNE's Guidelines for Trade Associations can be used to determine what information is commercially sensitive and, therefore, should not be transferred outside the Clean Team.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

It will depend essentially on the negotiation between the parties and on how they would like to allocate the antitrust risk.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

It will depend essentially on the negotiation between the parties and on how they would like to allocate the antitrust risk.

3. How do parties typically regulate a middle ground in risk allocation?

It is normally established that the parties must pursue the reasonable best efforts to offer remedies, and in some cases a threshold –for instance, of the Target's revenue– is established as a limit.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

The Chilean system has pre-established legal deadlines for the investigation and clearance of the FNE, so that generally the investigation deadlines are not only limited but also predictable; unless the parties have not foreseen the relevant risks of a Phase II, a long stop date provision should not be modified.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

It will depend essentially on the negotiation between the parties and on how they would like to allocate the antitrust risk.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

It will depend essentially on the negotiation between the parties and on how they would like to allocate the antitrust risk.

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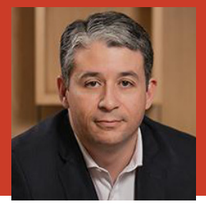

Alejandro García de Brigard
Partner

INTRODUCTION

Is merger control regulation in force?

Yes, Article 4 of Law 155/1959 as amended by Articles 9 and 10 of Law 1340/2009.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

Colombia is one of the only jurisdictions globally specifically allowing the parties to carve out the Colombian portion of the transaction to allow the transaction to close globally. The SIC has issued specific carve-out guidelines in the SIC Regulation, Title VII Chapter Two, Article 2.7.

These regulations indicate that the parties may put in place mechanisms allowing the transaction to close abroad if Colombia is properly isolated. The structure of the separation must ensure that the local operations are separated even if the transaction has closed in other jurisdictions. At a minimum, the structure must meet the following criteria:

1. No change of corporate control;
2. Absence of competitive influence over the target's shareholders, board, or management;
3. No exchange of strategic, confidential, or sensitive information; and
4. Ability to remain in place indefinitely, in such a way that the independence of the business in Colombia is guaranteed if the transaction is blocked.

The parties may seek prior approval of the carve-out structure, but approval is not required as long as the requirements are met.

The SIC regulations specifically indicate that when the parties have structured a carve-out mechanism following the SIC regulations, the SIC may not impose gun-jumping penalties unless it specifically establishes that the regulations have not been met. In other words, when the parties have a carve-out in place, the SIC must analyze all the requirements before deciding on a fine.

The SIC regulations make no mention of or include no restrictions on the payment of dividends, stock splits, spin-offs, etc.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

Failure to file or closing before clearance is secured are considered an antitrust violation and as per Law 1340 of 2009 the SIC, with fines that can go up to 100,000 monthly minimum wages (COP$130.000.000.000 c. US$ 31.1 million). For individuals, fines are capped at 2,000 monthly minimum wages (COP$2.600.000.000 US$6.2 million).

In practice fines for failure to file or gun jumping have been substantially lower to the theoretical fees and have never exceeded an aggregate US200,000 for companies and individuals.

If a transaction that the parties failed to report or was closed before clearance is deemed to have anticompetitive effects so that the authority would have blocked the transaction, the antitrust authority has the power to order the reversion of the transaction, which includes the power to order the divestiture of assets.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

On (a) Yes, the mere exchange of commercially sensitive information can be considered as gun jumping. The SIC has indicated that the exchange of information between competitors prior to approval by the competent authority, is considered as gun-jumping, as a form of illegal agreement if the parties have not yet obtained the authorization of the authority. Sharing competitively sensitive information on prices, costs, customer, and others before the approval is obtained, creates structural economic links that may affect competition. When the parties perform acts that imply the creation of structural economic links between them, and in particular those related to competition issues, it is clear that they have begun to integrate, regardless o the fact that the integration has to go through other steps to be completed. The creation of structural economic links is per se a suitable mean to affect competition and consumers.

Regarding (b) Yes, the mere potential to influence the target can be considered as gun-jumping. Under Colombian antitrust law (Article 45 of Decree 2153/1992) control is defined as the ability to directly or indirectly influence competitive decisions. Therefore, the mere ability to influence could be considered gun-jumping.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

In 2023-2024, the authority has imposed a large number of behavioral remedies, particularly in cases where structural remedies were not possible or not useful to address the specific competition concern. Behavioral remedies typically include commitments to modify business practices or share resources in ways that they do not eliminate competition.

A notable case from 2023 is the Tigo and Telefónica transaction (Resolution 61548 of 2023). In this case, the SIC approved a joint business to share mobile radio access network infrastructure between these two telecom companies. The remedy imposed included: (i) The release of portions of radio spectrum to avoid exceeding regulatory limits and (ii) Ensuring separation of critical infrastructure

(like network cores) to prevent market dominance and (iii) a series of corporate safeguards and restrictions to guarantee that the JV would not share information of its partners to each other, would avoid acting in conflict of interest to its shareholders and would not act in a discriminatory manner against third party telecom operators. These behavioral conditions were designed to preserve competition in both wholesale and retail telecommunications markets

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

The typical duration of a behavioral or hybrid remedy generally ranges from 3 to 10 years, depending on the complexity of the market and the specific risks to competition. For cases that involve rapidly evolving markets or where temporary measures suffice, shorter terms of around 2 to 5 years might apply. However, longer-term or indefinite remedies may be imposed when ongoing oversight is necessary to ensure that the remedy achieves its objectives. For instance, in the Tigo-Telefónica case, the spectrum release and infrastructure-sharing agreement is set to last until 2025, after which it will be reviewed and possibly extended if needed.

3. What are the consequences of breaching the agreed/imposed remedies?

Non-compliance with these remedies can lead to significant legal and financial consequences. Under Law 1340 of 2009 and Decree 2153 of 1992, the SIC has the authority to revoke the approval of the merger if the remedies are not met. Additionally, the SIC may impose substantial fines, as indicated in HT1Q2 above. Further, if the breach involves a failure to carry out divestitures, the SIC can enforce these obligations, potentially under stricter terms. In some cases, the SIC may also increase its level of monitoring and oversight to ensure compliance going forward. This legal framework ensures that the remedies are respected and that competitive conditions are maintained in the affected markets.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

In Colombia, there are no explicit legal standards specifically regulating the terms and conditions of a Clean Team Agreement in competition law. However, Clean Team Agreements are commonly used in M&A transactions to ensure compliance with competition laws, particularly regarding information exchange prior to clearance.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

Yes, having a Clean Team Agreement can help avoiding allegations of gun jumping. The SIC scrutinizes information exchanges during the merger process to ensure that companies do not engage in conduct that could violate competition laws, such as market coordination before formal approval.

While the existence of a Clean Team Agreement is not a guarantee that gun jumping will be ruled out, it serves as a mitigating factor when evaluating whether improper information sharing has occurred.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

The SIC provides guidelines to analyze if specific information is sensitive/confidential or if it has commercial value. The SIC provides some examples to determine what kind of information could be problematic and could restrain competition. However, the SIC does not provide behavior obligations to market agents.

Some of the information that has been considered competitively sensitive information is:

1. Information regarding current, recent prices or future prices, as well as information on discounts, price margins.
2. Information regarding current or recent production or sale volumes, detailed production cost, or cost structures.
3. Information regarding current and future strategy information, e.g. product development, marketing strategies, investment plans (more detailed than generic sector information)
4. Information regarding detailed operations expansion or reduction plans or future commercial strategies or, key account customer names

The SIC has also indicated that historic or aggregated data is not considered competitively sensitive.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Yes, in certain transactions, the hell or high-water clause is accepted. It implies that the buyer assumes all risks related to obtaining regulatory approvals, such as the antitrust clearance. An example of this would be the Avianca-Viva transaction, where the buyer agreed to go forward regardless of any potential issues with the Colombian authority.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

Typically, buyers and sellers negotiate commitments prior to the transaction. These commitments are intended to limit the buyer's obligations to measures that do not impose a material adverse impact on the business. If the SIC or any other authority imposes conditions beyond those agreed, the parties may negotiate a "walk away" clause, allowing them to terminate the transaction without penalties.

3. How do parties typically regulate a middle ground in risk allocation?

Parties usually reach an agreement by defining acceptable commitments for antitrust approval, ensuring both sides can proceed with the transaction. The negotiation focuses on finding a balance that aligns both parties' interests, minimizing excessive risk while securing the transaction's approval.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

In Colombia, antitrust clearance processes can experience significant delays due to regulatory complexities. These delays have led to instances where transactions exceed the long stop date, ultimately preventing the parties from closing the deal. The inclusion of regulatory timing considerations in the agreement has become more common to manage such risks.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

Yes, the use of walkaway clauses is increasingly common. These clauses give parties the flexibility to terminate the transaction if regulatory authorities impose unfavorable conditions or if the antitrust review process takes longer than expected.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

Yes, reverse termination fees are often included as a mechanism to compensate the seller if the buyer cannot close the deal due to regulatory rejections.

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INTRODUCTION

Is merger control regulation in force?

Yes. This is regulated by Law 9736 "Law for the strengthening of Competition Authorities in Costa Rica", and its regulations. Also, both competition authorities (mentioned below) have issued guideline for the filing and review of mergers.

There are two competition authorities that oversee mergers. The Commission to Promote Competition (COPROCOM), who is the national/general authority, and the Superintendence of Telecommunications (SUTEL) who is the regulator and competition authority for the telecommunications sector.

The procedure followed by both authorities is identical, with two differences: a) There are no thresholds in the telecommunications sector, so all transactions must be filed; and b) SUTEL must consult with COPROCOM before issuing a decision on a case.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

Yes. The Law provides that, exceptionally, the parties may request permission to execute the transaction before the approval and considering the potential harm to the involved parties and the overall competitive landscape. The parties may be required to meet specific conditions or obligations set by the Authority to ensure that the eventual final decision will be effectively implemented.

In practice, however, there has not been a case yet where the parties have been authorized to execute the transaction prior to the approval.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

If a transaction is notified after its execution but before any action is taken by the Authority, the parties may be subject to a penalty of up to 3% of their turnover for the previous years. If the filing is made after an investigation has begun, penalties may increase to up to 5%. If, in addition, the transaction generates anticompetitive effects, then the penalties may increase to up to 10%.

In all three cases the transaction must be filed and will be reviewed by the Authority, and remedies may be imposed depending on its effects on the market. In this case, the transaction would not be approved by silence even of the statutory term to decide elapses.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

Yes to both scenarios. The parties are expected to behave independently from each other until the transaction is approved, so the information that is not normally shared with third parties cannot be shared between them either. Also, gun jumping occurs when the transaction generates any legal or de facto effects. Hence, the possibility to influence the target, even if potential, would infringe the Law.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

The remedies most commonly ordered are behavioral. They relate mostly to the modification of contract clauses, the prohibition to deny supply to third parties, and "hold separate" obligations.

In one recent case, the remedy adopted by the Authority was to order the buyer to hold ethical walls (hold separate) between certain entities that were related to them prior to the transaction. Hence, the potential possibility to exercise market power was prevented.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

By Law, behavioral remedies can be imposed for up to 10 years, renewable for up to 5 more years if there are still anticompetitive effects after the end of the initial term. Typically, remedies are imposed for up to 5 years.

3. What are the consequences of breaching the agreed/imposed remedies?

In case of breach of the remedies, the parties can be penalized with up to 10% of their sales of the previous year.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

The Law does not specifically regulate clean team agreements. The general principle is that the transaction may not generate any effects, whether legal or de facto, and the parties are expected to behave accordingly.

In practice, it is normally recommended that the clean team members do not belong to the commercial teams of the parties (do not participate in decisions affecting the behavior of the company in the market) and that the information exchanged is only what's indispensable to carry out the transaction. Members of the clean team are expected to sign an NDA.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

There has not been any case yet where this has been discussed. However, one of the criteria set by Law to establish the amounts of the penalties is the intentionality of the parties. So one may assume that the existence of a clean team is a show of good faith.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

There is no official guidance issued by either competition authority on this issue. Whether the information exchanged exceeds what's strictly necessary would be a matter determined on a case-by-case basis.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

When reviewing mergers or acquisitions, regulatory authorities typically focus on the potential impact of the deal on competition and market dynamics. They are not directly involved in negotiating the terms of the transaction between the buyer and seller. This means that the allocation of risks, such as potential liabilities or future obligations, is primarily a matter for the parties themselves to agree upon.

In practice, it's uncommon for buyers to agree upfront to any potential conditions that might be imposed by the authority. However, buyers may implicitly consider the possibility of regulatory conditions when structuring the deal and determining the purchase price.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

Yes. Typically, when a buyer enters into a merger or acquisition agreement, they often include a "material adverse change" (MAC) clause. This clause allows the buyer to terminate the deal under certain circumstances, such as if a significant event occurs that negatively impacts the value or prospects of the target business.

In the context of regulatory approvals, a MAC clause can be particularly important. If a regulatory authority imposes conditions on the deal that are deemed to have a substantial negative impact on the value of the target business, the buyer may be able to exercise their right to terminate the transaction. This provides the buyer with a degree of protection against unforeseen regulatory hurdles that could significantly alter the economics of the deal.

However, it's important to note that the definition of a "material adverse change" can be subject to negotiation and interpretation. Additionally, the specific conditions imposed by the regulatory authority will need to be carefully evaluated to determine whether they indeed constitute a material adverse change. The precise application of this clause will depend on the specific terms of the agreement and the nature of the regulatory requirements.

3. How do parties typically regulate a middle ground in risk allocation?

When negotiating a merger or acquisition, parties often seek to mitigate the risks associated with regulatory approvals. One way to do this is by agreeing in advance on certain conditions that they are willing to accept, with a "walk-away" clause allowing them to terminate the deal if the regulatory authority imposes conditions that exceed the agreed-upon limits.. This can help to reduce uncertainty and expedite the approval process.

By specifying acceptable conditions upfront, the parties can signal their willingness to compromise and demonstrate their commitment to the deal. This can improve their chances of obtaining regulatory approval and reduce the likelihood of protracted negotiations or unexpected delays.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

In most cases, the regulatory approval process for mergers and acquisitions is relatively predictable, and the timeline can be estimated with reasonable accuracy. This allows the parties to incorporate the expected duration of the process into the terms of their agreement.

However, there are instances where the regulatory approval process can be delayed or extended due to unforeseen circumstances, such as complex antitrust reviews or public inquiries. In such cases, it is not uncommon for the parties to agree to extend the long-stop date to accommodate the extended timeline.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

Yes, these clauses are common. However, as mentioned above, while the regulatory approval process for mergers and acquisitions is generally predictable, there are exceptions where unforeseen circumstances can lead to delays. In such cases, the parties may need to adjust the terms of their agreement, including the long-stop provisions, to accommodate the extended timeline.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

Given the low incidence of regulatory rejections in our jurisdiction, reverse termination fees are not a common feature of merger and acquisition agreements. This is because the risk of a deal falling through due to regulatory objections is relatively low, reducing the need for such protective measures.

However, in regional transactions involving multiple jurisdictions, the risk of regulatory challenges may be higher. This is because each jurisdiction has its own unique regulatory framework, and the approval process may involve coordination and harmonization between different authorities. In such cases, reverse termination fees are more commonly used as a risk-sharing mechanism.

Dominican Republic

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INTRODUCTION

Is merger control regulation in force?

Yes, merger control is applicable in the Dominican Republic for regulated sectors (e.g. electricity, telecommunications, baking, among others). Bear in mind that we have the Law No. 42-08 on the Defense of Competition which regulates competition matters. This law seeks to ensure free and fair competition by preventing actions that would hinder market efficiency or harm consumers. The *Comisión Nacional de Defensa de la Competencia* (PROCOMPETENCIA) oversees the enforcement of this law.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

Permission to partially execute the transaction before merger control approval will depend on the regulator involved. Accordingly, parties involved in a transaction are required to maintain independent operations until the necessary approvals are obtained. They are bound by a standstill obligation to avoid premature execution of the transaction before clearance.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

Implementing a transaction without prior approval can result in the nullification of the transaction. The parties involved may also face fines, which can be significant depending on the nature and extent of the violation. In extreme cases, the antitrust authority may order corrective measures, including unwinding the transaction.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

Based on our experience, (a) Yes, the mere exchange of commercially sensitive information can be considered gun jumping, particularly if it involves strategic data that could affect competition. (b) The potential to influence the target, even without actual exercise of control, can also be deemed gun jumping. A case of designating board members in advance of approval, despite no decisions being made, was considered a violation under this principle.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

Common remedies include behavioral and structural actions, such as imposing price controls or requiring divestitures to restore competitive balance. Relevant public case that we can mention could be the one related to Demerge Republica Dominicana, SAS, whereby they complaint against VISA INTERNATIONAL DOMINICANA, S.A. ("VISA") and MASTERCARD REPÚBLICA DOMINICANA, S.R.L., for the alleged collusion and abuse of dominant position, in violation of Article 5, section "e," and Article 6, sections "e" and "f" of the General Competition Defense Law, No. 42-08. This complaint was subject to several appeals. Accordingly, they requested for the initiation of an investigation for actions constituting anti-competitive collusion and abuse of dominant position and for the adoption of precautionary measures, and pursuit of administrative sanctions. As a result, the requested sanctions were not imposed to Visa since the necessary legal conditions for the imposition of such measures were not met.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

Based on our experience, remedies typically range between 5-6 years, depending on the complexity of the case.

3. What are the consequences of breaching the agreed/imposed remedies?

Breaching remedies can result in fines proportionally related to the company's revenue or the unwinding of the transaction.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

The Dominican Civil Code establishes the "freedom of contract principle", stating under article 1134 that "agreements legally construed carry the force of law for the parties involved. They may not be revoked, unless by mutual consent, or by the causes set forth by law. These agreements are to be executed in good faith." Accordingly, there are no legal standards for the terms and conditions of a Clean Team Agreement in the Dominican Republic.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

Based on our experience, the existence of a Clean Team Agreement can help mitigate risks of gun jumping, but the competition authority will evaluate whether the information exchanged was strictly necessary and if confidentiality was adequately protected.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

Information considered strictly necessary for the transaction is limited to what is essential for the deal's feasibility. It should be non-strategic and aggregated where possible, with historical data preferred over projections to avoid anticompetitive risks.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Please refer to the above mentioned "freedom of contract principle". As a result of said principle, the terms and conditions set forth between the parties should be acknowledged and respected by Dominican Courts, so long as these terms and conditions do not violate the rule of public order. Accordingly, hell or high-water clauses, which obligate buyers to secure regulatory approval regardless of the burden, are rare in the Dominican Republic, as they carry substantial risks for the buyer but can be agreed between the parties.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

Please refer to the above mentioned "freedom of contract principle". Moreover, buyers commonly limit their obligations to avoid significant material adverse effects, especially in the second phase of merger control review.

3. How do parties typically regulate a middle ground in risk allocation?

Based on our experience, risk allocation is usually balanced with the involvement of the buyers in the process of obtaining the applicable regulatory approvals, the latter considering that they already know the market and understand local bureaucracy.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

Please refer to the above mentioned "freedom of contract principle". Based on our experience, long stop dates have been extended to accommodate antitrust clearance processes. Parties often allow automatic extensions if approvals are delayed, although shorter stop dates remain preferred by some.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

Please refer to the above mentioned "freedom of contract principle". Based on our experience, walkaway clauses are not yet common in the Dominican Republic, but they may become more prevalent as regulatory complexities increase.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

Please refer to the above mentioned "freedom of contract principle". Based on our experience, reverse termination fees are not commonly used, but they may be considered in high-risk transactions as a precaution against regulatory rejection.

Ecuador

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INTRODUCTION

Is merger control regulation in force?

Yes, since 2011, when the Market Power Regulation and Control Act ("LORCPM") was enacted. The LORCPM established a merger control regime applicable to any horizontal or vertical merger or transaction (economic concentration operation) that surpasses the turnover or market share thresholds.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No. Articles 15 and 16 of the LORCPM establish that any transaction subject to merger control must notify and obtain prior approval from the competition authority, Superintendence of Economic Competition ("SCE"). A standstill obligation exists, under which the agents must refrain from implementing the transaction before obtaining authorization.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

Failure to comply with the standstill obligation may lead to the following consequences:

1. Substantial fines up to 8%, 10% or 12% of the company´s total turnover in the previous year, depending on the degree of implementation of the transaction.
2. The establishment of corrective measures, such as structural (divestments) or conduct requirements.
3. The unwinding of the transaction. This includes that the acts of the parties leading to the transaction implementation may be declared null and void.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. In general, the mere exchange of commercially sensitive information should not be considered by itself as gun jumping. However, if the information exchange is used to influence the conduct and operation of the target, it could be considered important evidence that the transaction was implemented. It is also important to take into consideration that the exchange of commercially sensitive information may also constitute evidence of an anticompetitive or restrictive agreement. Therefore, it is highly advisable to limit information exchange to what is strictly necessary.

b. The mere potential to influence the target can be sufficient to be sanctioned as gun jumping. The LORCPM prohibition on implementing the transaction before the authority's approval refers to acquiring control of the target. Therefore, any action deemed as granting control to the acquiring firm of the target will constitute gun jumping, even if there is no effective evidence of the exercise of such control.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

In 2023-2024, most of the transactions subject to merger control were approved without conditions. Conditional approvals are scarcer. When remedies are imposed, the most common type are behavioral remedies, limiting the conduct of the merged parties, such as prohibiting exclusive agreements. Structural remedies, requiring the divestiture of part of the business, are less common. One recent example, is the conditional approval of International Consolidated Airlines Group S.A. (Iberia, British Airways, etc.) acquisition of Air Europa Holding S.L.U, subject to the divestiture of certain assets related to the Madrid-Quito and Madrid-Guayaquil air routes.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

There is no standard time lapse for the duration of a behavioral or hybrid remedy. The authority's decisions vary on the duration of the remedies depending on the case and market conditions. However, on average, the duration of a behavioral or hybrid remedy could range between 4 to 6 years.

3. What are the consequences of breaching the agreed/imposed remedies?

Failure to comply with the imposed remedies or conditions will be considered an infringement of an authority's decision and therefore subject to the imposition of a fine of up to 12% of the total turnover in the previous year. Additional conditions may be imposed in the form of corrective measures. Also, given that conditional approval is subordinated to the fulfillment of the imposed remedies, a breach may lead to the withdrawal of the approval and unwinding of the transaction.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

Although there are no legal standards in Ecuador for the terms and conditions of a Clean Team Agreement, the fact that the law determines gun jumping as very serious offense with fines up to 12% of the total turnover of the infringing party, has resulted in Ecuadorian entities involved in M&A transactions to adopt international standards when it comes to the scope and terms of a Clean Team Agreement.

It is advisable to clearly define the purpose of the clean team, emphasizing that its role is to facilitate due diligence and integration planning without making any decisions on the transaction. The key of a Clean Team Agreement is the exchange of information on a need-to-know basis and in an aggregated manner to a limited number of relevant employees of the potential buyer and its advisors. Eith regards to the duration of the Clean Team Agreement, the best alternative is to keep it as short as reasonably possible, typically lasting until the completion of the transaction or until a specified milestone is reached.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

As the Clean Team Agreement is not expressly regulated, we cannot ascertain that it is a decisive factor to discard gun jumping. Nonetheless, if information is being exchanged between the parties to an M&A transaction, especially in the stage between signing and closing, in order to legitimately determine that such information is only for integration planning and not meant for control purpuses, a Clean Team Agreement will be a very important tool.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

There is not specific guidance within the Ecuadorian legal framework on how to identify the information that is 'strictly necessary' for the transaction.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Hell or high-water clauses are rarely accepted in local transactions as, depending on the case, it is likely for the Antitrust Authority to impose behavioral conditions (e.g., contractual obligations, information sharing restrictions, non-exclusivity clauses,) and/or structural conditions (e.g., divestitures). Parties to an M&A transaction will seldom accept a clause with no way out in case the conditions affect the value to the entity/assets being purchased.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

Buyers often negotiate restrictions on the antitrust compliance covenant to protect themselves from events that could significantly harm their businesses, assets, revenues, financial standing, profits, and future opportunities.

3. How do parties typically regulate a middle ground in risk allocation?

Parties may adopt a balanced approach to risk allocation by incorporating antitrust compliance covenants that require the buyer to make "commercially reasonable efforts" or "best efforts" while avoiding excessive burdens, also including specific exemptions for material adverse impacts. This includes determining specific thresholds (based on value or EBITDA) that trigger a "way out" for the buyer if certain remedies/conditions are imposed.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

The merger clearance processes in Ecuador are among the longest in the region, where transactions cleared in Phase 1 often undergo a 3 – 4 month process and transactions cleared in Phase 2 can take up to 7 – 8 months. As such, long stop date provisions are commonly tied to timing expectation for the merger clearance process.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

Yes, the inclusion of walkaway clauses is a common trend in Ecuadorian M&A transactions, particularly in response to regulatory complexities. These clauses allow parties to terminate the agreement if specific conditions, such as delays or obstacles in obtaining regulatory approval, are not met within a defined timeframe. This approach helps manage risks associated with prolonged merger clearance processes and provides both parties with a clear exit strategy if regulatory issues arise.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

Although reverse termination fees provide financial assurance to the party that would be adversely affected by the failure to close the deal and helps parties mitigate some of the risks associated with regulatory uncertainties, these fees are not commonly used in Ecuadorian M&A transactions. Instead, parties often rely on other mechanisms, such as walkaway clauses, to manage the risks associated with regulatory rejections.

El Salvador

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INTRODUCTION

Is merger control regulation in force?

Yes. In El Salvador, we have the Competition Law (hereinafter the "Law") which was enacted through Legislative Decree Number 528 on November 26, 2004, and subsequently published in the Official Gazette, Number 240, Volume 365, on December 23, 2004. In the referred law, there is a section regarding the obligation to submit a transaction for authorization of economic concentration when certain requirements and thresholds established by the law are met.

Article 32 of the Law establishes what shall be understood as control in accordance with the provisions of literal b) of the aforementioned Article 31 and indicates that this term refers to "the ability of an economic agent to influence another through the exercise of property rights or the right to use, of all or part of the assets of the economic agent, or through agreements that confer substantial influence over the composition, voting, or decisions of the governing bodies, administrative or legal representatives of the economic agent."

Once it has been determined that an economic concentration exists, it will be relevant for the purposes of the Superintendence, meaning that it must be submitted for its review, when the economic thresholds established in Article 33 of the CL are exceeded. The aforementioned thresholds are as follows:

a. Combined value of the assets in Salvadoran territory (book value) of all of the parties involved in the transaction exceed **US$219,000,000.00**.

b. Total combined income originated in El Salvador of all of the parties involved in the transaction exceeds **US$262,800,000.00**.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No, under the Law, the notifying parties cannot partially execute the transaction before obtaining merger control approval. According to the Law, transactions that meet the established thresholds must be submitted for review by the Superintendence of Competition, and any execution of the transaction, in whole or in part, is prohibited until approval is granted. Implementing the transaction before receiving approval could result in sanctions to the involved parties.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

Fines for not requesting pre-merger approval may go up to 5,000 minimum wages (US$1,825,000.00) as regulated in Article 38 of the Law. However, if this infraction is of particular severity under the criteria of the regulator, it may impose fines up to 6% of the offender(s) assets or up to 10 times the profit made out of the transaction. In addition to financial penalties, the Superintendence of Competition may order the cessation of the anti-competitive practices within a determined period and establish necessary structural or behavioral conditions or obligations to restore competition.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. The exchange of confidential commercial information, while not considered "gun-jumping," may still be regarded as an anticompetitive practice in accordance with the provisions of Article 25 of the Competition Law. This applies as long as it can be proven by the Superintendence of Competition that the exchange of commercial information may affect the market or reduce competition in El Salvador. If the exchange of commercial information is determined that it does not undermine in any way the market or reduce competition regulation in El Salvador, then said exchange will not be regarded as an anticompetitive practice.

b. Potential influence by itself is not sufficient to impose sanctions. As mentioned above, there must be an effective exercise of such influence that results in an economic concentration or anticompetitive practice. For instance, according to Article 32 of the Law, "control" is defined as the ability to influence another economic agent through property rights, rights of use, or agreements that confer substantial influence over decision-making. However, such conduct must be materialized, and the mere potential for influence is not enough to impose sanctions.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

There were no remedies decisions from the Superintendence of Competition for the period 2023-2024.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

There is no standard duration or term for a behavioral or hybrid remedy. This remains at the discretion of the Superintendence of Competition.

For example, in resolution SC-003-S/CE/R-2016 dated August 26, 2016, concerning the merger between AB InBev and SABMiller, the regulator imposed a structural remedy on AB InBev, requiring the divestment of two beer brands within 180 business days, which may be extended for the same

period. The purchaser had to be an independent third party approved by the regulator and could enter into a production agreement (maquila) and access Industrias La Constancia's distribution network for three years, with the option to extend said period.

Finally, AB InBev submitted a document in which it accepts all the conditions imposed by the regulator.

3. What are the consequences of breaching the agreed/imposed remedies?

Article 38 of the Law establishes that when an economic agent, whose request for a merger has been conditioned, fails to comply with the final resolution issued in this type of authorization procedure, or does so incompletely, incorrectly, falsely, or misleadingly, the Superintendence of Competition may impose a fine of up to 5,000 minimum wages (US$1,825,000.00) for each day of non-compliance.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

In El Salvador there is no legal standard of terms and conditions for a Clean Team agreement. However, it is recommended that in a Clean Team Agreement, access to such information must be restricted to a selected team (on a need-to-know basis) that is not involved in the day-to-day operations, in order to prevent violations. While no specific term is provided under the law, the agreement should have a reasonable duration that covers the period of the transaction or the necessary analysis, until regulatory approvals are obtained, to ensure that sensitive information remains confidential during this time. There is no explicit regulation regarding who may be part of the clean team. However, it is expected that such members are individuals or independent third parties who are not involved in strategic or commercial decision-making within the companies concerned, to prevent any undue influence on the companies' operations.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

In accordance with the Law, the existence of a Clean Team Agreement is not, in itself, a decisive factor for the Competition Authority to dismiss "gun jumping" behavior related to the exchange of information. While a Clean Team Agreement may serve as a measure to mitigate the risks of sharing sensitive information, what will actually be assessed is whether the exchange of information has affected the market or reduced competition, or if the parties have partially execute the transaction before the merger control approval.

A Clean Team Agreement can serve as a tool to demonstrate that the parties have taken preventive measures to ensure that confidential information is not used in a way that violates the law. However, the Superintendence of Competition will conduct a comprehensive assessment to determine if the exchange of information, even within such an agreement, has had an anticompetitive impact.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

Strictly necessary information refers only to that which is essential for carrying out the transaction. Therefore, if information that does not have a direct link to the feasibility of the transaction is shared, it may be considered unnecessary. This criterion is established based on an analysis of necessity and reasonableness, in line with the principles outlined in the Law, which seeks to promote competition and prevent anticompetitive practices.

Additionally, it is recommended that, to the extent possible, the shared information:

1. be aggregated so that competitors related to this information cannot be identified, thereby minimizing the risks of collusion;
2. include historical data, as information based on projections could be used for anticompetitive purposes, contravening the provisions established in Article 25 of the Law; and
3. be non-strategic in nature, in order to reduce the influence one party may exert over the other, thus avoiding situations that may compromise effective competition in the market.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Hell or high water ("HOHW") provisions are currently rare in the Salvadoran market as they require the buyer to take all necessary actions to obtain antitrust clearance by the agreed long stop date, regardless of the cost or burden. While regulating a HOHW provision may be considered powerful to ensure that the transaction closes despite regulatory hurdles, buyers tend to resist this clause due to the potential risks involved. Under Salvadoran law, the Superintendence of Competition can impose behavioral conditions (e.g., non-discrimination obligations), structural conditions (e.g., divestitures) and hybrid conditions (e.g., licensing) intended to prevent or mitigate the potential anticompetitive effects that could arise from the transaction. As such, buyers in our jurisdiction are mostly reluctant to agree on a HOHW provision as there is a possibility that the Superintendence of Competition may impose structural or hybrid conditions as part of the antitrust clearance procedure.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

In practice, contractual clauses that define buyers' obligations often include limitations designed to avoid scenarios that would result in a material adverse effect. In particular, buyers typically seek to include provisions that allow them to withdraw or renegotiate the deal if fulfilling certain obligations would cause a significant adverse effect on the business. This approach helps mitigate the risk of regulatory approvals leading to burdensome conditions that could substantially alter the deal's economic rationale. In the context of merger control, the Superintendence of Competition evaluates transactions on the basis of their impact on market competition, and buyers usually negotiate to limit their commitments to those that do not negatively affect their business operations or create disproportionate risks (e.g., in practice, there has been certain cases where the Superintendence of Competition has imposed burdensome conditions and the buyer has withdrawn of the transaction). The specific terms of buyers' obligations would depend on the contractual negotiations between the parties, provided they adhere to the legal framework and are not structured in a way that would harm competition.

3. How do parties typically regulate a middle ground in risk allocation?

The parties may seek a moderate approach to risk allocation through antitrust compliance covenants that, on the one hand, require the buyer to make "commercially reasonable efforts" without imposing undue hardship on them, and, on the other hand, provide carve-outs for material adverse impacts. Such carve-outs may be included by defining specific regulatory material adverse conditions (i.e., divestiture of another line of business) that the buyer is not required to accept in case the Superintendence of Competition imposes burdensome conditions for the closing of the transaction. This approach helps balance the interests of the parties within the framework of the Law, avoiding the imposition of conditions that could have a significant impact on the buyer's operations, while ensuring that the economic concentration process complies with the applicable regulations in El Salvador.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

In El Salvador, antitrust clearance can significantly influence the structuring of long stop date provisions in Share Purchase Agreements. Given that transactions subject to review by the Superintendence of Competition must obtain approval before they can proceed, the uncertainty and potential delays caused by the antitrust review process are often factored into the drafting of long stop dates. The most common timeframe to receive final resolution is approximately up to 9 months from the admission of the written petition by the authority. However, if, upon reviewing the file, the authority determines that clearance is not required (i.e., the transaction does not meet the requirements/thresholds of the CL as mentioned in our answers above), a resolution can be obtained within an estimated of 2-3 months.

Typically, parties will set the long-stop date with sufficient flexibility to account for possible delays in obtaining antitrust clearance. It is not common for parties to negotiate provisions that allow for the termination of the agreement if clearance is not granted by the long-stop date. Usually, the parties are interested in closing the transaction, so they prefer to include provisions that provide flexibility in case of delays in obtaining antitrust clearance.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

In the context of regulatory complexities, particularly concerning antitrust clearance, the inclusion of walkaway clauses is not a prevalent trend in our market. Generally, parties involved in transactions prioritize closing the deal rather than negotiating terms that would allow for termination. Instead of focusing on walkaway clauses, parties often negotiate provisions that offer flexibility and accommodate possible delays in obtaining antitrust clearance. This approach reflects an understanding that regulatory processes can be unpredictable and may require additional time. As a result, it is more common for parties to agree on extended long-stop dates and include mechanisms that allow for extensions if necessary, rather than seeking to walk away from the transaction entirely.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

To date, there is only one merger authorization request that has been denied by the Superintendence of Competition. As a result, the use of reverse termination fees is not common in this jurisdiction, given the low incidence of denials. Typically, parties tend to prefer structuring agreements with flexibility around antitrust processes, including extended long-stop dates or automatic extensions, as opposed to imposing penalties for failure to obtain clearance. In complex transactions where antitrust concerns are a significant factor, reverse termination fees may be more likely to appear as a way to allocate risk, but this remains the exception rather than the rule in our jurisdiction.

Guatemala

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INTRODUCTION

Is merger control regulation in force?

No. Merger control regulation is not yet in force. The Guatemalan Anti-Trust law "*Ley de Competencia*" (the "Law"), Congressional Decree 32-2024, was published in the Official Gazette on December 9th of 2024.

The Law sets different time periods in which the different sections will come into force. Chapter III of Title I – which regulates merger control – will come into effect two years from its publication in the Official Gazzete, which means merger control regulation will become effective and applicable in December of 2026.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No. Once the Chapter III of Title I of the Law– which regulates merger control – is in force, the merger control approval must be granted before the merging parties execute the transaction. A merger must have an approval from the authority in two cases:

a. When the combination of the total assets in the national territory, of at least two of the parties involved, exceeds the threshold of seven million times the minimum daily wage in force for non-agricultural activities, as reflected in the financial statements corresponding to the last fiscal year or annual tax period[1]; or,

b. When the combined total annual income in the national territory of at least two of the parties involved, exceeds the threshold of nine million times the minimum daily wage in force for non-agricultural activities[2].

In the cases where an approval is required, article 16 of the Law states that *the request for authorization of an economic concentration (a merger) must be made before the legal act is perfected, the acquisition or direct or indirect exercise of de facto or de jure control of another economic agent is exercised, before the merger agreement is formalized, before the act of pronouncement by an authority occurs, or in the case of a foreign operation, before the transaction takes legal or material effect in the national territory.*

The Law contemplates an exception to what is stated in article 16, allowing the merging parties to begin to execute the transaction before the authorization is granted when the reason for the merger is to avoid systemic risks arising from insolvency or bankruptcy of one or more of the merging parties.

1 Approximately US$ 111,041,280.00
2 Approximately US$ 142,767,360.00

The Law defines "systemic risks" as the risk of interruption of the flow of financial services that: 1) is caused by the deterioration of all or part of the financial system; and 2) has the potential to cause serious damage to the real economy.

When an authorization to merge is required, article 20 of the Law states that *the acts related to a concentration may not be formalized in a public deed or private document, nor may they be recorded in the corporate books, nor may they be registered in the corresponding registries, until the favorable or conditional authorization of the Superintendency is granted*.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

If a merger that requires an authorization by the authority is implemented without approval or permission, the Law considers it an "irregular merger". Chapter I of Title IV of the Law contemplates performing or incurring in an irregular merger an infraction of the Law, therefore allowing it to be subject to sanctions.

In this sense, the authority can partially or completely unwind the transaction through the termination of the control that one of the parties has on the other/others.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

No. The mere exchange of commercially sensitive information is not considered as gun jumping by the Law, in fact, there are no merger control rules regarding the exchange of commercially sensitive information. Therefore, this conduct cannot be considered as gun jumping and cannot be sanctioned as such.

In relation to the influence of a target, an effective exercise of such influence is required. The Law defines an economic concentration – or merger – as the *integration of two or more economic agents, previously independent of each other, by means of any act, contract or agreement, which results in the transfer of control from one of the economic agents to another or others, or the creation of a new economic agent under the individual or joint control of the others*.

Article 15 of the Law defines control as *the capacity of an economic agent to exercise decisive influence over another or other economic agents, through: 1) The exercise of shareholding rights or participations, or agreements, contracts or agreements, which allow decisive influence on the composition, voting or decisions of the bodies thereof or on their activities; or, 2) The exercise of property rights or rights of use, enjoyment and enjoyment of their assets*.

Therefore, the Law requires the effective exercise of the conduct for it to be considered as control.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

Since the Guatemalan Antitrust Law was recently enacted, and has not completely come into force, the competition authority has not produced case law regarding antitrust matters or imposed remedies as the result of non-compliance of merger control regulation. In that sense, there is yet no pattern.

Notwithstanding the above, once the Chapter III of Title I of the Law– which regulates merger control – is in force, the authority can partially or completely unwind the transaction through the termination of the control that one of the parties has on the other/others

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

Since the Guatemalan Antitrust Law was recently enacted, and has not completely come into force, the competition authority has not produced case law regarding antitrust matters or imposed remedies as the result of non-compliance of merger control regulation. In that sense there is no standard for the duration/term of a behavioral or hybrid remedy.

3. What are the consequences of breaching the agreed/imposed remedies?

Since the Guatemalan Antitrust Law was recently enacted, and has not completely come into force, the competition authority has not imposed remedies as the result of non-compliance of merger control regulation and there has not been a case where remedies have been imposed to companies who executed an unlawful merger agreement.

According to the Law, the authority can partially or completely unwind the merger. Nonetheless, the Law does not regulate a consequence for breaching such remedies. Most likely the Law will be examined to determine if changes and reform are required.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

As of now, there are no standards regarding the terms and conditions of a Clean Team Agreement. In fact, there are no legal standards whatsoever regarding the confidentiality agreements between parties that wish to merge. In any case, the Clean Team Agreement would be drafted according to the information that each party wishes to protect, without there being a generally accepted standard.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

No. Since the Guatemalan Antitrust Law was recently enacted, and has not completely come into force, the competition authority has not issued decisions or produced case law to establish standards or criteria regarding the existence of a Clean Team Agreement being a decisive factor to discard Gun Jumping behavior.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

No. As mentioned above, there are no generally accepted standards regarding any aspect of a Clean Team Agreement. Therefore, the information that is 'strictly necessary' for the transaction will depend on the scope of the confidentiality that each party in their specific transactions wishes to implement.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

No. Since the Guatemalan Antitrust Law was just recently enacted and has not completely come into force, mergers are not yet regulated by a competence authority and the hell or high-water clause for purposes of Antitrust Risk Allocation is not a matter of negotiation.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

No. Since the Guatemalan Antitrust Law was just recently enacted and has not completely come into force, mergers are not yet regulated by a competence authority and this is not a matter of negotiation.

3. How do parties typically regulate a middle ground in risk allocation?

Since the Guatemalan Antitrust Law was just recently enacted and has not completely come into force, there are no merger transactions that are subject to regulation, and this is not a matter of negotiation for purposes of Antitrust Risk Allocation.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

Since the Guatemalan Antitrust Law was recently enacted and has not completely come into force, mergers are not yet regulated by a competence authority and, for the time being, there is no antitrust clearance needed prior to executing an acquisition agreement. In this sense, parties do not take into consideration this aspect when setting Long Stop Date provisions.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

No. Leaving aside the walkaway clauses that may be included in relation to other necessary approvals and authorizations by governmental authorities regarding matters other that antitrust clearance, walkaway clauses subject to antitrust clearance are not included since no approval is required for the merger of companies in Guatemala at the moment.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

No. Aside from termination fees used to compensate rejection relating to situations other than antitrust matters, no reverse termination fees as a consequence of antitrust clearance rejection are included in acquisition agreements since an obligation to obtain an approval from a competition authority is not yet necessary under the Guatemalan Anti-Trust Law before executing a merger agreement.

Honduras

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INTRODUCTION

Is merger control regulation in force?

Yes, based on Legislative Decree No. 357-2005 and its administrative regulation, which approved and publicized the Law for the Defense and Promotion of Competition, whose main objective is to promote and protect the exercise of free competition in order to ensure the efficient operation of the market and consumer welfare.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

The notification must occur before the concentration is legally perfected, before control is assumed *de facto or de iure* by the acquiring or absorbing entity or before a merger agreement is signed. Concentrations must therefore be notified before the merger has taken place, in other words, a favourable pronouncement from the Regulator on the merger is required first.

Also, a merger resolution must be publicized as information to third parties in a newspaper of national circulation, before the merger is recorded with the Commercial Register as applicable.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

(i) Implementation before clearance: It is fined with a penalty between approximately USD 50 to USD 2,500 per day up to a maximum of 30 days from the date on which the notification of the resolution issued by Commission.

(ii) Failure to file: Where a merger occurs without previously filing, it is considered a violation of the competition laws. The authority may even order an unwinding based on proportionate justifications and subject to due process.

(iii) Not provided requested information: In case the economic agent does not give the information asked, the Commission can impose an administrative fine as penalty.

For this last item, the Commission can also impose an administrative fine as penalty based on the amount of three times the gain obtained by the economic agent. In case the gain is not easily measurable, the penalty can amount to 10% of the gross income on the sales of the preceding year.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

The law does not specifically regulate such cases, being that it defines economic concentration for merger control as the taking or change of control of one or several companies through:

1. Shareholding, management control, merger, acquisition of ownership or any right over shares or capital participation, debt securities that cause any type of influence on corporate decisions.
2. Consolidation, integration or combination in its business in whole or in part.
3. Other operations derived from judicial adjudications, acts of voluntary or forced liquidation and inheritances, by means of which companies, divisions or parts of companies and assets in general are concentrated.
4. Any other act by virtue of which shares, participations, trusts or assets are grouped among suppliers, clients or any other economic agent.

Eventual associations formed for a defined period of time to develop a specific project are not considered as economic concentrations.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

To the best of our knowledge, during 2023-2024 no corrective remedies were applied to economic concentrations, as the regulator generally imposes only behavioral remedies and subject to ex post efficiencies analysis on the authorized transaction or merger. However, the Competition Law establishes that through its regulatory entity, the Commission for the Defense and Promotion of Competition, may order corrective remedies so that an economic concentration complies with the law. These remedies shall:

1. Obligate to spin-off, divest, sell or transfer to third parties not related to the parties involved in the concentration, rights over certain assets, material or intangible, participartions or shares.
2. Obligate to modify, transfer or eliminate a certain line of production; and,
3. To force the modification or elimination of clauses in contracts, agreements or arrangements entered into.

Corrective remedies should not be imposed if they are not directly related to the correction of the effects of the concentration in question. The remedies adopted must be proportionate to the intended correction.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?
The main purpose of these measures is that they are of a provisional nature in order to stop the acts that are considered to be in violation of the law and its regulations, as the law only refers that they should be proportionate and does not specify on duration or any other standard.

3. What are the consequences of breaching the agreed/imposed remedies?
The Commission by means of a reasoned resolution may apply successive sanctions to economic agents and associations of economic agents of up to Fifty Thousand Lempiras exactly (L 50,000.00),m approximately Two Thousand United States Dollars (USD 2,000.00) for each day of delay in complying with the order in the resolution where the remedies to be complied with were filed, up to a maximum of thirty (30) calendar days.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).
There are no specific guidelines for executing a Clean Team Agreement as the law does not regulate this item specifically. However, as a good practice among the economic agents involved in the merger, these types of agreements are advisable.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?
No, since it is not a formal requirement requested by the regulator.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?
See answer 3.1

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?
Yes, since no guidelines are established in the legislation on these clauses, merger agreements between economic agents that contain these clauses tend to be previously negotiated between the parties, so that the *pacta sun servanda* principle prevails and the regulator assumes that both parties recognize the obligations they are bound to comply with.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?
Yes.

3. How do parties typically regulate a middle ground in risk allocation?
In practice, risks are borne by the party that may have triggered an order of events that resulted in the creation of risks in the merger. Normally, clauses are used where the seller will need the buyer's authorization to make decisions related to the business of the target company in order to reduce the risks that may arise prior to the closing date.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?
In practice, parties generally take into account possible scenarios on antitrust clearance when applicable and take it into consideration on the provisions related to contractual terms and closing dates.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?
Yes.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?
Yes.

Mexico

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INTRODUCTION

Is merger control regulation in force?

Yes, merger control regulation is in force in Mexico. The Federal Economic Competition Law ("**FECL**") regulates merger control in Mexico. Under the FECL, concentrations which are defined as "the merger, acquisition of control, or any act through which companies, associations, shares, partnership interests, trusts or assets, in general, are joined together, and carried out among competitors, suppliers, clients or any other economic agents" must be notified to and authorized by the Federal Economic Competition Commission ("**COFECE"** or **"Commission**") if they meet the thresholds that are established in Article 86 of the FECL.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

There are no exceptions to partially execute the transaction before receiving the antitrust approval. According to article 87 of the FECL, the Economic Agents directly involved in the concentration must obtain authorization for carrying out a concentration prior to its closing, i.e. before acquiring or exercising de facto or de jure control over target. Prior to obtaining the approval from COFECE, the parties must remain independent of each other and compete in the markets as separate economic agents until the approval is obtained.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

In the event that a concentration triggers an antitrust filing, and the involved Economic Agents fail to notify the concentration to the Commission, the transaction will be considered null and void; in addition, the parties will be subject to the fines up to 5% of annual income, each.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. The mere exchange of commercially sensitive information is not considered as gun jumping. For horizontal transactions, if competitors exchange commercially sensitive information prior to receiving the antitrust approval, said conducts may be considered as collusive behavior (i.e., Absolute Monopolistic Practices provided in Article 53 of the FECL).

b. If prior to receiving the antitrust approval, the purchaser is able to control or influence the target, it would be considered as gun jumping even if such rights are not exercised. The FECL nor the Merger Guidelines make difference between having or exercising control or influence on the target.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

During the 2023-20224 only one transaction was subject to remedies. It was the sale of Iberdrola´s 13 power generation plants by the Mexican Government (through a trust). The sale of the plants was subject to behavioral remedies to ensure that independent operation of the plants from the energy utility Comision Federal de Electricidad, a public company that holds a dominant position in the Mexican market.

Among the conditions imposed, COFECE requested: maximum percentages of shareholdings, independent administrator, setting of rules and mechanisms to ensure that the decisions related to the plants´ operations remain independent, appointment of a compliance officer, among others.

Up to date, the Commission has imposed mainly behavioral remedies, however, in recent cases, the Concentrations Department (technical area of COFECE) has expressed that they would prefer to accept structural remedies.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

There is not a standard for duration, it is decided on a case-by-case basis. In the Iberdrola case aforementioned (2024), the remedies imposed had a duration of 10 years. In 2007, in contrast, the former antitrust authority, imposed Coca-Cola Company behavioral remedies with different durations, for instance, prohibitions of tying products and exclusivities had no expiration (i.e., they are still in force) but the obligation of appointing an independent trust to verify the compliance of the remedies had a duration of 5 years. These remedies were imposed as a result of the acquisition of *Jugos del Valle* (a beverage company).

3. What are the consequences of breaching the agreed/imposed remedies?

Article 127, Section IX of the FECL states that the Commission may impose a maximum fine equivalent to ten percent of the Economic Agent's income, for failing to comply with the conditions specified in a concentration resolution.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

There are no specific legal standards for Clean Team Agreements. However, COFECE´s Guidelines for the Exchange of Information between Economic Agents, provides recommendations in the context of mergers that may be reflected when drafting this type of agreements, namely:

a. Each economic agent will identify its strategic information (i.e., competitively sensitive information).

b. Strategic Information to be shared must be limited to information strictly necessary to assess the transaction, for instance for evaluating the value of the target.

c. When possible, it should be preferred to share aggregated and historic information of the target and avoid providing current or future strategic information.

d. Setting protocols or strict rules to have access to strategic information, including NDAs. Said rules should limit the access to information for due diligence activities; restrict access to employees that do not participate in sales or operations activities.

e. Appointing a short team to handle the sensitive information (kind of clean team), such team will not include employees that participate in commercial areas, the members should execute NDAs.

f. If possible, the analysis of strategic information should be done by a third independent party.

g. Keep records of all the exchanges of information between the parties (including details of the contacts, timelines, etc.).

h. Avoid coordinating to have as a result collusive behavior.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

It is not, but having in place a Clean Team Agreement is an element that COFECE would take into account in the context of an investigation for gun jumping.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

The Guidelines for the Exchange of Information between Economic Agents (here available), provides the information that can be shared will be limited to information that is needed to calculate the transaction value and the steps to complete the transaction. There is not a specific discussion about what the "strictly necessary" basis implies.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Yes, it is commonly accepted. COFECE is used to review SPAs where hell or high-water clauses are agreed. To our knowledge, this type of clauses is enforceable in Mexico and do not contravene local regulation.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

In many contracts, especially in M&A transactions, buyers' obligations may indeed be conditioned on the absence of a material adverse effect (MAE). This means that if a significant negative change occurs in the target's business or financial condition, the buyer might have the right to terminate the agreement or adjust the terms.

However, the specifics can vary depending on the negotiations and the parties' intentions. It's essential for both buyers and sellers to clearly define what constitutes a "material adverse effect" in the contract to avoid ambiguity. Legal advice is often sought to ensure that these provisions are appropriately tailored to the transaction.

3. How do parties typically regulate a middle ground in risk allocation?

Parties typically regulate a middle ground in risk allocation through several mechanisms:

Representations and Warranties: Both parties make certain promises about the state of the business or asset, which can help allocate risk. If these representations turn out to be false, the injured party may have recourse.

Indemnity Clauses: These clauses allow one party to compensate the other for losses resulting from specific events or breaches. They can be tailored to limit the scope and duration of indemnification.

Limitations on Liability: Parties often negotiate caps on liability to limit exposure to certain types of damages, such as consequential damages, and may set thresholds that must be met before indemnification kicks in.

Escrow Accounts: An escrow account can hold a portion of the purchase price for a specified period to cover potential post-closing liabilities, providing a buffer for both parties.

Insurance: Requiring certain types of insurance can mitigate risk, ensuring that funds are available in case of unforeseen liabilities.

Negotiated Exclusions: Parties may explicitly exclude certain risks from liability or indemnification, which allows them to agree on specific areas of risk that will remain with one party.

Dispute Resolution Mechanisms: Agreeing on how disputes will be resolved—through mediation, arbitration, or litigation—can provide a clear path for addressing issues related to risk allocation.

By negotiating these elements, parties can find a balanced approach that aligns with their risk tolerance and business objectives.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

When antitrust reviews take longer than anticipated, especially if the deal raises potential competition concerns, the parties usually negotiate longer long stop dates to account for these delays. In other cases, the parties can agree on the right to terminate the agreement without penalty if the transaction is not cleared in a certain period.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

The inclusion of walkaway clauses is uncommon in our jurisdiction.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

It is not common practice in Mexico.

Nicaragua

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INTRODUCTION

Is merger control regulation in force?

Yes. Law No. 601 "Law on the Promotion of Competition", approved on September 28, 2006, published in Official Gazette No. 206 of October 24, 2006, which entered into force on June 24, 2007 is the regulatory framework that governs merger control in Nicaragua.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No. Under article 32 of Executive Decree 79-2006 "Regulations to Law on the Promotion of Competition" establishes that filing for antitrust clearance must be made prior to any act tending to carry out a concentration between economic agents.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

Article 28.c) of Law 601 sets forth the faculty of PROCOMPETENCIA (Competition Authority) to order a partial or total divestiture of what has been unduly merged, the termination of control or the termination of acts as appropriate. Also, article 36 of Law 601 establishes the following sanction c) For not having notified the mergers subject to said obligation, from a minimum of one hundred minimum wages up to a maximum of six hundred minimum wages (US$23,400.00 up to US$140,000.00. approx.)

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. Although there are no specific cases resolved by PROCOMPETENCIA imposing sanctions in this regard, based on article 18 a) of Law 601 sharing commercially sensitive information may reveal a coordination between the companies with the intention (purpose or effect) of harming competition.

b. Although there are no specific cases resolved by PROCOMPETENCIA imposing sanctions in this regard, the mere potential to influence the target could be sanctioned according to article 27 of Law 601 which sets forth that when investigating concentrations PROCOMPETENCIA will take into consideration any act or "**attempt**" carried out by the economic agents which has the purpose or effect of substantially facilitating the exercise of anti-competitive practices by the participants in said act or attempt.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

During that period, the only merger decision was Resolution to merger control number 002-2022 issued by PROCOMPETENCIA on July 3, 2023, and are behavioral remedies:

1. **Continuation of compliance with good business practices**: the economic agent is ordered as a condition to continue carrying out its business practices related to its economic activity and good market practices.

2. **Price stability**: the economic agent is required as a condition to ensure price stability, by adopting measures aimed at reducing operating and distribution costs that induce improvements that can be transferred (directly) to the consumer via price and quality, as proposed in the request for authorization of the merger; and must justify, if applicable, the increase in prices in the products described in the content of this resolution.

3. **Distribution Channels**: Maintain the supply of the distribution channels that they currently operate, seeking to expand them to new distribution channels, promoting the supply of the market and the quality of the product.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

Three years. Once the deadlines have elapsed, PROCOMPETENCIA will assess whether a relevant modification has occurred in the structure or regulation of the market in question, which justifies the maintenance, adjustment or elimination of the corresponding conditions for an additional period of two years.

3. What are the consequences of breaching the agreed/imposed remedies?

Breaching of the imposed remedies may lead to the revocation of authorization. Sanctions may be imposed depending on the nature of such breach.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

There are no legal standards or specific cases resolved by the competition authority concerning the scope of the terms and conditions of a Clean Team Agreement in Nicaragua.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

Although there are no specific regulations or cases in this regard, the existence of a Clean Team Agreement is recommended to the extent it evidences party´s efforts to mitigate coordination risks.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

There is no guidance on how to identify the information that is "strictly necessary" for the transaction. General guidelines and best practices should be observed, i.e. information that is essential for the feasibility of the transaction.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

It is very unlikely to agree on a HOHW clauses; antitrust risk uncertainty is not commonly entirely allocated to buyer and rather shared among parties; one major concern refer to time; although Law 601 provides for a 30-day initial review period, all cases resolved by PROCOMPETENCIA have been extended to the second phase and the duration of an antitrust investigation is uncertain; also, although there are no legal precedents by which PROCOMPETENCIA has ruled ordering severe structural remedies, it is unlikely that buyers will accept to enter into a commitment of this nature since the law does provides the possibility for the authority to authorize the transaction imposing structural or hybrid conditions other than behavioral, with the purpose to or mitigate the potential anticompetitive effects of the transaction.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

Yes. Buyer´s obligations are usually limited to those that do not entail material adverse impact that could be so onerous that devoid the transaction of its intended value, benefits or purpose. As indicated in this section, the Nicaraguan Competition Agency, PROCOMPETENCIA, has been flexible in negotiating remedies based on the bona fide antitrust concerns of the transactions.

3. How do parties typically regulate a middle ground in risk allocation?

Although all merger control cases in Nicaragua have been resolved in the second phase, there are no precedents on rejection of a merger filed for antitrust clearance; and only one case in which PROCOMPETENCIA has imposed a structural remedy for divestiture, and this latter was proposed by the parties. Taking this into consideration, middle ground in risk allocation in this jurisdiction can be achieved through "effort clauses" governing what the parties agree to do in order to obtain antitrust clearance for the transaction and limiting the scope of the type of remedies buyer is obliged to accept.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

Considering the maximum terms provided in Law 601 for merger control: 30 business days for the first phase, 90 business days for the second phase, 60 business days for final analysis and recommendations, 30 business days for issuing resolution., parties are now opting for longer long-stop dates, which can even be automatically extended for an additional term if the antitrust authorization has not been obtained, taking into account an approximate timeframe of 9 to 12 months.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

Regulatory complexities in this jurisdiction usually concern the time it takes to obtain clearance and not the conditions imposed by the competition authority; therefore, walkaway clauses are not a common trend in this market.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

To this date, no merger known by the competition authority has been rejected; therefore, termination fees are not commonly agreed upon by parties.

Panama

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INTRODUCTION

Is merger control regulation in force?

Yes. Law 45 of October 31st, 2007, as amended, regulates consumer protection and competition defense (the "Law 45"). Article 21 of Law 45 defines economic concentrations as the merger, acquisition of control, or any act that groups together companies, associations, shares, social parts, trusts, establishments, or assets in general. This can occur among suppliers or potential suppliers, customers or potential customers, and other economic agents who are competitors or potential competitors. Said economic concentrations can be notified and submitted for verification by the interested economic agent to the National Authority of Consumer Protection and Defense of Competition ("ACODECO"), before taking effect. We stress that the verification is voluntary and not mandatory. Once verified and approved by the ACODECO, these concentrations can operate validly and cannot be challenged later based on the verified elements, unless the approval was obtained using false or incomplete information provided by the interested agent. Additionally, Economic concentrations that have not been voluntarily submitted for verification can be challenged, through a judicial lawsuit before specialized courts, within the next three years from their completion, both, by ACODECO or any person which claims an adverse effect due to the concentration. Thus, the filing is voluntary and recommendable to submit if there are elements that the concentration might be considered as an unlawful, with the object of obtaining a favorable concept from ACODECO, eliminating the risk of the concentration being contested by third parties or ACODECO.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No. The prior consultation and verification process before ACODECO in general terms once the filing has been submitted to ACODECO would take approximately two (2) months if ACODECO does not request additional information. To the extent ACODECO requests additional information, it may take more time. In accordance with Art. 110 the Law 45 and Article 19 of the Executive Decree number 8-A of 2009 which regulated Title I and other disposition of the Competition Act ("Executive Decree 8-A"), the process is as follows:

1. Once filed with ACODECO, it can require additional information within 20 calendar days after receipt of the filing.
2. Once the additional documents are received by ACODECO or if no additional information is requested, ACODECO will have sixty (60) calendar days to issue its resolution. If that term expires without a resolution being issued, it would be understood that the concentration has been approved.
3. The resolution of ACODECO must be issued based on the applicable law.
4. The favorable resolution of ACODECO regarding the economic concentration does not imply there is a pronunciation by ACODECO of monopolistic practices; and
5. ACODECO may reject the filing when it's inconducive or inadmissible or if ACODECO has already issued a resolution on said matter.

ACODECO may conditioned the approval to certain conditions, such as: (i) Refraining from certain conduct; (ii) Transferring rights over specific assets to third parties; (iii) Modifying, transferring, or eliminating a production line; (iv) Modifying or eliminating clauses in agreements or contracts; (v) Making production or logistics capacity available to competitors; (vi) Offering guarantees of efficiency benefits to consumers; (vii) Hiring an auditor to monitor compliance; and (viii) Any other measures deemed necessary to eliminate anticompetitive effects.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

Article 26 of Law 45 establishes that any person may challenge a concentration by taking the corresponding action before the courts provided for in Law 45. This case will be processed through a summary procedure, in the manner indicated in Law 45, and the Judicial Code procedure applies in supplementary. Additionally, if ACODECO determines that an economic concentration is among those prohibited under Law 45, whether submitted for consultation and verification process or not, ACODECO can adopt among the following corrective measures: (i) subject the transaction to complying certain conditions that are necessary to adjust in order to comply with the applicable law; and (ii) order the partial demerger or total demerger, the termination of the control or suppression of acts, as applicable. These corrective measures are regardless of penalties that may be applied by ACODECO or imposed by local courts.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

The mere exchange of commercially sensitive information will not be considered gun jumping, but the potential to influence the target can be considered a restrictive activity, in particular, a monopolistic practice under Law 45.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

There have not been many cases during the last couple of years. One of the most important cases was in 2022 with the previous verification in a merger and acquisition transaction between CABLE & WIRELESS PANAMÁ, S.A. ("CWP") and CLARO PANAMÁ, S.A., two telephone companies. ACODECO

authorized the merger conditionally, subject to certain conditions, such as: (i) both companies must remain operating separately for 10 months; (ii) both companies could not request additional number lines before the National Authority of Public Services for two years; (iii) modification of the noncompete clause from 5 years to 1, the parties must submit the amended clause within the 30 days from the notification of the resolution; (iv) CWP must offer the competitors of the market the option of national roaming for a year in wholesale and non-discriminatory prices; (v) CWP, as a mobile concessionaire, commits to carrying out a netting process for monthly call termination charges with the mobile operators in the market. If there is a positive balance in their favor, CWP commits to not charging and definitively waiving this positive balance in favor of the mobile operators in the market for a period of 6 months, starting from the moment it operates as a single market agent, that is, after 10 months have passed since the notification of the resolution. (vi) Both companies commit to not generating any type of promotion for their mobile services, whether individually or in packages, with other services that are not similar to the promotions previously offered by the companies as of the date of the resolution, unless they are promotions to react and match new promotions from other mobile operators; likewise, they commit to not making investments in infrastructure to improve their network except for those of the regular course of business previously planned to meet the quality and confidentiality of the service, those investments to offer national roaming to market operators, and investments for the integration of the networks of both companies, for a period of 10 months, (vii) CWP must conduct a corporate program. The ACODECO can conduct audits in any moment to prevent monopolistic practices and to check the compliance of the corrective measures for a period of 3 years.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?
The law does not specify a duration/term for a behavioral or hybrid remedy, it will vary case to case.

3. What are the consequences of breaching the agreed/imposed remedies?
Depending on the content of the resolution, ACODECO may imposed fines, order the demerge or partial demerge, and, in accordance with Article 30 of Law 45, if the actions taken by the party falls under the prohibitions established by the said law, based on a private lawsuit, courts can impose a penalty up to three times the damages caused, plus costs. However, if the economic agent acted without bad faith or intent to harm, the penalty can be limited to the actual damages or reduced to twice the damages, plus costs.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).
The figure of clean team agreement is not common in Panama.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?
N/A

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?
N/A

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?
Normally said clauses will not be accepted by ACODECO by the way the approvals take place in Panama, especially as previously mentioned, that misleading information can leave without effect the approval.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?
The Panamanian merger control process is a single-phase procedure, with a favorable outcome if ACODECO does not reply in the established timeframes. However, buyers' obligations regarding material adverse impact are often subject to negotiation and can vary from contract to contract. Buyers typically negotiate limitations on the antitrust compliance covenant to prevent any events that could significantly harm their business, assets, revenues, financial or trading position, profits, and prospects. The material adverse impact is generally assessed based on the buyer's group after the closing, including the target company and any indirect targets. This is because the buyer's primary concern is to protect its post-closing strategy.

3. How do parties typically regulate a middle ground in risk allocation?
Parties might aim for a balanced approach to risk allocation through antitrust compliance covenants. These covenants would require the buyer to make "commercially reasonable efforts" without causing undue hardship. Additionally, they would include specific carve-outs for material adverse impacts.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?
The Panamanian merger control has strict timeframes, which may be included in the contract as a precedent condition for closing or having the effects of the contract suspended until the clearance by ACODECO. But, as previously mentioned, in the case of Panama, if ACODECO does not provide an answer within the established timeframes it will be considered approved.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?
Yes, it is usual.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?
It is not usual to have a reverse termination fee, but it Is usual to have a breakup fee in case there is a breach on the obligations that are not attributable to any of the parties.

Paraguay

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INTRODUCTION

Is merger control regulation in force?

Yes. Law No. 4956/2013 on Defense of Competition contains a chapter dedicated to merger control regulations. This chapter came into force during 2014. Further, presidential Decree No. 1490/2014 also contains provisions related to merger control enforcement. Lastly, the National Competition Commission (Conacom) has issued guidelines on the instructions for merger filings.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

Based on the interpretation of the provisions of Law No. 4956, it can be inferred that ex post filings are allowed. In fact, several post-closing transactions have been filed before Conacom. Therefore, permission to partially execute a transaction before obtaining merger control approval would not be necessary under this interpretation.

However, Conacom holds a different view and believes that they must approve a transaction before its implementation. Given this divergence in interpretations, we recommend reviewing the specifics of the case and conducting a thorough analysis of potential competition concerns before deciding whether to pursue a pre- or post-closing filing.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

There are no sanctions set forth in the law for implementing a transaction without prior approval. However, the authority mentioned that they are entitled to impose sanctions if there are any anticompetitive conduct arising from the transaction closed prior to the filing.

Law No. 4956 establishes the following sanctions for any breach of the law, (i) administrative fines of up to 150% of the earnings generated by the illegal conduct, or up to 20% of the gross turnover for the sale of the goods that have been traded in the last 12 months, counted from the beginning of the investigation; (ii) nullifying effects; and (iii) warnings and orders to cease any further actions that contravene the competition regulations.

So far, Conacom has not imposed any fine nor has identified any anticompetitive conduct resulting from a transaction notified after the closing.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. There are no specific provisions regulating the exchange of commercially sensitive information. Based on the response to question 1 above, this issue appears to be of limited relevance in our jurisdiction. To date, there have been no sanctions or investigations initiated for gun jumping.

b. As previously mentioned, this is not a significant issue at present. No provisions addressing this matter have been established.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

According to Conacom's public records, during 2023-2024 only one merger transaction was subject to behavioral remedies. Case No. 062 Medlog and Seré Transaction (file No. 006/2024), whereby Medlog, affiliate of a global shipping company, acquired 50% stake in a regional logistics' company.

Remedies consisted in the prohibition of offering exclusive shipping services; informing the services and prices charged to the parties' respective clients; application of non-discriminatory conditions for similar services; allowing clients to freely choose the provider of services; and providing copies of relevant annexes to the share purchase agreement. These conditions are valid for 3 years and may be extended to 5 years subject to Conacom's decision.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

There are no legal standards on the term of a behavioral remedy.

Regulatory Decree No. 1490 provides that remedies shall be designed to overcome the creation or strengthening of a dominant position that poses obstacles to competition in the relevant market. The remedies shall be proportional to the objective. Conacom usually imposes remedies for a term of 3 to 5 years depending on the specifics of the case. Based on the legal provision, it may be inferred that Conacom considers the imposed term sufficient to overcome the competition concerns identified during the merger filing analysis.

Agreements were an additional hybrid remedy imposed by INDECOPI, with a duration of 5 years.

3. What are the consequences of breaching the agreed/imposed remedies?

Conacom may impose sanctions for non-compliance of remedies, following the initiation of an administrative procedure. Please see response to question 1.2 above for the list of applicable sanctions.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

There are currently no legal standards governing the terms of a Clean Team Agreement. In our experience, such agreements are relatively uncommon. However, if regulations regarding the exchange of sensitive information are adopted, it is possible that guidelines or regulations for Clean Team Agreements may be introduced in the future.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

As previously mentioned, gun jumping is not currently a significant concern in our jurisdiction due to the prevailing interpretation that allows for post-closing filings. However, we cannot completely rule out the possibility that Conacom may scrutinize such conduct in the future, especially considering their current position that filings should occur prior to closing. In this context, while the existence of a Clean Team Agreement could be seen as a mitigating factor, it is not guaranteed to be decisive in preventing potential scrutiny.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

No, there is no guidance on this matter. The parties' counsels should ensure that only essential information, directly relevant to the transaction, is shared in a manner that minimizes potential risks.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Although the acquirer is legally obligated to notify Conacom of a transaction, Hell or High-Water clauses, which impose significant burdens on the buyer, are not commonly used.

In practice, where the merger approval is a condition precedent to the closing, typically the buyer requires that the transaction be either unconditionally approved or approved with conditions acceptable to the buyer. It is also common for the seller to agree to collaborate with the buyer in the merger filing process, as required by the buyer.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

This issue is typically addressed as mentioned earlier; buyers generally limit their obligations to the outcome of the merger filing, such as obtaining unconditional approval or approvals subject to conditions acceptable to the buyer. While this may vary on a case-by-case basis, if the parties do not anticipate significant issues arising from Conacom's review, these clauses are often not heavily negotiated. The role of the parties' counsel and expertise in merger control matters are key to assess their clients.

3. How do parties typically regulate a middle ground in risk allocation?

Please refer to the previous answer.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

The impact of antitrust clearance on long stop date provisions depends largely on the specific circumstances of the transaction and the prior analysis conducted by counsel regarding potential competition issues. If the legal assessment identifies significant antitrust risks, long stop date provisions are typically discussed and negotiated in detail to account for potential delays caused by regulatory review.

In cases where the parties opt for ex post notification, these clauses generally become less relevant, as the transaction is completed before obtaining regulatory clearance. However, if the parties proceed with ex ante notification, the inclusion and scope of long stop date provisions will depend on the level of risk identified during the preliminary competition analysis. This ensures that the transaction timeline is aligned with potential regulatory challenges, mitigating any undesired delays.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

We cannot say that these clauses are common trend in our market. It may be included if the parties had identified potential competition concerns arising from the antitrust assessment of the transaction.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

Not commonly used either. Parties would typically assume the expenses each party generate and share those related to payment of official fees, for instance.

Peru

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INTRODUCTION

Is merger control regulation in force?

Yes. On January 7, 2021, Law No. 31112, the Merger Control Law, was published in the Official Gazette "*El Peruano*" and came into force on June 14, 2021. Previously, a merger control regime was applicable only in the power industry under Law No. 26876, the Antimonopoly and Anti-oligopoly Law.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No. According to article 23 of Law No. 31112, the notifying parties (the agents that gain control of another agent) are bound by the standstill obligation under which the agents involved in the transaction need to remain as separate and independent economic agents until approval. In other words, the notifying parties must not have the power to exert a decisive and continuous influence or control over the other company involved in the transaction.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

The transactions implemented without approval/permission will entail the nullity of the acts. Moreover, article 27 of Law No. 31112 sanctions the behavior with a fine of up to 1,000 tax units (up to USD 1.3 million) provided that such fine does not exceed ten percent (10%) of the infringing company's or its economic group's sales or gross income during the calendar year immediately prior to the issuance of the Peruvian antitrust authority´s (INDECOPI) infringement resolution.

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. The mere exchange of commercially sensitive information is considered an indication of gun jumping. Sharing commercially sensitive information that is relevant in the market can reveal a coordination between the companies with the intention of harming competition. The risk of sharing confidential information increases when it involves the agent's commercial strategy. Therefore, it is recommended to limit the exchange of information to that which is strictly necessary in the framework of the transaction and through a Clean Team.

b. The mere potential to influence the target can be considered as gun jumping. For example, under Resolution No. 001-2010/CLC-INDECOPI, issued under the former merger control regime applicable only in the power industry, the Peruvian competition authority analyzed an acquisition where the buyer designated the members of the target's board of directors prior to having obtained the relevant authorization. The buyer was sanctioned even though the designated directors did not take any effective decision regarding the commercial strategy of the target in Peru. Since the appointed board of directors could potentially influence the target's strategy, the authority considered this designation as a gun jumping scenario.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

Within this period, three merger transactions have been subject to specific remedies:

- **Resolution N° 014-2024/CLC-INDECOPI**
  INDECOPI evaluated the acquisition by China Southern Power Grid International (HK) Co., Limited of all shares in Enel Distribución Perú S.A.A. and Enel X Perú S.A.C. Both the acquiring and target companies are active in Peru's power sector.
  Conditions: The transaction was approved under the condition that the target entities must procure power through a competitive bidding mechanism, supervised by OSINERGMIN (Peru's electricity regulator). This process will allow both affiliated companies and independent third parties to compete on equal terms. The bidding mechanism is mandated to remain in effect until 2030, subject to oversight by INDECOPI.
- **Resolution N° 187-2024/CLC-INDECOPI**
  INDECOPI assessed the joint acquisition of control by Pangea LuxCo S.à r.l. and Telefónica Hispanoamérica, S.A. over Pangeaco S.A.C., a joint venture established to deploy the largest fiber optic network in Peru.
  Conditions: The approval requires the parties to amend certain transaction agreements to adjust the wholesale and retail non-compete clauses and the exclusive purchase provisions in line with INDECOPI's standards. Additionally, provisions concerning the right of first offer and matching rights must be removed. The parties are also required to appoint a compliance officer and report any exclusivity clauses executed by Pangeaco S.A.C. with future customers over the next five years to INDECOPI.
- **Resolution N° 206-2024-CLC-INDECOPI**
  This resolution conditionally authorizes Sika AG's acquisition of the Peruvian group Chema, which specializes in producing construction materials.
  Conditions: As part of the approval, Sika must permanently divest specific Chema Group brands and license other brands to an independent company for a period of seven years. This independent entity will be allowed to operate and compete effectively, temporarily using the Chema logo and branding in market segments where competitive concerns were identified. After the seven-year licensing term, Sika will face a three-year blocking period, during which it cannot commercialize products under the licensed brands. This measure is designed to provide the licensed company adequate time to establish itself as a meaningful competitor within the Peruvian market.

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

The duration of obligations generally ranges between five to ten years. For instance, as outlined in Resolution N° 014-2024/CLC-INDECOPI, the requirement for a competitive bidding process to select the energy supplier will remain in effect until 2030, covering an approximately six-year term. Similarly, under Resolution N° 206-2024-CLC-INDECOPI, the obligation for Sika to license specific brands to an independent company is set for a period of seven years, followed by an additional three-year restriction period on Sika's use of these brands.

Before, in 2022, INDECOPI issued another ruling with imposed remedies under Case No. 076-2022/CLC-INDECOPI. This case established a behavioral remedy designed to be temporary, commencing immediately after the transaction closed and lasting until specific licensing agreements were executed. During this period, a price policy was enforced to prevent the involved companies from raising the prices of products marketed under the trademarks to be licensed. Additionally, INDECOPI required the signing of these licensing agreements as part of a hybrid remedy, with a duration set at five years.

3. What are the consequences of breaching the agreed/imposed remedies?

Non-compliance with the conditions set forth will lead to the imposition of a fine of over 1,000 tax units (over USD 1.3 million), provided that such fine does not exceed twelve percent (12%) of the infringing company's or its economic group's sales or gross income during the calendar year immediately prior to the issuance of INDECOPI's resolution. Additionally, INDECOPI may establish corrective measures aimed to reverse the breach of the imposed conditions by unwinding the transaction.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

Although it is not considered as a requirement for exchanging information, the competition authority recommends that all information to be shared between companies shall be done through a Clean Team.

Moreover, it is recommended that the Clean Team should not be formed by: (i) any member of the company involved in competitive decisions; or (ii) people who may share sensitive information with such personnel. It is recommended that the Clean Team be formed by external advisors. The Clean Team Agreement should establish a timeframe in which it is considered reasonable to exchange information. It is advisable that there should only be an exchange of information during the due diligence and negotiation stage. After these stages, sharing information must be justified by criteria that demonstrate that the information exchanged is strictly necessary to protect the value of the target company.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

The existence of a Clean Team Agreement can sway the competition authority's decision regarding the gun jumping behavior, as it is considered as a precaution aimed to mitigate coordination risks. However, the competition authority will conduct case-by-case analysis in order to determine if the Clean Team is sharing the strictly necessary information and guarding the confidentiality of said information.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

Strictly necessary information is considered to entail only the information required to carry out the transaction. Accordingly, if information that does not have a direct link to the transaction's feasibility is shared, it could be considered as not necessary. This criterion is established based on an analysis of necessity and reasonability.

Moreover, it is recommended, to the extent possible, that the shared information: (i) is aggregated, so that the competitors related to this information cannot be identified; (ii) contains historic data, since information based on projections could be used for anticompetitive purposes; and (iii) is non-strategic, to diminish the influence one party could exert over the other.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

Hell or high water ("HOHW") provisions are currently rare in the Peruvian market as they require the buyer to take all necessary actions to obtain antitrust clearance by the agreed long stop date, regardless of the cost or burden. While regulating a HOHW provision may be considered powerful to ensure that the transaction closes despite regulatory hurdles, buyers tend to resist this clause due to the potential risks involved. Under Peruvian law, INDECOPI can impose behavioral conditions (e.g., non-discrimination obligations), structural conditions (e.g., divestitures) and hybrid conditions (e.g., licensing) intended to prevent or mitigate the potential anticompetitive effects that could arise from the transaction. As such, buyers in our jurisdiction are mostly reluctant to agree on a HOHW provision as there is a possibility that INDECOPI may impose structural or hybrid conditions as part of the antitrust clearance procedure.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

The Peruvian merger control procedure has two phases. If INDECOPI determines that the proposed transaction raises serious concerns regarding potential restrictive effects on competition in the corresponding market, then the transaction will be evaluated in the second phase. If deemed necessary to prevent or mitigate potential anticompetitive effects, in the second phase INDECOPI may impose conditions for the closing of the transaction. Especially when buyers foresee that it is likely for the transaction to be assessed by INDECOPI in the second phase, it is common practice for buyers to negotiate limitations to the antitrust compliance covenant to avoid any events that may materially adversely affect their businesses, assets, revenues, financial or trading position, profits and prospects. Typically, the material adverse impact is assessed considering the buyer's group post-closing, taken as a whole (e.g., including the target company and any indirect targets), because the buyer's primary concern is to ensure that its post-closing strategy is not jeopardized.

3. How do parties typically regulate a middle ground in risk allocation?

Parties may seek a moderate stance on risk allocation through antitrust compliance covenants that, on one hand, require the buyer to use "commercially reasonable efforts" without imposing undue hardship on the buyer, and, on the other hand, provide certain material adverse impact carve-outs. Such carve-outs may also be included by defining specific regulatory material adverse conditions (e.g., divestment of another line of business) that the buyer is not required to accept in case INDECOPI imposes conditions to the closing of the transaction.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

Prior to the entry into force of the current merger control regime, most acquisition agreements included a short long-stop date provision or even simultaneous signing and closing. Considering the terms of the two phases provided for by the current regime (i.e., 55 business days for the first phase and 90 business days for the second phase, which can be extended by 30 additional business days under certain circumstances), some parties are now opting for longer long-stop dates, which can even be automatically extended for an additional term if the antitrust authorization has not been obtained. However, there are still parties that prefer to have shorter long-stop dates, usually considering only the term of the first phase of the antitrust procedure and preserving the right to terminate the agreement if the antitrust procedure is drawn out in the second phase. In this second scenario, if the antitrust review takes longer than expected and the parties opt to amend the transaction agreement after its execution to extend the long-stop date, that amendment must be submitted to INDECOPI as soon as it is executed.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

From the over fifty requests for authorization processed since 2021 by INDECOPI, only five have raised serious concerns regarding their effects on competition and have been assessed in the second phase. Given the low number of transactions with regulatory complexities to date, the inclusion of walkaway clauses is not yet a common trend in our jurisdiction. However, these clauses may become more prevalent as our regulatory environment continues to evolve.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

Only one request for authorization has been rejected to date by INDECOPI. Therefore, the use of reverse termination fees is not common in our jurisdiction, given the low incidence of rejections. However, they may be included in certain high-risk transactions as a precautionary measure to compensate the parties involved in case of an unexpected rejection. As seen in other jurisdictions, depending on the complexity of the transaction, reverse termination fees can be structured either as a single fixed amount or a ticking fee that accounts for the duration of the antitrust review.

Uruguay

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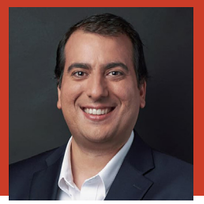
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INTRODUCTION

Is merger control regulation in force?

Yes. Uruguayan Law No. 18.159 (the "Competition Law") envisaged a merger control notification since its enactment in 2007. An amendment of Competition Law through Law No. 19.833 introduced full pre-merger control proceedings since 2019, which has been modified several times since it came into force, the last substantial modification being Law No. 20.212 providing for new notification thresholds and a new definition of control since 2024.

HOT TOPIC 1: GUN JUMPING

1. Can the notifying parties get permission to partially execute the transaction before the merger control approval?

No. Pursuant to article 7 of Competition Law, the parties to a transaction shall submit a filing requesting authorization of the act of economic concentration prior to the completion of the act or the taking of control, whichever comes first. Moreover, Article 9 establishes that the economic concentration cannot be perfected until it has received the express or tacit authorization of the enforcement body (in most cases such enforcement body is the Competition Commission, the "Commission") has been granted. There is no partial permission to execute the transaction before the merger control authorization is granted.

2. What are the consequences of implementing a transaction without approval/permission? Is unwinding the transaction contemplated?

The Competition Law envisages that an act of economic concentration that has not received the explicit or tacit approval of the Commission cannot be perfected. It does not explicitly envisage that the transactions implemented without approval will entail the nullity of the acts.

However, the Commission issues gun-jumping fines to parties that failed to comply with pre-merger control. Previous gun-jumping fines were approximately USD 500 where the Commission was alerted to instances of failure to notify when reviewing notified transactions, which required to be reported. These fines referred to failures to notify transactions that would have been reportable under the previous legal framework (prior to 2020) under which a filing was only made "for information" within 10 days of closing. Transactions post-2020 are subject to higher potential penalties as: (i) the new legal framework requires a full prior authorization request with bar on closing (and therefore the infringement would be more serious), and (ii) the amount of these fines are now clearly regulated by law and would range from a minimum of approximately USD 15,000 to a maximum of 10% of the infringers' annual turnover. The Commission can choose to impose a warning with no fine. Fines could be imposed on executives or board members of the companies involved in an infringement if personal involvement can be proved (e.g. the infringing action was discussed in board minutes and directors were present at the meeting). We do not have record of these penalties having been imposed in practice so far.

There is no criminal liability under Uruguayan Law for antitrust infringements.

In addition, the Commission has the possibility of requesting a judge to declare the transaction null and void (therefore the transaction would not produce any legal effects in Uruguay). So far, this has never happened. We are aware that in a recent infringement proceeding against a local fund for failure to request prior authorization, the Commission did not declare the transaction null and void but asked for the re-granting of the Share Purchase Agreement (Decision No. 68/2024).

3. Specific cases: (a) Can the mere exchange of commercially sensitive information be considered as gun jumping? and (b) Can the mere potential to influence the target be sanctioned or is an effective exercise of such influence required?

a. Yes, the mere exchange of commercially sensitive information during the due diligence or negotiation phase could potentially be considered gun jumping under Competition Law, insofar it results in an early integration or coordination between the parties prior to obtaining antitrust clearance. In line with international competition standards (which Uruguay tends to follow) the exchange of sensitive information shall be strictly limited to what is necessary for assessing the target's business and should be safeguarded through mechanisms thought for such purpose (e.g. Clean Team Agreements, see below).

b. While the mere potential to influence the target's business might raise concerns, under most international competition standards followed by Uruguay, actual or effective exercise of influence tends to be the trigger for sanctions related to gun jumping. The Uruguayan Competition Law does not have explicit provisions clarifying this point, but it is reasonable to assume that the Commission would scrutinize actions that imply an early transfer of control or coordination of business activities. As such, entering into agreements or practices that provide one party with the ability to influence the target's decision-making—such as by providing feedback on strategic matters or participating in internal meetings—could be interpreted as exercising influence, even if not formally executed. To minimize risk, it is advisable to -at least in early stages- avoid situations where such influence could be inferred.

HOT TOPIC 2: IMPOSED REMEDIES (2023-2024)

1. Based on your competition authority's decisions during 2023-2024, what kind of remedies are the most widely used? Please mention a relevant case.

The only merger transaction subject to remedies in such timeframe that has been publicly disclosed has been Case N° 2024-5-1-0003863, where BB Global Investing Holding S.L.U acquired the 100% of the shares of Itacaré S.A. and Plesir S.A. Both the acquirer and the targets are active in the local food production industry, especially the production of industrial bread. This transaction was approved with behavioral conditions, which were kept confidential.

In previous years, information and behavioral conditions have been used in other cases. Structural remedies have only been negotiated exceptionally, yet in a case where the authorization was ultimately blocked by the Commission (yet challenged by the parties to the transaction via administrative remedies, still awaiting final decision).

2. What is the standard for the duration/term of a behavioral or hybrid remedy?

In our legal system, even though remedies are explicitly established in article 45 of Decree No. 404/007, it is not a common practice of the Commission to impose remedies, neither structural nor behavioral. However, behavioral remedies have been used on some occasions. The duration of these remedies depends on each case.

For example, in Cases No. 60/2020 and 16/2021, behavioral conditions were established, which included the sending of specific information for a period of five years, starting from the date when the concentration was authorized.

Lasty, the Uruguayan Economic Analysis Guide to Economic Concentrations establishes, as a rule, that the imposed remedy: "must be effective as long as the expected damage in the market as a result of the concentration lasts. If the harm caused to competition is expected to be permanent, the remedy must be permanent. On the contrary, if the effects of the concentration on competition are expected to last a limited time, it is not advisable to use permanent remedies. If possible, it is advisable to include an end date or end condition for the proposed remedies. Alternatively, they may be subject to review after a certain period, with the option of being maintained, removed or adapted depending on the conclusions of such review."

3. What are the consequences of breaching the agreed/imposed remedies?

The consequences of breaching the agreed or imposed remedies are not expressly contemplated in the Competition Law. However:

- Article 44 of Decree No. 404/007 envisages that the Commission may apply penalties in a scenario of breaching the agreed/imposed remedies, referring to the general framework on sanctions under the Competition Law (warning and penalties).
- Article 45 of Decree No. 404/007 envisages that **non-acceptance** by the notifying parties of the conditions or the compliance program and its deadlines, established by the Commission, will imply the **denial of authorization** for the operation of the concentration.

HOT TOPIC 3: CLEAN TEAM AGREEMENTS

1. Are there any legal standards for the terms and conditions of a Clean Team Agreement in your jurisdiction? (scope of the confidentiality obligation, term of the agreement, members, among others).

As of today, there are no local market standards regarding Clean Team Agreements ("CTA") given the negligible number of CTAs entered into in the last years.

From an antitrust perspective, implementing a CTA to manage the exchange of information between companies in the context of a transaction is prudent when the antitrust process is between competitor and sensitive information is to be exchanged. This approach helps mitigate the risk of alleged gun-jumping claims and other potential antitrust infringements (mostly in relation to collusive agreements and practices) by ensuring that sensitive information is shared in a controlled and compliant manner.

2. Is the existence of a Clean Team Agreement a decisive factor for the competition authority to discard gun jumping behavior regarding the exchange of information?

There are insufficient precedents to define whether the Commission would consider the existence of a CTA as a decisive factor in dismissing gun-jumping behavior related to the exchange of information.

However, it is reasonable to presume that the existence of -and compliance with- a CTA would be taken into account as a relevant factor (although not decisive), as it demonstrates efforts to regulate and control access to sensitive information, thereby minimizing the risk of antitrust infringements.

The existence of a CTA in and on itself is not decisive given that the authority should focus on whether there was any actual exchange of sensitive information and how such information was used. In this sense, the existence of a CTA coupled with evidence of compliance with its terms could prove extremely relevant in an investigation since the authority would have evidence of a real intent of the parties to abide by reasonable limitations on their information exchange, making a strong case in favor of the parties.

3. Is there any guidance on how to identify the information that is 'strictly necessary' for the transaction, so that it may be shared through a Clean Team Agreement?

There is no specific guidance in place that defines what constitutes information as "strictly necessary" for a transaction in the context of a CTA.

However, best practices suggest that the information shared should be directly relevant to the evaluation and completion of the transaction, typically limited to data that is required for purposes of a buyer conducting due diligence, assessing synergies and making informed business decisions.

Sensitive commercial information, such as pricing strategies, customer lists or future plans should be carefully reviewed and, where possible, excluded (unless deemed indispensable for the transaction in which case it is advisable to operate under a CTA). Legal and antitrust counsel should be involved in determining the exact scope of such information on a case-to-case basis.

HOT TOPIC 4: ANTITRUST RISK ALLOCATION IN THE SPA

1. Is the hell or high-water clause commonly accepted?

No. Antitrust merger control is recent in Uruguay and very few transactions have been rejected by the authority so far, so this type of clauses is not routinely proposed.

2. Are buyers' obligations usually limited to those that do not entail a material adverse impact?

Most M&A agreements in Uruguay stipulate that both parties shall collaborate in submitting their case before the authorities and agree to keep themselves informed and coordinate their strategies towards such end. However, typically the agreement stipulates that neither buyer nor seller is obliged to make divestitures, or material disbursements or material actions in order to obtain the authorization and that they are not obliged to accept conditions by the authorities (except for very limited conditions such as information conditions).

3. How do parties typically regulate a middle ground in risk allocation?

See above.

HOT TOPIC 5: CONTRACTUAL MECHANISMS TO MITIGATE UNDESIRED DELAYS CAUSED BY ANTITRUST RULINGS:

1. How has antitrust clearance impacted long stop date provisions?

In those deals that require antitrust authorization long stop date has been impacted. Prior to the antitrust authorization some of those transactions could be closed simultaneously with closing or in a period between 2-4 months. Nowadays, deals subject to authorization typically have a long stop date between 6 to 9 months from signing.

2. Is the inclusion of walkaway clauses a common trend in your market regarding regulatory complexities?

The inclusion of walkaway clauses in Uruguayan market is not a common trend as of now. This is due to the low percentage of transactions that have raised serious concerns in relation to antitrust matters. Given that the antitrust regulations and enforcement in Uruguay are constantly evolving, we cannot rule out that these types of provisions will not gain popularity in the future.

3. Are reverse termination fees commonly used to compensate any of the parties in case of rejection?

We have seen reverse break up fees in only a few cases. The inclusion of these types of clauses are not common market practice, at least as of now. The Commission does not have a significant track record of rejections (since 2020, only three transactions were rejected, one of which has been reverted and another is currently challenged via administrative remedies). Therefore, it does not seem as a major concern for parties to include these types of clauses as of today. However, considering the recent precedents of rejections by the Commission, the inclusion of these types of clauses in some high-profile transactions that carry a risk of rejection may be included as a measure to compensate the parties involved.

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