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

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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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