

Merger Control in Chile: Overview

by Claudio Lizana and Daniela León, Carey

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A Q&A guide to merger control in Chile.

This Q&A is part of the global guide to merger control. Areas covered include the regulatory framework, regulatory authorities, relevant triggering events and thresholds. Also covered are notification requirements, procedures and timetables, publicity and confidentiality, third party rights, substantive tests, remedies, penalties, appeals, joint ventures, inter-agency co-operation, powers of intervention and proposals for reform.

Regulatory Framework

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction?
What is the regulatory authority?

Regulatory Framework

The regulatory framework for merger control is composed of:

- Chapter IV of Law Decree 211 of 1973 (Competition Law), which sets out the general legal framework.
- Decree 41/2021 of the Ministry of Economy, which establishes the Mergers Regulation, which in turn sets out the information that must be submitted to the National Economic Prosecutor's Office (*Fiscalía Nacional Económica*) (FNE) in merger filings submitted after 2 November 2021. (The Mergers Regulation in force before 1 November 2021 was set out in Decree 33/2017 of the Ministry of Economy.)
- Resolutions issued by the FNE setting the thresholds for mandatory notification (the most recent is Resolution No 157 of March 2019).
- FNE Guidelines on matters related to mergers, including on the interpretation of thresholds, jurisdiction and remedies.

Regulatory Authority

The FNE reviews and approves (or prohibits) transactions that are subject to mandatory merger control. Phase I and Phase II investigations are conducted by the FNE. If the FNE decides to prohibit a transaction, the parties can file a special review appeal to the Competition Court (*Tribunal de Defensa de la Libre Competencia*), under Article 57 of the Competition Law.

Triggering Events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering Events

Concentrating operations between economic agents whose sales in Chile are above the relevant thresholds are subject to mandatory merger control. Under Article 47 of the Competition Law, a concentrating operation is any deed, act or convention, or combination thereof, where two or more previously independent economic agents that do not belong to the same business group cease to be independent in any aspect of their activities. Concentrating operations are limited to the following:

- Mergers, whatever the corporate form of the merging entities or the entity resulting from the merger.
- Acquisitions of rights that, directly or indirectly, allow the acquirer(s), individually or jointly, to have a decisive influence over the administration of another entity (such as the acquisition of sole or joint control through a share purchase).
- Associations of any kind for the purposes of constituting a permanent independent economic agent distinct from the parties (full-function joint ventures).
- Acquisitions of control over the assets of another entity in any way (such as acquisition of sole or joint control through an asset purchase).

Changes of control come about whenever an acquisition of rights entitles the owner to exert decisive actual or legal influence over the target. “Decisive” influence is the possibility of determining or vetoing the implementation of decisions in relation to the competitive behaviour and strategy of an undertaking (*FNE’s Guidelines on Jurisdiction*). Therefore, acquisitions of minority interests are subject to merger control rules if they grant the ability to exert such a decisive influence.

The mere possibility of exercising legal or actual decisive influence is sufficient to qualify the rights acquisition as a concentration operation (even if the acquirer does not choose to exercise those rights).

Concentration operations that have been closed without mandatory approval fall under the general statute of limitations for competition infringements, which is three years from the deal closing.

Thresholds

The thresholds apply at a national level and are set out in the Unidad de Fomento (UF), which is an accounting unit used in Chile linked to the consumer price index. According to the FNE’s Guidelines on Thresholds, if sales are recorded in a different currency, they must be converted into Chilean pesos using the average annual exchange rate published by the Chilean Central Bank. The value of the UF (as at 31 December of the year preceding the notification) is then used to convert the value of sales in Chilean pesos into UF.

Under Article 48 of the Competition Law, the parties must notify any concentration operation which surpasses the following thresholds in the calendar year prior to the notification:

- The combined revenue in Chile of the economic agents that intend to concentrate (merge) meets or exceeds UF2.5 million.

- The individual revenues in Chile of at least two of the economic agents that intend to concentrate each meet or exceed the equivalent of UF450,000.

The sales calculation varies depending on the type of transaction, as follows:

- For full mergers and joint ventures: the calculation includes the sales of the:
 - parties to the transaction; and
 - their corresponding business groups.
- For rights acquisitions: the calculation includes the sales of:
 - the economic agent obtaining a decisive influence;
 - its corresponding business group; and
 - the target.
- For asset acquisitions: the calculation includes the revenues in Chile of:
 - the acquiring economic agent;
 - its corresponding business group; and
 - any revenue arising from the acquired assets.

Under Article 96 of Law 18,045 on the Securities Market, the following are part of the same corresponding business group:

- A company and its controller.
- All companies that have a common controller, and the controller.
- Any entity determined to be a member of the business group by the Commission for Financial Markets.

Under Article 97 of Law 18,045, a person will be a “controller” of a company if they have a:

- Majority of votes at shareholders’ meetings and can appoint a majority of the directors.
- Decisive influence on the administration of the company (that is, they control at least 25% of the voting capital of the company).

However, a person will not have decisive influence on the administration of a company and therefore will not be its controller if:

- Another person controls an equal or higher percentage of the voting capital of the company.
- The person controls less than 40% of the voting capital of the company and their holding is less than the sum of the shareholdings of the other partners or shareholders with more than 5% of the of the voting capital.

Notification

3. What are the notification requirements for mergers?

Mandatory or Voluntary

Notification of concentration operations is mandatory if the sales thresholds are met (*see Question 2*). However, transactions below the thresholds can be voluntarily notified.

Timing

Transactions must be notified before the closing of the deal. The notification can be filed as soon as there is a serious intention of the parties to carry out the transaction (such as a letter of intent, memorandum of understanding or commitment letter).

Pre-notification and Formal/informal Guidance

The FNE has an informal pre-notification procedure whereby parties can ask questions and clarify doubts. Normally, the parties can bring procedural or substantive questions such as, for example, whether:

- The transaction can be legally qualified as a concentration.
- The ordinary or the simplified notification form applies.
- Overlaps exist in the relevant product or geographic markets.

The FNE encourages pre-notification discussions to avoid mistakes and to expedite the process.

The FNE has issued instructions for pre-notification under which, once the corresponding query has been received, a meeting, videoconference or telephone conference will be scheduled with the parties within a maximum of five administrative business days, to discuss the queries contained in the request. If a draft notification form is submitted for the purposes of clarifying specific doubts, the timeframe ranges between five and ten business days. Exceptionally, these deadlines can be extended to a maximum of 15 business days, if this is necessary for conducting an adequate analysis of the query in light of its breadth and/or complexity.

Responsibility for Notification

The parties that conclude the purchase or relevant agreement must file the notification.

Relevant Authority

The notification must be made to the FNE.

Form of Notification

Following the enactment of Decree 41/2021 of the Ministry of Economy, the FNE published a single merger notification form for all purposes on the FNE website (www.fne.gob.cl).

The parties do not have to submit a draft filing before formal notification, but they can choose to do so in the context of a pre-notification consultation.

Filing Fee

There are no filing fees.

Obligation to Suspend

The transaction cannot be closed until the clearance decision is issued (a stand-still obligation). There are no exceptions. Early termination of an investigation depends entirely on the FNE. The FNE may choose to issue its decision before or at the expiry of the legal deadline, at its sole discretion.

Other

In concentration operations that are below the thresholds, the FNE has the power to nevertheless open an investigation within one year of the closing of the transaction and can then challenge the transaction through an action before the court if the FNE views the transaction as substantially reducing competition.

Procedure and Timetable

4. What are the applicable procedures and timetable?

There are currently three types of notifications:

- Ordinary.
- Simplified.
- Light simplified.

While the ordinary notification is the standard procedure, the simplified notification requires less information, and the light simplified notification requires even less (as it is for transactions where there are no horizontal or vertical overlaps). The only difference among these three types of procedures is the amount of information that must be submitted with the notification. The timetables remain the same.

Once the notification is filed, the FNE has ten administrative days (that is, excluding Saturdays, Sundays and holidays) for reviewing the completeness of the notification. After that period, it can open the investigation or declare the notification incomplete. If the notification is declared incomplete, the parties have ten administrative days to file the missing information or to clarify. The review process is then repeated within the ten administrative days' timeframe.

After opening the investigation, the FNE has 30 days (Phase I) to review, and can then either:

- Grant conditional or unconditional clearance.
- Extend the investigation for up to 90 additional days (Phase II).

In Phase II, after the investigation period, the FNE must either grant conditional or unconditional clearance, or prohibit the transaction. In the case of prohibition, the parties can apply for a special review before the Competition Court.

Timetables can be suspended on agreement between the FNE and the parties, for up to 30 days in Phase I and up to 60 days in Phase II, and only once per phase. In addition, if the parties offer mitigation measures, the timetable can be suspended for up to ten days in Phase I, and up to 15 days in Phase II.

For an overview of the notification process, see [Chile Merger Notification Flowchart](#).

Publicity and Confidentiality

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

Merger investigations are kept confidential from the pre-notification contacts until the beginning of Phase I, when the FNE publishes a short decision declaring the filing complete and opening the investigation. The investigation file itself is confidential during Phase I. At the closing of the Phase I investigation, the FNE's report and decision are made public.

If the FNE decides to open a Phase II investigation, the file becomes public and is published, although the FNE may declare certain parts of it to be confidential or reserved.

Automatic Confidentiality

All documents provided by the parties are automatically kept confidential during the pre-notification period and Phase I.

Confidentiality on Request

When the file becomes public after the Phase II decision, the parties can request that certain information be kept confidential, in which case they must provide redacted public versions of the file.

Rights of Third Parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

Third parties can be requested to answer official requests for information (RFIs) from the FNE during Phase I. When answering RFIs, they may make representations if the FNE asks them if the transaction raises any concerns in their view.

During Phase II, when the file becomes public, any third party with an interest can offer information and make representations.

Document Access

In Phase I investigations, third parties can request access to the investigation file, but the parties can oppose this request.

In Phase II, the file becomes public, and there are public versions of confidential documents available for those who request them.

Be Heard

In Phase I, the right to be heard is limited to the information provided by third parties in response to the RFIs. However, in Phase II, anyone who has an interest in the transaction can contribute with information.

Substantive Test

7. What is the substantive test?

The legal test for approving a transaction (with or without conditions) is that the transaction is not able to substantially reduce competition.

For opening Phase II, the test is whether the FNE considers that, if the transaction were to close without conditions or with the conditions offered so far by the parties, it could substantially reduce competition.

A recent example is the *EssilorLuxottica/GrandVision* transaction, where the parties offered mitigation measures in Phase I, but the FNE considered these to be insufficient. For that reason, the FNE decided to open Phase II. Ultimately, the FNE approved the transaction, considering that the remedies offered in Phase II were able to mitigate the competition concerns arising from the transaction.

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

The parties can describe and submit information evidencing consumer benefits or efficiencies. For these purposes, efficiencies must be:

- Verifiable.
- Inherent to the transaction.
- Capable of compensating for the increased market power of the resulting entity.

- Transferred to consumers.

9. Is it possible for the merging parties to raise a failing/exiting firm defence?

Merging parties can use a failing/exiting firm defence, but they must submit information evidencing:

- That the relevant economic agent will otherwise imminently exit the market.
- The otherwise inevitable loss of assets.
- Their having exercised reasonable efforts to maintain the assets in a manner less harmful to competition than the transaction.

Remedies, Penalties and Appeal

10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

Structural and/or behavioural remedies can be offered in Phase I and/or Phase II. Structural remedies are preferred by the FNE, as they do not require monitoring. When commitments are offered, there is a suspension in the reviewing period under Article 60 of the Competition Law. If measures are offered, the suspension can be for up to ten days in Phase I, and for up to 15 days in Phase II.

Monitoring of compliance with the measures is agreed on a case-by-case basis with the FNE.

11. What are the penalties for failing to comply with the merger control rules?

Failure to Notify Correctly

If the parties fail to notify, there is a daily fine of up to 20 annual tax units (*Unidad Tributaria Annual*) for each day of delay on filing the notification. (Annual tax units, like UF, are indexed accounting units mainly used for tax and penalty purposes.)

If the parties notify the transaction by submitting false information, the FNE can file a lawsuit with the Competition Court for

the imposition of fines of up to 60,000 annual tax units and/or other measures.

In the case of intentional submission of false information or if the parties hide information/documents from the FNE during its investigation, the responsible individuals can be subject to imprisonment for a period of 61 days to three years.

If the FNE requests information and the individuals who are obliged to respond do not provide an answer or respond partially, they can be subject to a daily fine of up to two annual tax units for each day of delay.

If fines are not paid, the Competition Court or the FNE can impose precautionary or compulsory measures.

Implementation Before Approval or After Prohibition

Implementation before approval or after prohibition of the merger is considered gun-jumping, and the FNE can file a lawsuit for the imposition of fines and/or other measures with the Competition Court under the general sanctions regime. Under Article 26 of the Competition Law, the Competition Court can impose:

- Measures including the:
 - modification or termination of agreements; or
 - modification or dissolution of legal entities.
- Fines of up to:
 - 30% of the offender's sales corresponding to the line of products or services associated with the offence during the period for which it was in effect; or
 - double the economic benefit reported because of the offence.
- Alternatively, if it is not possible to determine the sales or economic benefit, the Competition Court can apply fines of up to 60,000 annual tax units.

Failure to Observe

In the case of failure to observe a decision of the regulator (including failure to implement any remedial undertakings), the FNE can file a lawsuit for the imposition of fines and/or other measures with the Competition Court under the general sanctions regime. Under Article 26 of the Competition Law, the Competition Court can impose measures or fines (*see above, Implementation Before Approval or After Prohibition*).

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of Appeal

Prohibition decisions can be appealed by means of a special review before the Competition Court.

Procedure

The appeal must be made to the Competition Court within ten days of the notice of the prohibition resolution.

Third Party Rights of Appeal

Only the notifying parties have the right to appeal.

Automatic Clearance of Restrictive/ancillary Provisions

13. If a merger is cleared, are any restrictive or ancillary provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

There is no provision in the Competition Law on the automatic clearance of provisions in agreements related to a cleared transaction. However, if the FNE considers that any restrictive or ancillary provisions in the agreements have anti-competitive effects, it normally raises these concerns to the parties for them to amend the agreements as part of their remedy commitments.

Regulation of Specific Industries

14. What industries (if any) are specifically regulated?

Media

The media is specifically regulated under Law 19,733 on Freedom of Opinion and Information. Generally, any modification or change in ownership in the mass media must be reported to the FNE within 30 days of execution. However, any modification in the ownership of media companies that are subject to state-granted concessions (that is, television and radio) requires a report to be submitted to the FNE prior to closing.

There is a specific form for these purposes, and once submitted, the FNE must review and issue a report within 30 days. If the FNE's report is unfavourable, the transaction must be submitted to the Competition Court for a consultation procedure.

Banking

In the banking industry, banks require special authorisation from the Commission for the Financial Markets (*Comisión para el Mercado Financiero*) (CMF). This authorisation is in addition to the FNE's clearance. Under Law 21,130 to Modernise the Banking Laws, the CMF's authorisation is required for banking mergers, acquisitions of control, increases in control, or acquisitions of assets/liabilities if the acquirer bank or banks have "systemic importance". The banks qualifying as "systemically important" are determined each year, based on the factors of:

- Size.

- Inter-connectivity with other financial institutions.
- Degree of substitutability in the financial services.
- Complexity of business model and operational structure.

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

The FNE has published guidelines on all matters related to mergers, including on the interpretation of thresholds, jurisdiction and remedies.

In addition, the FNE's Guidelines for the Analysis of Horizontal Concentration Operations have a special chapter on digital markets and digital platforms, referring to their special features from a merger control perspective.

Powers of Intervention and Foreign Investment Review

16. What powers does the national government have to intervene in mergers on the grounds of public interest, national security or media plurality?

There are no special powers granted to the national government with regards to intervening in merger processes.

17. Are there any post-closing or foreign investment review filing requirements?

There are no post-closing filings or filings required for foreign investment review in the merger regulations.

Joint Ventures

18. How are joint ventures analysed under competition law?

Full-function joint ventures qualify under Article 47(c) of the Competition Law as associations among different economic agents with the purpose of creating an independent economic agent that will perform activities permanently. They are therefore concentrating operations that are subject to mandatory merger control when they meet the relevant thresholds. See [Question 2](#).

As explained by the FNE on its Guidelines for the Analysis of Horizontal Concentration Operations, when analysing the competition effects of joint ventures, the FNE's emphasis is on the risks of co-ordination, independent from the assessment of the market where the joint venture will be active and the corresponding analysis of non-horizontal effects.

Inter-agency Co-operation

19. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?

The FNE co-operates with other agencies when reviewing international transactions by exchanging information related to the transaction. First, the FNE asks the parties to indicate in which jurisdictions they are filing merger notifications. Second, the FNE may request the parties to submit a waiver, allowing the FNE to contact other agencies. The parties can also voluntarily submit a waiver when filing the notification or at any other time.

Recent Mergers, Cases, Trends and Statistics

20. What notable recent developments, trends or notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable? Are there any statistics published on annual merger reviews conducted in the jurisdiction?

Between January and December 2021, the FNE received 46 notifications, and opened 36 investigations, of which 34 were unconditional approvals and two were subject to conditions. No transactions were prohibited. However, in February 2022, the FNE prohibited the acquisition of control over a Chilean private health insurance company, known in Chile as an "ISAPRE", by the parent of another ISAPRE. The parties filed an appeal with the Competition Court (which is ongoing).

In 2020, the FNE instituted proceedings before the Competition Court in a case of delivery of false information and breaches of mitigation measures in the context of merger control. The case was settled in 2021 for the breach of mitigation measures, but the proceedings are still ongoing for the delivery of false information.

The FNE also for the first time began a lawsuit in November 2021 against a local shipping company for a merger that was below the thresholds for mandatory notification. This is possible because the FNE can investigate non-notifiable transactions (that is, transactions not surpassing the thresholds) within one year after closing (*see Question 3, Other*). The FNE claimed that this company monopolised a maritime route in the south of Chile by buying a vessel from its only competitor.

Additional Information and Proposals for Reform

21. Are there any proposals for reform concerning merger control?

There was a public consultation regarding the merger control procedure, which ended up with the publication of the new regulation on merger control, issued in May 2021, and entering into force on 2 November 2021. Among other things, this regulation:

- Clarified the definition of economic agents taking part in the transaction.
- Created a special simplified procedure for transactions without overlaps.
- Diminished the request for information in ordinary and simplified procedures.
- Allows certain documents to be submitted in English.

Contributor Profiles

Claudio Lizana, Partner

Carey
T +56 22 92 82 207
E clizana@carey.cl
W www.carey.cl

Professional and academic qualifications. Chile, Lawyer, 1990; LLM, Harvard University, 1993

Areas of practice. Competition law; mergers and acquisitions.

Recent transactions

- Advising EssilorLuxottica SA on the mandatory merger control procedure before the FNE regarding the global acquisition of control over GrandVision NV.
- Advising Veolia Environnement SA on the mandatory merger control procedure before the FNE regarding the global acquisition of control over Suez SA.
- Advising a global tech company on an anti-trust investigation by the FNE.

Languages. English, Spanish

Professional associations/memberships. Member of the Antitrust Committee, Chilean Bar Association.

Publications

- *Co-author of the Chilean chapter, Cartels & Leniency, ICLG, 2020.*
- *Co-author of the Chilean chapter, Overview of Competition Law in Latin America, IBRAC, 2016.*
- *Co-author of the book “Dumping and Disloyal International Competition”, 1995.*

Daniela León, Associate

Carey

T +56 22 92 82 207

E dleon@carey.cl

W www.carey.cl

Professional and academic qualifications. Chile, Lawyer, 2018

Areas of practice. Competition law.

Recent transactions

- Advising EssilorLuxottica SA on the mandatory merger control procedure before the FNE regarding the global acquisition of control over GrandVision NV.
- Advising Veolia Environnement SA on the mandatory merger control procedure before the FNE regarding the global acquisition of control over Suez SA.
- Advising a global tech company on an antitrust investigation by the FNE.

Languages. English, Spanish

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