Merger Control

The international regulation of mergers and joint ventures in 71 jurisdictions worldwide

Consulting editor
John Davies

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GETTING THE DEAL THROUGH

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Decree-Law 211 of 1973 (the Antitrust Law or DL 211) is the legislation governing antitrust matters in Chile. According to the Antitrust Law, both the Antitrust Court and the National Economic Prosecutor (FNE) are the entities enforcing antitrust laws and regulations in Chile.

The FNE is an independent administrative entity in charge of investigating conducts that may constitute violations to the Antitrust Law, representing the public interest before the Antitrust Court and seeking enforcement of resolutions, decisions and instructions issued and passed by the Antitrust Court.

The Antitrust Court is a special, independent court of law, subject to the supervision of the Supreme Court. Its role is to prevent, correct and sanction anticompetitive conducts, and to decide all cases the FNE or private individuals submit to its consideration. It is also in charge of issuing general guidelines for the enforcement of competition law.

2 What kinds of mergers are caught?

Any deed, act or convention, or combination thereof, the effect of which is that two or more economic agents that do not belong to the same business group, and that were previously independent from each other, are no longer independent in any aspect of their activities by any of the following means:

- merging, whichever the manner of corporate organisation of the merging entities or the entity resulting from the merger;
- acquiring, one or more of them, directly or indirectly, rights that allow them, individually or jointly, to have a decisive influence in the administration of another entity;
- associating under any method of association for the purposes of constituting an independent economic agent, distinct from them, that performs its functions permanently; or
- acquiring, one or more of them, control over the assets of another entity through any title.

3 What types of joint ventures are caught?

Joint ventures are caught to the extend they represent an association (under any method) for the purpose of incorporating an independent economic agent on a permanent basis.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is not defined in the DL 211. However, Law No. 18,045 (the Securities Market Act) defines the 'controller' as any person or group of persons acting together, which, directly or through other individuals or legal entities, participate in the ownership and have the power to carry out any of the following actions:

- to ensure the majority of votes in the shareholders meetings and elect the majority of the directors in the case of corporations, or to ensure the majority of votes in the assemblies or meetings of its members and to appoint the administrator or legal representative or the majority thereof, in other types of companies; or
- to decisively influence the management of the company.

Also, it shall be understood that any person or group of persons with a joint action agreement decisively influences the administration or the management of a company when they, directly or through other individuals or corporate entities, control at least 25 per cent of the voting capital of the company, or the capital thereof if it is not a joint stock company (provided certain conditions are met).

The Antitrust Court has taken into account such definition, and has also provided its own concept of control in Ruling No. 117/2011 as 'the capacity of a natural or legal person of exerting a decisive influence in competitive decision-making of other natural or legal persons'.

Moreover, on 1 June 2017, the FNE published the Competition Guidelines, whereby it stated that control or decisive influence is 'the de jure or de facto capability to determine or to veto the decision making about the strategy and competitive behaviour of an economic agent'.

Due to a recent modification to the Antitrust Law (30 August 2016), minority interests are now captured. Also, interlocking directorates (including top executives) among competing companies having annual incomes exceeding approximately US$4 million are prohibited. Also, there is a new provision imposing an obligation to notify the FNE, within 60 days as of its occurrence, of the acquisition of minority shareholdings of more than 10 per cent in competing companies having annual incomes exceeding approximately US$4 million.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Antitrust Law provides the following mandatory jurisdictional thresholds in Chile:

- if the sum of the sales within Chile of the economic agents planning to merge, reaches, in the financial year prior to the year in which the notification takes place, an amount equal to or higher than the threshold set by the FNE; and
- if at least two of the economic agents planning to merge have separately generated sales in Chile, in the financial year prior to the year in which the notification takes place, for an amount equal to or higher than the threshold set by the FNE.

The current thresholds issued by the FNE are the following:

- For joint sales: approximately US$70 million.
- For individual sales: approximately US$11 million.

Notwithstanding the foregoing, the FNE may nevertheless investigate transactions falling below the thresholds, within one year as of the date of their closing. Moreover, parties may voluntarily notify transactions below the thresholds, under the same procedure.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

As of 1 June 2017, filings are mandatory in Chile.

There is a simplified filing procedure for those transactions with no overlapping or low market shares.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

According to DL 211, any transaction having effects in Chile and fulfilling the thresholds must be notified to the FNE.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Foreign investment is regulated by Law Number 20,848 and Chapter XIV of the International Exchange Regulation of the Chilean Central Bank. However, these regulations do not govern concentration transactions but the entry of foreign capital into Chile.

There are special regulations and relevant approvals for the following matters:

- Securities market: see question 15.
- Banks and financial institutions: Decree with Force of Law No. 3 of 1997 (the Banking Law) regulates banks and financial institutions and created the Superintendency of Banks and Financial Institutions (SBIF). The Banking Law provides that no one may acquire, directly, through third parties or indirectly, shares of a bank which, by themselves or added to those previously held by the same person, amount to more than 10 per cent of bank capital, without the prior consent of the SBIF.
- Insurance: Decree with Force of Law No. 251 of 1931 (the Insurance Companies Law) regulates the insurance market. According to article 38 of the Insurance Companies Law, insurance companies must report to the Superintendence of Securities and Insurance (SVS) on any change to their shareholding structure entailing the acquisition of a 10 per cent or greater share of their capital by a shareholder. In turn, the shareholder who acquires this interest must report to the SVS on the identity of its controlling partners and provide evidence that they have not been declared guilty of certain crimes, or declared bankrupt or been penalised by the SVS.
- Mass media: Law No. 19,733 on Freedom of Opinion and Information and the Exercise of Journalism requires that any relevant event or act in connection with the modification or change of ownership or control in a media company must be reported to the Antitrust Court within 30 days of its consummation. However, in the case of media companies subject to the state-sponsored licensing system, this relevant event or act must be the subject of a previous report prepared by the Antitrust Court assessing its impact on the media market. This report must be issued within 30 days from the filing of this application, otherwise is to be deemed as not meriting any objection.
- Water utilities: Decree with Force of Law No. 382 of 1989 (the Water Utilities Law) establishes certain restrictions to entry into the water utilities sector for controlling shareholders of electric distribution utilities, local telephone companies and pipe gas utilities that are natural monopolies, with customers in excess of 50 per cent of all users of one or more of these utilities in the areas under concession to any given water utility in those same geographical areas.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Any filing must be carried out before the closing of the corresponding transaction. Concentration operations falling below the thresholds may nonetheless be voluntarily notified by the corresponding economic agents. If the latter are not voluntarily notified, the FNE may, within one year of the closing of the transaction, conduct an investigation into it.

If a notifiable transaction is closed without being notified, fines up to approximately US$16,000 per day would be applied until the transaction is notified. Since the mandatory merger regime is rather new, as of July 2017 there are no precedents for the application, or not, of the sanctions.

10 Who is responsible for filing and are filing fees required?

All economic agents being party to a transaction are responsible for filing a joint notification.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Notifiable transactions may not close until a final resolution is issued within the merger control procedure.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

The Antitrust Law provides that sanctions contained in article 26 will apply in this case. Such sanctions are:

- the modification or termination of acts or contracts;
- the ordering of dissolution or modification of legal entities, partnerships and companies; and
- fines: up to 30 per cent of the infringer's sales, corresponding to the line of products or services associated to the infringement during the period, while the infringement was being perpetrated; or
- up to double the economic benefit resulting from the infringement; or
- if none of the latter criteria can be determined, the Antitrust Court may impose fines up to approximately US$50 million.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions to be applied if the closing takes place before clearance in foreign-to-foreign mergers are the same as those applied in local mergers; therefore, the Antitrust Court shall be entitled to block the transaction and apply the sanctions described in question 12.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Chilean Antitrust Law does not provide for special rules with respect to closing before clearance in a foreign-to-foreign merger.

15 Are there any special merger control rules applicable to public takeover bids?

The general rule in Chile is that any takeover (by means of an acquisition of shares) entailing a change of control of an open-stock corporation must be conducted through a tender offer (an OPA). The OPA is a public offer for acquiring shares through the procedure described in the Securities Market Act. Such process ensures equal opportunity and fair dealing among all shareholders of the OPA target company.

Consequently, if one of two merging companies is an open-stock corporation, such integration must be subject to the OPA procedure. This is the general rule; however, the Securities Market Act provides for some exceptions.

Apart from that, there are no special merger control rules. Thus, if such a transaction meets the thresholds, completion of an OPA may not take place until such transaction has been cleared by the FNE.

16 What is the level of detail required in the preparation of a filing?

The Ministry of Economy recently issued Resolution No. 33 whereby it established the information that must be provided both for standard and simplified notifications. Part of the information required in both types of notification is the following:

- individualisation of the parties to the transaction, their representatives, powers of attorney, description of their economic activities and of their related parties;
- a full description of the proposed transaction, including related documents and exhibits, previous and resulting structure of ownership and control after the execution of the transaction, countries where the transaction shall produce effects, time frame and the existence of non-competition clauses; and
- the relevant market, including a description of the goods and services provided by each party, market size and market share of each party, structure and characteristics of the actual and potential supply and demand of the goods and services, costs, description of distribution and commercialisation systems, prices, existence of exclusivity and cooperation agreements, joint ventures of each party, monthly sales of each economic agent, production capacity, among others.

If such information is not filed along with the notification, the FNE shall deem the notification to be incomplete.

17 What is the statutory timetable for clearance? Can it be speeded up?

In the best-case scenario, the procedure may take up to two months. In the worst-case scenario, we estimate the procedure may take up to seven months. The process may be speeded up if the parties provide all the information needed by the FNE for making its assessment.

18 What are the typical steps and different phases of the investigation?

As of 1 June 2017, there is procedure before the FNE, with a reviewing stage before the Antitrust Court.

The procedure established in DL 211 is the following:

- parties should file either the standard or simplified form, as the case may be, along with the information required by the Ministry of Economy's regulation;
- within 10 business days, the FNE must inform whether the notification is complete or not. If it is complete, it shall issue a resolution beginning the procedure;
- within 30 business days as of the beginning of the investigation, the FNE must take any of the following actions:
  - unconditionally approve the transaction;
  - conditionally approve the transaction; or
  - extend the investigation for up to 90 additional business days;
- in case of extension, by the expiry of the additional period, the FNE must either:
  - unconditionally approve the transaction;
  - conditionally approve the transaction; or
  - ban the transaction; and
- if the transaction is prohibited, there is a special review remedy before the Antitrust Court, which the parties may file within 10 business days as of the notification of the resolution.

Substantive assessment

19 What is the substantive test for clearance?

According to the modified Antitrust Law, the substantive test is the capability of the transaction under analysis of substantially reducing competition. Under the new procedure, effective from 1 June 2017, there are no precedents on how this test is achieved or not. However, the following principles or criteria should apply for the analysis of concentration cases considering relevant resolutions and decisions issued by Chilean competition court:

- Definitions: the relevant markets must be defined to determine the degree of market concentration and applicable segmentation criteria, if any. Only then is it possible to predict the attitude competition authorities are likely to take in dealing with a specific event, act or contract referred to their attention. Chilean competition authorities have traditionally held that regulated markets bear a smaller risk of abuse of a dominant position. Competition authorities are obviously entitled to determine at their discretion the relevant market to be considered. This discretion is subject, at any rate, to the rule of reason.
- Existence of substitute products: availability of substitute products has a direct impact on how a relevant market is defined and the degree of market concentration is determined. If a product is easily replaceable by one or more adequate products offering comparable benefits to consumers, then the relevant market may be extended to include those substitutes.
- Demand elasticity: high elasticity of demand, that is, the degree to which demand responds to variations in market prices, reduces the risk of abuse of a dominant position in a relevant market.
- Barriers to entry and market growth: the existence or absence of barriers to entry is a weighty factor when attempting to determine the consequences of horizontal combinations. Chilean antitrust authorities have usually held that the risks of monopolistic abuses are considerably lowered in markets without any legal or natural barriers to the entry of potential competitors, that is, with high market contestability. Likewise, a growing market is probably better suited to withstand a horizontal combination given the probable incursion of new competitors into the market.
- Financial reasons for a merger: the financial or business reasons on which a merger is based are key elements in assessing the probability of success should any dispute arise with the competition authorities. Legitimate business reasons, such as economies of scale, or the need to tackle highly competitive markets, are considered reasonable justifications. Ultimately, the actual existence of synergies is an element that is especially held in regard by the competition authorities when approving or rejecting horizontal merger operations.
- Predictable consequences of horizontal business combinations: Chilean competition case law shows that the authorities do not consider market concentration as anticompetitive per se. Such a determination would require evaluating the likelihood of the surviving company to abuse its dominant position in the applicable relevant market.

20 Is there a special substantive test for joint ventures?

As mentioned in question 3, joint ventures have no special rules, but rather are subject to the same regulation as any other transaction falling under the definition of concentration operation under DL 211.

21 What are the 'theories of harm' that the authorities will investigate?

Articles 54 and 57 of DL 211 provide that the analysis is focused on whether the transaction is 'capable of materially reducing competition', and the theories of harm that FNE assesses are unilateral, coordinated, vertical and conglomerate effects of the respective transaction.

22 To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the review process, considering that DL 211 is only focused on competition matters, and the Antitrust Court has held the same in its rulings.

23 To what extent does the authority take into account economic efficiencies in the review process?

From the analysis of both Antitrust Court resolutions and investigations conducted by the FNE, it is possible to conclude that antitrust authorities have given importance to efficiencies arising from a transaction and how these could mitigate the potential antitrust risks. The assessment includes how efficiencies can be proven and how these shall be effectively transferred to consumers.

The Antitrust Court has also analysed whether efficiencies could be obtained by the parties without generating potential antitrust risks (ie, greenfield entrance or organic growth versus mergers and acquisitions).

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

According to articles 54 and 57 of DL 211, the FNE may approve a transaction with measures or conditions offered by the parties or it may prohibit it. Such prohibition may be overruled or confirmed by the Antitrust Court.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The parties to a transaction may offer either structural or behavioural remedies in order to overcome the risks identified by the FNE. In June 2017, the FNE issued the Remedies Guidelines whereby it provides guidance on the basic conditions to be met by the remedies and how the FNE would assess them.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no specific rules for this matter contained in the DL 211. Therefore, basic conditions and timing issues would be determined on a case-by-case basis by the FNE. Nevertheless, the offering of conditions suspends the deadlines for review, for up to 10 days on Phase I and up to 15 days on Phase II.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The antitrust authorities do not limit themselves in dealing with foreign-to-foreign mergers; they have asserted ample jurisdiction to review them as long as the activities carried out by the parties have an impact on the Chilean market. The most recent precedents regarding foreign-to-foreign mergers in Chile are as follows:

- Investigation F-80-2017: the concentration operation by and among Dow and Dupont (chemical companies) was approved under the fulfilment of the mitigation measures offered by the parties. These measures consisted in the disinvestment of the area business of the affected relevant markets.
- Investigation F-82-2017: this transaction was a joint venture by and between Nippon Yusen Kabushiki Kaisha Ltd, Mitsui OSK Lines Ltd and Kawasaki Kisen Kaisha, Ltd in order to integrate their global businesses of maritime transportation of line and container services. This transaction was unconditionally approved.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

To the extent that the related agreements (ie, non-competition) have the capability of substantially reducing competition or otherwise have an impact on the analysis of the transaction, these shall be covered.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

Customers and competitors may be contacted by the FNE in order to provide information about the market where the transaction shall take place. Third parties are not entitled to file a notification before the FNE.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The resolution ordering the opening of the investigation shall be published but protecting the confidential information of the parties. The investigation file shall be public as of the date of the extension of the investigation. Nevertheless, the FNE may order, ex officio or upon request, the confidentiality of certain documents, which must have public versions for the public.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

To facilitate the investigations undertaken by the FNE, the authority may enter into agreements with other civil services and public entities, either national, foreign or international entities or institutions, being able to share electronic data not catalogued as confidential or reserved.

Currently there are seven cooperation agreements in force between the FNE and other competition authorities regarding mutual technical assistance and the application of their competition laws as a whole, and not specifically focused on cartels (Brazil, Canada, Costa Rica, Ecuador, El Salvador and Spain).

Likewise, several free trade agreements currently in force (with Australia, Canada, EFTA, Mercosur, Mexico, Peru the European Union, Korea and the United States) are playing a very important role regarding cooperation between competition authorities owing to their antitrust provisions, which are real frameworks for mutual technical assistance, exchange of information, notifications, communications and the application of competition law.

Also, on 31 March 2011, the FNE executed an agreement on antitrust cooperation with the US Department of Justice and the Federal Trade Commission.

Judicial review

32 What are the opportunities for appeal or judicial review?

There is only a special review remedy before the Antitrust Court if the FNE prohibits the transaction.

33 What is the usual time frame for appeal or judicial review?

The review remedy must be filed by the parties within 10 business days from the service of process of the FNE's resolution banning the transaction.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

There are no precedents yet under the new mandatory merger review. There has been one recent Antitrust Court resolution on consultations and there are a few cases of settlement agreements being proposed by the FNE and the parties to the transactions containing measures approved by the Antitrust Court:

- Contitech Chile SA and Veyance Technologies Chile Ltda: the settlement with the FNE contemplated behavioural measures that remedied practices thought to restrict competition in the market, providing an advantage to the merging parties to the detriment of their competitors.
- FNE and Electrolux: Electrolux undertook the obligations to:
  - refrain its directors from blocking decisions on the Controladora Mabe board, if such decision were to cause effects in Mabe Chile;
  - refrain from exercising its right to appoint the vice-president in Mabe;
  - ensure the incapability of the Mabe directors appointed by Electrolux and relevant executives of the joint venture between Electrolux and General Electric to become relevant executives of Electrolux Chile;
  - establish firewalls to prevent the exchange of information among the executives and directors indicated before; and
  - establish internal policies and guidelines instructing on exchange of information and collaboration among competitors.

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- Sheraton hotels and San Cristóbal Tower: The Antitrust Court approved the acquisition by Inversiones Hoteleras Holding SpA of the ownership of the hotels Sheraton Santiago Hotel and San Cristóbal Tower. The transaction was approved unconditionally.
- Holchile SA and Inversiones Caburga Limitada: The Antitrust Court approved the settlement agreement reached by the parties and the FNE in the context of the Inversiones Caburga acquisition of a 54.32 per cent shareholding on Cementos Polpaico, being both active players in the cement and arid markets. The parties and the FNE agreed upon the disinvestment of certain production facilities and assets through a fiduciary agent.

35 Are there current proposals to change the legislation?

The most recent change is the shift from a voluntary merger regime to a mandatory one, effective as of 1 June 2017. There are no law bills to further amend the Chilean merger control regime.

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