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Cross-border Mergers

- Contribution from the Dominican Republic –

Cross-Border Mergers and Their Impact in the Dominican Republic: The Necessary Incorporation of Merger Control into the Dominican Legal System¹

1. Mergers and Their Impact on Free Competition

1. Mergers, concentrations, or acquisitions of companies, also known in the business world as "M&A operations," are a legitimate method of business growth, offering companies the benefit of expanding their operations and increasing their profits. These are strategic moves aimed at reducing costs, expanding, and gaining access to new markets and customer segments, which undoubtedly contributes to increasing business innovation capacity. Furthermore, the dynamics of mergers and acquisitions in the business sector are associated with various factors that can be grouped into three fundamental reasons: improving competitiveness, responding to changes in the sectoral environment, and inefficiency in capital markets. (Cantwell and Santangelo, 2002).

2. However, while mergers or business concentrations produce positive impacts in the business world, comparative experience warns us that this phenomenon is not without its negative effects in various areas, such as layoffs and personnel reduction, cultural clashes between merged companies, as well as monopolization and decreased market competition.

3. The negative impact that mergers, concentrations, or acquisitions of companies can have on markets is a phenomenon studied in specialized literature and regulated by competition agencies in many Western countries. Among the harmful effects that mergers could cause, we could broadly highlight market monopolization, which reduces the competitive capacity of other companies and drives them to bankruptcy, severely affecting the core of the right to free enterprise; abuse of the merged companies' dominant position, allowing them to impose unfavorable conditions on suppliers or customers; the restriction of market entry or barriers to potential competing agents, which harms innovation, as in a highly concentrated market, the dominant company has no incentives to innovate; and the reduction of consumer choice, leading to lower product and service quality.

4. Another harmful effect, although less explored in the literature on the subject, is that the lack of an appropriate environment of free competition in markets also has an indirect social impact. Indeed, free competition collaterally impacts economic growth and poverty eradication policies. Competition promotion and defense policies help guide the

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development strategies of government agencies, thereby ensuring the economic balance that generates progress and social justice.

5. The UNCTAD Model Law on Competition defines mergers and acquisitions (M&A) as "a situation in which, through a legal operation, two or more companies legally unify the ownership of their assets that were previously under separate control. This includes absorptions, joint ventures, concentrations, and other modes of acquiring control such as through common directors" (UNCTAD, 2007).

6. Mergers and acquisitions, which involve the purchase of entire companies or their specific assets by another company, can be classified as related or unrelated based on the similarity of their activities and position within the value chain. Related mergers and acquisitions include horizontal mergers, which occur between competitors in the same sector, and vertical mergers, where companies operate at different stages of the value chain, having a buyer-supplier relationship. Unrelated mergers or conglomerates occur between companies from different lines of business without any specific relationship.

7. There are also cross-border mergers and acquisitions, where companies are established in more than one country. These mergers also involve transactions that affect markets in multiple nations, regardless of the physical location of the companies. Cross-border mergers are a form of Foreign Direct Investment (FDI), which have the advantage of increasing a company's market share in a country through foreign investment, providing access to distribution channels, natural resources, brand consolidation, or the availability of skilled workers (Ottorino & Pezzi, 2014).

8. Dunning, cited by the OECD (2001), developed the Ownership, Location, and Internalization (OLI) paradigm to explain the reasons that drive companies to engage in Foreign Direct Investment. According to this model, companies consider three key factors when investing abroad: their own competitive advantages, transaction costs, and the specific characteristics of the host country.

9. Competitive advantage is based on the ownership of intangible assets such as technology, specialized knowledge, brand, or human capital, which exhibit characteristics of economies of scale or scope. Location creates incentives to leverage these assets in different jurisdictions through FDI, access to appropriate infrastructure, or favorable tax policies. Finally, internalization refers to the company's decision to maintain direct control over its foreign operations rather than opting for licensing or outsourcing, thus ensuring a more integrated and efficient management of its international assets and operations.

10. (Ottorino & Pezzi, 2014) distinguish six (6) waves of mergers from the late 19th century to the early 21st century. The first wave (1895–1904), known as horizontal integration, promoted concentration within various industries and the creation of a few large monopolies. The second wave (1922–1929) was driven by economic recovery after World War I and was characterized by vertical integration and the proliferation of oligopolies. The third wave (1965–1969) encouraged conglomerates as a growth strategy in response to antitrust policies. The fourth wave (1981–1989) reversed many of the acquisitions from the previous wave, with companies focusing on their core capabilities. The fifth wave (1992–2000) was characterized by the expansion of the U.S. economy, technological changes, global agreements, and the acquisition of companies by emerging economies. Finally, the sixth wave (2003–2007), which had significantly lower premiums compared to the fifth wave.

2. The Convenience of a Preventive Mechanism for Mergers Control

11. As can be seen, mergers and corporate concentrations are a natural phenomenon in the industrial or economic development of a country. They are not inherently negative but can generate undesirable turbulence in the markets, which can affect economic balance and harm the legitimate rights of consumers. As Granda Boullón (2013) aptly states, "The concentration of two companies means that they combine their capital to pursue the same economic purpose. The economic purpose is related to the generation of profits. Corporate concentration is not inherently bad; the union of capital allows for the creation of economies of scale, what Americans refer to as *merger-specific efficiencies*. That is, concentration through the buying and selling of shares or through mergers produces certain desirable benefits in a free-market economy. It is only when these benefits collide with other benefits that the free-market system protects, through the protection or safeguarding of the principle of free competition, that this conflict arises."

12. In this regard, Quintana Sánchez (2012) highlights four (4) reasons that justify the implementation of a mechanism for controlling corporate mergers: "The first is to prevent the creation of dominant companies that may later affect market competitiveness. The second is to prevent potential anti-competitive practices that could occur in the market once the concentration operation has been authorized. The third is the control of exploitative abuse, that is, when dominant companies do not restrict competition but instead take advantage of consumers, for example, by charging excessive prices. The argument in this case is that if the rule prohibiting anti-competitive conduct does not allow for sanctioning exploitative abuse, mergers control at least prevents companies from being in a position to commit such acts. The fourth justification is the control of tacit collusion situations, that is, when competitors can coordinate their behavior without needing to agree, but simply by observing how the rival acts in the market to make their own business decisions based on the expected behavior of the competitor. The argument here is that if the rule prohibiting anti-competitive conduct does not allow for sanctioning tacit collusion, the mergers control rule at least prevents the market from being structured in a way that enables competitors to behave in such a manner."

13. Regarding the latter reasoning of Professor Quintana Sánchez, which refers to the usefulness of the preventive mechanism for controlling mergers, aimed at preventing anti-competitive conduct that may not necessarily be classified as such under the legal framework, a concrete example is provided with "tacit collusion." The examination that the competition agency must conduct to assess the potential negative impacts of a corporate merger on a market allows at least for the avoidance of potential behaviors that could harm competition and would be difficult to detect later.

14. The need for preventive control of corporate mergers applies both to mergers with internal effects and to those that, although involving companies merged under the control of a foreign agency, still have cross-border effects on markets in other countries.

15. An example of the growth in cross-border mergers in recent years can be seen in economic statistics. In fact, it's important to highlight that during the period from 1990 to 1999, cross-border mergers grew at an annual rate of 18.98 percent, rising from 150.6 billion dollars to 720.1 billion dollars (United Nations Conference on Trade and Development, 2000). The United States and the United Kingdom were the two leading countries in cross-border mergers and acquisitions during the period from 1991 to 1998. Mergers and acquisitions conducted by the United States (purchases) reached 463 billion dollars, or 23.4% of the total, while the United Kingdom carried out mergers and acquisitions amounting to 303.1 billion dollars, equivalent to 15.3% (Kang & Johansson, p. 13).

16. In the case of Latin America and the Caribbean, cross-border mergers and acquisitions grew from 11.5 billion dollars in 1990 to 37.2 billion dollars in 1999, with Brazil and Argentina being particularly prominent. Cross-border mergers and acquisitions conducted by U.S. companies in Brazil in 1998 amounted to 4.23 billion dollars, while in Argentina they reached 1.041 billion dollars (Ottorino & Pezzi, 2014, p. 74).

Table 2.1. Cross-border Mergens and Acquisitions Sales by Region, 1990-1999 (in billions of dollars)

Region	1990	1995	1997	1998	1999
Developed Countries	134.2	164.6	234.7	445.1	644.6
European Union	62.1	75.1	114.6	187.9	344.5
United State	54.7	53.2	81.7	209.5	233.0
Japan	0.1	0.5	3.1	4.0	15.9
Developing Countries	16.1	15.9	64.3	80.7	63.4
Africa	0.5	0.2	1.7	0.7	0.6
Latin America and the Caribbean	11.5	8.6	41.1	63.9	37.2
Europe	0.0	0.0	0.0	0.0	0.3
Asia	4.1	6.9	21.3	16.1	25.3
Pacific	0.0	0.1	0.3	0.0	0.1
Central and Eastern Europe*	0.3	6.0	5.8	5.1	10.3
World Total**	150.6	186.6	304.8	531.6	720.1
World Growth		23.9	63.3	74.4	35.5

Note: * Includes the countries of the former Yugoslavia

** Includes amounts that cannot be distributed by region

Source: UNCTAD

17. Cross-Border Mergers and Acquisitions (M&A) are modes of industrial globalization and corporate strategies employed by companies facing intense global competition, trade liberalization, technological changes, and capital movement (Kang N. S., 2001), according to Mitchell and Mulherin (1996). In this regard, globalization and international competition have driven consolidation strategies in sectors such as textiles, apparel, metals, mining, and rubber and tire manufacturing. Furthermore, Li, Xue, Lu, and Li (2018) found that Free Trade Agreements (FTAs) are associated with higher bilateral cross-border mergers and acquisitions. Additionally, existing FTAs have a spillover effect on cross-border M&A activity in third countries.

18. Privatizations facilitate cross-border mergers and acquisitions by expanding M&A opportunities and opening economies to greater competition. For example, in Mexico, the privatization of state-owned enterprises was a decisive factor in cross-border mergers and acquisitions. During the period from 1990 to 2000, 11 privatization operations were carried out, accounting for 24.5% of total cross-border M&A activity (Garrido, 2001). In Brazil, M&A activity increased from \$4.7 billion in 1996 to \$12.6 billion in 1997, and \$24.8 billion in 1998, partly due to the privatization of public enterprises (Kang & Johansson).

19. Similarly, liberalization and international capital movements encourage cross-border mergers and acquisitions. The removal of financial and trade barriers facilitates the flow of capital between countries, allowing companies to more easily access new markets and invest in foreign economies. Additionally, deregulation in sectors such as telecommunications, aviation, electricity, and finance has been a factor contributing to cross-border mergers and acquisitions (OECD, 2001).

20. Technological advances also drive cross-border mergers and acquisitions, and this presents another significant challenge for free competition: mergers in digital markets. New information and communication technologies (ICTs), such as the Internet, email, and electronic data exchange, facilitate and accelerate commercial expansion internationally. These ICTs also support the creation of new companies and markets, rapidly transforming market conditions.

21. Bourreau & de Stree (2020) indicates that merger control can be subject to two types of errors: false positives and false negatives. False positives are associated with the prohibition of a merger that should have been allowed, while false negatives refer to mergers that were permitted but should have been prohibited. In the case of digital markets, false positives are not expected to occur, as all mergers have been permitted; however, false negatives may have occurred, which would indicate that there is insufficient control over digital mergers.

22. The literature has studied the factors that explain cross-border mergers and acquisitions. Goddard, Molyneux, and Zhou (2011) analyzed banking mergers and acquisitions in Latin America and the Caribbean during the period from 1998 to 2009, concluding that these were associated with financial restructuring, privatization, and deregulation in the markets. Similarly, Pérez (2013) found that the privatization of state-owned enterprises favored transnational corporations in mergers and acquisitions of large companies in Mexico.

23. Bohada and Romero (2019) conducted a literature review on mergers and acquisitions, finding that the M&A processes in the Latin American region were focused on corporate performance and hostile takeovers, the impact on corporate governance, and the effects of economic deregulation and privatization in the region. In terms of sectors, these mergers and acquisitions concentrated on primary sectors of the economy: mining, gas, oil, and metals, as well as the tertiary sector, such as banking and transportation services.

24. These authors also cited similar works by Amighini et al. (2014) and Ahsa and Musteen (2011), who studied the phenomenon of multinational companies in emerging economies. In both studies, different categories of analysis were identified: country- and company-level advantages; motivations for making foreign acquisitions; and the common modes of entry into foreign markets.

25. As can be seen, there are a multitude of "economic causes" that justify the phenomenon of mergers and acquisitions; however, there also remain "legal consequences" arising from the act of merging, which a preventive merger control mechanism could mitigate or avoid, thereby reducing adverse effects on market competition.

3. Impact of Cross-Border Mergers: Challenges and Issues

26. The objective of merger and acquisition (M&A) control is, in addition to preventing serious harm to free competition in the markets, to ensure consumer welfare by preventing merged companies from obtaining excessive market power through competitive market structures. Furthermore, it enables companies to make long-term strategic decisions.

27. Mergers, on one hand, allow local companies to access new markets or distribution channels, and on the other hand, to modify the competitive structure of the markets. Mergers and acquisitions are carried out with the expectation that the value of the merged companies will exceed the sum of the values of the independent entities prior to the merger

and acquisition (Ottorino & Pezzi, 2014). The merger enables the creation of synergies, economies of scale, and economies of scope that enhance the efficiency of the companies.

28. However, mergers and acquisitions may also have negative effects as they can create companies with significant bargaining power over consumers and other businesses, reduce consumer welfare, increase prices, and lead to lower-quality goods (Méndez Arzeno, 2023).

29. Cross-border mergers have increased, especially since the 1990s. The International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD) have highlighted the importance of controlling cross-border mergers. Given the unique nature of these operations, which have a structural effect on the economy with consequences in various jurisdictions, the limitations of national competition laws have been recognized. This calls for a special international regime, although this also presents significant challenges due to the lack of consensus.

30. Esteban Ramos (2023) highlights, in reference to the impact of cross-border mergers:

31. "A merger, particularly a cross-border one, allows companies to improve their productivity and results in a globalized and internationalized market such as the current one. In certain cases, access to these operations presents the only possibility to avoid their disappearance. Therefore, it is essential to provide a legal framework that enables mergers, both domestically and internationally, addressing any conflicts that may arise from their implementation. When a cross-border merger is planned, it involves companies from different states and, consequently, different legal systems, which complicates the structuring of such operations compared to domestic mergers. In addition to the procedural challenges, there is the circumstance that the applicable regulations for the resulting company will differ from those previously applied, at least to one of the companies involved in the transaction. Therefore, one of the factors to consider when deciding which company will receive the assets and shareholders of the companies that will cease to exist as a result of the merger is the national legislation that will apply to it..."

32. It is important to highlight, when addressing this point, that the preventive control of corporate mergers is not only about a "legal control" of the merger transaction but also requires a "pro-competitive viability control" that can identify whether the corporate merger could potentially generate harmful effects on market competition.

33. Emerging economies face significant challenges in establishing control over cross-border mergers and an effective competition policy. The OECD (2012) identifies the following challenges:

- **The lack of a competition culture** due to the historical dominance of the state in the economy and, consequently, an underdeveloped private sector. This lack of a competition culture affects the enforcement of competition laws and leads to a distorted view of the competition process;
- **A lack of human and financial resources.** Competition authorities often lack the necessary resources and trained personnel in law and economics to perform their regulatory functions due to budgetary constraints. In this context, merger control is not a priority, and efforts are focused primarily on tackling cartels and abuse of dominant positions;
- **An inadequate or non-existent legal framework for merger control,** often consisting only of basic provisions that are insufficient for effective control over cross-border mergers;

- **The role of Foreign Direct Investment (FDI)** is viewed positively by some countries, where foreign companies are considered a key factor for economic development. In contrast, some countries impose strict controls on FDI participation in certain sectors of the economy. However, there is a general consensus that merger controls do not affect the attraction of foreign capital.

4. Current Diagnosis of Economic Concentration Control in the Dominican Republic

34. The Dominican Republic does not have a unified corporate merger control regime that regulates the entire economy, although there are sector-specific provisions that may be applied by regulatory agencies. However, these sector-specific regulations do not establish thresholds or procedures to verify whether a merger or acquisition could result in economic concentration or the creation of market power, as the preventive control exercised by these agencies is merely a legality check, rather than a pro-competitive viability assessment in the markets.

35. As a general rule, and in accordance with the provisions of the Commercial Companies Law No. 479-08, corporate mergers are not subject to prior authorization, except in cases where the law explicitly requires it. In fact, Article 382 of this law states that “one or more companies may, through merger, transfer their assets to an existing company or to a new company they establish.” The aforementioned Commercial Companies Law only requires, in paragraph I of Article 16, that the merged companies register their agreement in the Mercantile Registry.

36. However, there are specific cases where state authorization is required for the validity of a corporate merger. These merger controls are not focused on preventing harm to competition but rather on verifying compliance with certain legal, technical, and economic conditions necessary to operate in the market.

37. For example, the Commercial Companies Law itself states in Article 157, paragraph I, that in the case of mergers of publicly held corporations, the process is supervised and authorized by the Securities Superintendence (Superintendencia de Valores).

38. In the health insurance fund management market (ARS), Article 153 of Law 87-01 requires that any merger within this market be approved by the Superintendence of Health and Labor Risks (Superintendencia de Salud y Riesgos Laborales).

39. Similarly, in the pension fund management market (AFP), the Superintendence of Pensions (Superintendencia de Pensiones) has the authority to approve mergers within this market, in accordance with the provisions of Article 93 of the aforementioned Law 87-01.

40. In the **electricity sector**, the **Superintendence of Electricity (SIE)** authorizes mergers and acquisitions, as established in Article 12, paragraph II, of the General Electricity Law No. 125-01. Vertical mergers are prohibited, except for the three distribution companies that emerged from the market capitalization process in 2001, which participate in the generation market with a market share not exceeding 15%.

41. In the **financial sector**, Articles 9, paragraphs f) and g) of Law 183-01 stipulate that the **Monetary Board** is the governing body of monetary policy and is responsible for approving mergers and acquisitions with an emphasis on economic and social objectives. However, the aforementioned **Monetary and Financial Law** specifies in Article 2 that the regulation of the financial sector “seeks the proper functioning of the system in a competitive, efficient, and free market environment.”

42. In the securities market, the National Securities Council (Consejo Nacional del Mercado de Valores) is responsible for authorizing mergers among companies participating in this market, pursuant to Article 13, section 8, of Securities Law No. 249-17.

43. In the telecommunications market, the Dominican Institute of Telecommunications (INDOTEL) is the state authority responsible for approving mergers or concentrations of companies in this sector, as prescribed by Articles 25 of Law 153-98 on Telecommunications and Article 12.3 of its Regulation of Free and Fair Competition for the Telecommunications Sector (Resolution No. 022-05). Similarly, Article 4.4 of this regulation states: "In order to protect free, fair, and effective competition, mergers and concentrations in the telecommunications market are subject to prior authorization by INDOTEL, under the reserve of establishing applicable regulations as a result of changes in market structures caused by such transactions."

44. As can be seen, in the Dominican model of competition law enforcement, there is no single government agency responsible for regulating free competition across all markets. There is a central authority, the National Competition Defense Commission (Pro-Competencia), tasked with promoting competition before all branches of the public administration, but the authority to enforce or sanction anti-competitive conduct is limited to specific regulatory agencies in sectors where the respective sector laws grant such authority. In cases where the sector-specific law does not grant this authority to its regulatory body, then the responsibility for sanctioning rests with Pro-Competencia.

45. The Dominican Constitution, in its Article 50.1, places the responsibility on the State to "promote and ensure free and fair competition," but it does not establish a specific model. When the current Competition Defense Law (Law 42-08) was enacted in 2008, the regulatory landscape was fragmented, with various market regulators, and many of them had sector-specific laws that required the implementation of certain competition policies, including those related to market regulation, such as merger control.

46. This situation was recognized by Law 42-08 itself, in which Article 2 establishes: "This legal framework is of general observance and of public order throughout the national territory and applies to all areas of economic activity. Consequently, all economic agents are subject to its provisions as established by this framework; primarily for all economic agents and, secondarily, for those economic agents regulated by sector-specific laws that contain provisions on competition."

47. This same legislation, in paragraph III of Article 20, when referring to the advocacy of competition or non-binding observations regarding administrative acts or regulations that may impact free competition, states: "Both the Commission and the acting regulatory body must primarily apply the competition law established in the special regulations governing the acting regulatory body, and subsidiarily, in cases where the former is silent, unclear, or ambiguous, the provisions of this general legislation shall apply."

48. Article 70 of the same law reaffirms this principle of prioritizing sector-specific market laws, recognizing the authority of their respective regulatory bodies: "This law repeals and substitutes any other legislation that contradicts it, except for the provisions of sector-specific legislation on competition."

49. However, in the everyday operation of markets, the regulatory authorities do not emphasize the review of mergers in terms of their potential impact on the economic concentration among companies and its effect on the free competition environment in the markets. They limit themselves to reviewing compliance with documentary requirements without conducting an economic impact study to assess the appropriateness or not of the proposed merger for the markets.

50. Therefore, it is necessary to promote a reform to the Competition Defense Law in the Dominican Republic that implements preventive control of mergers and acquisitions to mitigate or avoid in advance any harmful effects on the markets.

5. Importance of International Cooperation in the Regulation of Cross-Border Mergers

51. International cooperation is crucial for the regulation of cross-border mergers. This cooperation can be multilateral, regional, or bilateral. Multilateral cooperation, in particular, does not require binding commitments from countries, which represents an advantage for developing countries. This approach has the potential to achieve a degree of harmonization without imposing norms, principles, or standards on countries or their competition authorities. Furthermore, it sets guidelines for the development of public policies and allows countries to gain experience in the area of concentration control.

52. Regional cooperation offers certain advantages for developing countries, such as addressing cross-border competition issues among interested countries when there are no effective national regimes for concentration control. The case of MERCOSUR provides an interesting experience, as efforts have been made to harmonize the competition law regimes of its member countries and to establish provisions for the control of mergers through the Competition Defense Agreement. This agreement urges member states to establish common rules on concentration control, but does not determine how a common system of concentration control should be structured.

53. Regarding bilateral cooperation, it has grown significantly since the 1990s. According to the OECD, bilateral cooperation offers important benefits, particularly for developing countries: (i) improving the effectiveness of competition law enforcement and investigations; (ii) avoiding jurisdictional conflicts; (iii) protecting legitimate interests of countries; (iv) reducing the need for exchanging confidential information; (v) providing legal certainty to the parties involved in the merger; and (vi) creating a closer link between the relevant competition authority and the merger in question (OECD, 2012).

54. In the case of the Dominican Republic, the Competition Defense Law No. 42-08 establishes in Article 31, paragraphs p), q), and r), that Pro-Competencia will lead and advise the Dominican State in the negotiation of international treaties that impact free competition. This scenario opens the legal possibility for, within the framework of a bilateral or multilateral free trade agreement, the inclusion of a reciprocity clause in international agreements that allows the competition agency of each signatory country to exercise prior control over cross-border mergers between the signatory nations.

55. In this regard, cooperation between the European Commission and the United States (U.S.) in the area of merger control is established through a cooperation agreement signed in 1991. For example, in the case of Intel and McAfee, the European Commission benefited from close collaboration with the Federal Trade Commission (FTC) of the United States through information exchange. Similarly, the fruitful relationship between Brazil and the U.S. Department of Justice and the Directorate-General for Competition of the European Commission is notable (United Nations Conference on Trade and Development, 2015). Cooperation agreements between Brazil and most competition agencies include provisions related to cross-border mergers.

6. Impact of Cross-Border Mergers in the Dominican Republic

56. The Dominican Republic does not have a general and unified regime for corporate mergers, nor does it specifically regulate cross-border mergers. However, the Competition Defense Law (Law 42-08) in Article 3, paragraph a) states that the law applies to "agreements, acts, or conduct, including those arising from a dominant position, that originate outside the territory of the Dominican Republic, as long as they produce restrictive effects on competition within the national territory."

57. Despite lacking a merger control regime, the Dominican economy is the seventh-largest in Latin America, with a Gross Domestic Product (GDP) of \$119.9 billion in 2023 and a per capita GDP of \$11,186.96 (International Monetary Fund, 2024). Additionally, the country is a major recipient of Foreign Direct Investment (FDI), reaching \$4.39 billion in 2023.

58. While this economic data makes the Dominican economy highly attractive for foreign investment, the absence of a merger control regime creates uncertainty for capital allocation. It is well-known that one of the advantages of prior merger control is the protection of free competition, as it prevents the creation of monopolies and keeps markets with favorable competitive standards. This not only translates into greater security for capital investment but also benefits consumers by ensuring fair prices and optimal quality of products and services (Bullard, Falla & Roldan, 2012).

59. The Dominican Republic has seen significant corporate mergers. For example, the Brazilian brewing company Ambev acquired the majority of shares in Cervecería Nacional Dominicana (CND) in 2012 for \$1.237 billion. Likewise, the French telecommunications company Altice acquired Orange in 2013 for \$1.435 billion.

60. The history of mergers between foreign and Dominican capital dates back even further. In 1986, the León Jimenes Group and Heineken purchased 92% of the shareholding in Cervecería Nacional Dominicana (CND), the country's leading brewery. At that time, there was no prior merger control as exists today, at least in certain markets. The economy was more localized and did not have the global reach that the world economy has today.

7. International Comparison: Merger Control Experiences in Similar Economies

61. Cross-border merger control is a mechanism that, in other countries in the region, has yielded positive results—not only for the purpose of protecting free competition in the domestic market but also as a factor that fosters innovation by proactively preventing excessive concentration of power in a few companies. In this way, firms are encouraged to innovate and continuously improve in order to remain competitive, while also contributing to greater economic stability, as a balanced and competitive market helps prevent economic crises that could arise from the concentration of power in a few firms.

62. To better illustrate the advantages of cross-border merger control, let us examine the cases of Brazil and Mexico, countries that have had varied experiences in mergers and acquisitions, both domestically and cross-border. Below, we will review the most significant cases.

7.1. Brazil

7.1.1. Case 1: Colgate and Kolynos

63. The merger between Colgate and Kolynos in Brazil in 1995 was a key case in competition regulation in concentrated markets. Colgate acquired Kolynos, a popular oral hygiene brand, which raised concerns about monopoly power in the toothpaste market. Kolynos was an extremely popular brand in Brazil and had a significant market share. With the merger, the combined market share of Colgate and Kolynos in the Brazilian market would amount to about 80%, leaving very little room for competition and limiting consumer options.

64. The Administrative Council for Economic Defense (CADE) initially opposed the merger between Colgate and Kolynos due to serious concerns that the consolidation would result in a monopoly or excessive market dominance in the Brazilian toothpaste sector. CADE ultimately approved the merger subject to certain conditions. These conditions included prohibiting Colgate from using the Kolynos brand for four years and imposing measures to prevent abuses of dominant position. Furthermore, CADE encouraged the entry of new competitors to enhance competition.

65. CADE's decision has been widely regarded as appropriate, as it protected competition and facilitated the entry of new brands, ensuring market efficiency. This case is considered a model for other countries.

7.1.2. Case 2: AMBEV

66. In 1992, the Brahma Brewery Company and Antártica Paulista Company announced their merger to create AmBev, a company with a capital of \$8 billion and annual sales of \$10 billion. Brahma and Antártica, leaders in the Brazilian beer industry, controlled approximately 75% of the market and produced the three most popular brands: Skol, Brahma, and Antártica (Correa & Aguiar, 2022). Although the companies argued that the merger would reduce costs and strengthen their global competitiveness, the competition authorities raised concerns about potential negative effects on consumers, particularly the possibility of price increases.

67. The Administrative Council for Economic Defense (CADE) required AmBev to transfer one of its three main brands (Skol, Brahma, or Antártica) to a third party. This was aimed at reducing market concentration and ensuring that the company would not exercise an absolute dominance in the Brazilian beer industry.

68. The conditions imposed by CADE were justified by the need to prevent unilateral price hikes and maintain a sufficient level of competition in Brazil's beer market. By ensuring the presence of multiple competitors, the goal was to protect consumers from potential market power abuses by AmBev.

69. From these cases, it can be concluded that both CADE and other regulatory entities, such as the Secretariat for Economic Monitoring (SEAE) and the Secretariat for Economic Law (SDE), have taken a proactive approach in evaluating mergers that could significantly affect competition in the market. In both cases, these authorities identified concerns about high market concentration and the potential negative impact on consumers.

7.2. Mexico

7.2.1. Case: Aeroméxico and Delta Airlines

70. A notable case in Mexico highlighting the importance of pre-merger control was the case of Aeroméxico and Delta Airlines. On May 8, 2015, Aeroméxico and Delta Airlines notified the Federal Economic Competition Commission (COFECE) of their intention to form a Joint Cooperation Agreement (JCA). This is considered a concentration under Mexico's Federal Economic Competition Law. The purpose of this agreement was to jointly operate flights between Mexico and the United States, establishing a common strategy for pricing, ticket sales and distribution, flight operations, and the use of shared facilities. This type of alliance required approval from both COFECE in Mexico and the U.S. Department of Transportation (DOT).

71. The collaboration raised concerns in both authorities about the potential negative effects on competition, as it could increase the joint market power of the airlines, allowing them to raise prices without effective competition. After analyzing the case, COFECE determined that the agreement could limit competition on routes between Mexico City and the United States and approved the operation under certain conditions. Notable conditions included: 1) Aeroméxico and Delta were required to transfer eight pairs of slots (time slots allocated for landings and takeoffs at specific times) at Mexico City International Airport (AICM) to competing airlines; 2) The airlines could not maintain designations on overlapping routes, forcing one of them to give up its rights to these routes.

72. The DOT, for its part, approved the cooperation agreement between Aeroméxico and Delta in 2016, but also imposed additional conditions to preserve competition and avoid harming consumers. The most relevant conditions included the transfer of slots at key airports and the commitment to maintaining competition on routes between the two countries. Ongoing supervision ensured that the alliance did not negatively affect flight availability or prices for passengers.

73. This type of control over concentrations is crucial to balancing the anticompetitive and pro-competitive effects of an agreement between companies, ensuring that consumer welfare is not reduced while encouraging the entry of new competitors into the market.

8. The Necessary Incorporation of Merger Control into the Dominican Legal Framework

8.1. Characteristics of the Dominican Merger Control Model. Weaknesses

74. Currently, more than one hundred countries worldwide have mechanisms for controlling corporate mergers and acquisitions. Of these, 57 countries have multijurisdictional or cross-border merger control, meaning their competition authorities have the power to control the effects of mergers involving companies from third countries. In Latin America, countries such as Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela have merger control procedures in place.

75. The Dominican Republic has a corporate merger control regime, but it is not centralized and homogeneous; rather, it is fragmented across different markets as established by its sectoral laws. This phenomenon, far from contributing to the protection of competition in domestic markets and benefiting the legitimate interests of consumers, creates a breeding ground for fostering business concentrations that lead to abusive dominant positions in those markets.

76. Another characteristic of the current Dominican model is that it does not have control over the effects of cross-border mergers. In fact, the sectoral regulations that assign jurisdiction to certain market regulatory agencies do not include mechanisms for controlling mergers conducted in foreign countries; they only regulate the approval of mergers occurring within the Dominican Republic, leaving the country vulnerable to global trade dynamics and even the rise of digital markets, where geographic factors are no longer relevant.

77. Interestingly, it is precisely the characteristics of the Dominican merger control regime that justify the implementation of a centralized, homogeneous, and inclusive regime across all markets. The concern that a merger might negatively impact free competition is not specific to any one market but affects all markets, particularly when considering the control of the effects of cross-border mergers.

8.2. Risks of Types of Corporate Mergers. The Need for Centralized Merger Control in a Single Agency

78. Specialized literature has identified a series of risks associated with corporate mergers, depending on whether the merger involves companies competing in the same market or companies situated at different levels of the production chain (upstream or downstream).

79. According to Clarke (2010), Bullard, Falla & Roldán (2012), and Jiménez Arana (1998), the risks that different types of mergers can pose to free competition are as follows:

80. In the case of horizontal mergers—that is, when two companies operating in the same relevant market merge—the competition risks are of two types: (a) unilateral and (b) coordinated. Unilateral risks refer to the fact that the merger eliminates competition between the companies whose ownership becomes concentrated, which could allow the resulting company to achieve such market power that, without the need to coordinate with competitors, it could profitably increase prices and/or reduce product quality and/or the degree of innovation in the market. In other words, the merger could be a strategy to eliminate the second competitor that ensures market balance, thereby absorbing the other competitors or creating “strategic barriers” to discourage new entrants into a highly concentrated market dominated by a hegemonic company.

81. Coordinated risks arise because the merger reduces the number of competitors, so the remaining companies can easily recognize their strategic interdependence and may coordinate their actions to limit competition. Coordination can be explicit, in the form of a cartel, or implicit, and is facilitated when fewer companies remain. If these companies are symmetric, it becomes easier to jointly determine key variables (such as price and/or quantity) and simultaneously reduces the temptation to deviate from the coordinated arrangement.

82. Regarding vertical mergers—mergers between companies at different levels of the production chain—the aforementioned authors (Clarke, 2010; Bullard, Falla & Roldán, 2012; and Jiménez Arana, 1998) point out that the competition risks involve the possibility that the merged company may create artificial barriers to entry by denying access to essential inputs and/or increasing the costs for its rivals.

83. A third case is conglomerate mergers, which involve companies from different, unrelated markets. This type of merger produces a kind of “illusion effect,” as it appears that such mergers do not pose a competition risk since the companies operate in different markets. However, these types of business concentrations could ultimately be harmful to competition and consumers.

84. Carlos Angostini (2023), Professor of Economics at the University of Michigan, highlights these risks: facilitating collusion through multi-market contact; discouraging or making it difficult for new competitors to enter a market (by refusing to sell productive inputs or provide financing); and **predatory behavior** toward competitors, given that conglomerates are better able to absorb losses incurred during a predatory period over the medium or long term, which could result in the bankruptcy of their competitors.

85. In a fragmented and atomized merger control model, such as that in the Dominican Republic, where the sectoral market regulator does not have the protection of free competition as its key focus, such strategies can slip "under the table"; not necessarily due to complicity on the part of the regulatory agents, but rather due to their lack of knowledge regarding these issues and challenges. For this reason, a centralized merger control model under the competition authority would be more appropriate.

86. Other challenges faced by pre-merger and business concentration control mechanisms are highlighted by Tanja Goodwin (2020): The first challenge pertains to the determination of thresholds that allow the authority to effectively focus on those transactions that may pose the greatest competition risks.

87. The second challenge relates to the content of the transaction analysis. According to Goodwin, there are still open questions about how certain international practices apply to countries that are just beginning to analyze merger control. How are efficiencies assessed, for example, or the impact of the informal economy? This is a key element in countries like the Dominican Republic, which requires transnational merger control.

88. Lastly, Goodwin identifies a third challenge: the risk of political interference in the procedure or decisions of the competition authority, which could undermine the goal of strengthening free competition.

89. According to Goodwin, there are three types of political interference: when the process itself is used as a political tool, meaning that a procedure is opened and left open without authorization as a form of leverage against economic groups for political purposes; the inclusion of political criteria in the review process; and when, after the substantive evaluation, there is a review at a political level.

90. In the case of the Dominican Republic's competition authority, the issue of political interference is safeguarded by the very Law on Competition Defense (Law 42-08). In fact, several mechanisms are established in this legislation to strengthen the political autonomy and independence of the governing body.

91. Among these mechanisms is the requirement for suitability for appointment as a board member of Pro-Competencia, the country's competition agency. Specifically, Article 28, subsection e) of Law 42-08 establishes a conflict of interest that would prevent any person from being appointed to the Board of Directors of the agency if they have active political affiliation.

92. Another mechanism ensuring political independence is the selection procedure for the members of the Board of Directors: pursuant to Article 26 of Law 42-08, the Board of Directors consists of five members who are appointed at different times, ensuring that the entire membership is not renewed at once during each renewal process before the National Congress. Three members are elected by the Senate, and two by the Chamber of Deputies.

93. The third mechanism guaranteeing political independence is the non-removability of the Board members. Article 26, paragraph II of Law 42-08 establishes that they serve a non-renewable term of five (5) years and can only be removed for the legal reasons exclusively enumerated in Article 29 of the same law. These reasons are:

- When, without a valid and justifiable cause, they fail to attend six (6) regular sessions per year;
- When, due to physical incapacity, they are unable to perform their duties for a period of six (6) months;
- Upon a final conviction for a criminal offense;
- When there is clear evidence of negligence in performing their duties or if, without proper justification, they fail to comply with their obligations as stipulated by law, regulations, and the decisions of the Board of Directors;
- When they are found responsible for fraudulent, illegal, or clearly contrary acts to the goals and interests of the institution.

8.3. Challenges of “Digital Mergers”

94. Another reason to consider implementing a centralized merger control mechanism in the Dominican Republic are the risks arising from mergers in digital markets. It is undeniable and inevitable that the traditional economy is increasingly integrating into digital markets, and the growth of these markets is already beginning to penetrate consumers' daily lives. Therefore, it is a reality in which competition agencies must develop appropriate strategies to defend free competition within digital markets.

95. One of the risks to consider are the “price effects” generated by digital mergers. According to Motta & Peitz (2019), the effects of horizontal mergers on prices can be detrimental to the market when the merger does not generate efficiency gains. For example, two companies may merge to mitigate or reduce the harm imposed by aggressive price competition within the digital market. This, in turn, causes competitors, whose residual demand increases, to also raise their prices, albeit by a smaller percentage. Since all prices rise, the merger ultimately harms consumers in the long run.

96. Another risk is the anti-innovation effect that a digital merger may entail. To understand this aspect, it is necessary to comprehend the business logic of digital platforms. According to Nicolas Petit (2018), digital companies often offer services for free, but on the condition that their consumers use only one platform or adopt a single-homing model. When providing their services, these platforms capture data from users, which can then be used to provide key insights to advertisers or sponsors.

97. As the platform user is subject to the single-homing model, digital companies attract consumers who do not use other platforms. Advertisers, on the other hand, place their ads across multiple platforms. Under this dynamic, free competition flows within digital markets, forcing platforms to innovate so that advertisers pay more for their ads based on the number of consumers each platform has.

98. But what would happen if two platforms were to merge digitally? Competition would decrease, increasing the market power of the merged digital entity, which would no longer have incentives to maintain high service quality. Consequently, consumers would be harmed while the merged company would increase its profits by generating higher revenue from advertisers due to its larger advertising inventory.

99. According to Carolina Abate and Zoe Lyon (2023) in a report for the OECD titled “Theories on the Harm Caused by Digital Mergers,” mergers in digital markets have been a heavily debated topic in recent years due to the characteristics and dynamics inherent to these environments (network effects, tipping points, two-sided markets, the importance of data, among others), which distinguish them from traditional markets. It is estimated that

between 1987 and 2020, the GAFAM companies (Google, Apple, Facebook (Meta), Amazon, and Microsoft) carried out approximately 825 acquisitions or mergers; however, nearly 97% of these transactions have not been reviewed by competition authorities worldwide.

9. Potential Benefits for the Economy and Consumer Protection

100. In the previous section, we addressed the risks posed by business mergers that are not subject to prior merger control by the competition authority. In this section, we will reflect on the potential benefits of having a merger control mechanism. The other side of the coin.

101. According to Zuñiga Fernández (2018), merger control is a competition policy tool that complements another competition policy instrument known as ex-post control. The control of business concentrations or economic concentrations is a market structure control, not a control of competitor behavior in the market. Through this mechanism, a prospective evaluation is conducted, looking into the future.

102. Business concentration, as Zuñiga Fernández points out, does not undermine the market; what undermines the market are the effects of the concentration. This is why market structure control specifically focuses on these effects—it does not condemn all the effects of substantive changes in control of structure. The assumption is that it is a substantive change, meaning there is an effect on the constitution and the market scenario.

103. This mechanism provides preventive protection to the market from potential harms to free competition and prevents the creation of strategic or structural barriers to entry caused by the abusive market dominance of hegemonic firms.

104. This dynamic within the market also generates collateral benefits, such as stimulating business innovation, driving the development of new technologies and products. Additionally, it serves as an incentive for both domestic and international investment, thanks to the legal certainty provided by a free competition environment, which in turn drives economic growth.

105. The quality and variety of products and services offered in a competitive market by economic agents leads to fair prices, which directly benefits consumers.

106. The specialized literature on the matter (Baker & Salop (2015); Piketty (2013); Mark Ivaldi M., Jenny, F., & Kimichk, A. (2017)) has reflected upon and demonstrated that in countries with effective competition policies and mechanisms such as merger control, the economy is dynamic and thrives. In fact, empirical evidence and statistics have shown that free and fair competition directly contributes to economic growth because:

- The reduction of entry barriers for businesses increases sources of employment.
- Free competition fosters small and medium-sized enterprises, leading to a greater number of entrepreneurs formalizing their economic activity, thus moving out of the "informal economy."
- Government purchases benefit from price reductions, thereby favoring the poorest classes.
- It generates economic growth. Countries with competition policies tend to have higher growth rates than those without such policies.
- It has a redistributive effect by reducing the price of essential goods.

107. On the other hand, John E. Kwoka (2013), in his article *"Does Merger Control Work? A Retrospective on Antitrust Enforcement in the United States and the Results of Mergers"*, provides a thorough analysis of the effectiveness of merger control in the United States. In his study, he notes that there are limitations in evaluating this phenomenon due to the lack of public information on the performance of companies and their products, which prevents a broader study. Moreover, Kwoka describes the methodological limitations of his research, such as the relatively small number of observations, the difficulty in classifying cases, inherent limitations in the available data, and selection bias issues.

108. In his conclusion, Kwoka highlights that in many cases, competition agencies take action and impose structural or behavioral remedies. Despite this, agencies are generally capable of correctly distinguishing between cases that do not pose a threat to competition and those that do. However, the author also concludes that the remedies imposed—such as divestitures and behavioral remedies or conditions—are not always sufficient to effectively preserve competition. In particular, price increases tend to persist even after these remedies are implemented, especially in cases where behavioral remedies or non-structural conditions are applied.

109. Kwoka suggests that, in cases where more decisive measures are not implemented, it may be necessary to resort to stronger political measures, such as a complete opposition to mergers or the imposition of structural remedies rather than approaches based on behavioral conditions.

10. Role of Pro-Competencia: Proposal for a Regulatory Framework for Merger Control in the Dominican Republic

110. Within the concept of “competition defense,” the regulation of economic concentrations, such as mergers and acquisitions that could negatively impact market structures, is also included. While mergers can lead to efficiencies and increased competitiveness for companies, they can also reduce competition if they result in the creation of companies with disproportionate market power. Competition authorities analyze each concentration operation to ensure that it does not lead to the creation of monopolies or oligopolies that could harm consumers or competition in general.

111. Given that the merger control mechanism is a valuable tool for preventing potential large-scale anti-competitive behavior in markets, every national competition policy should include a procedure of this nature. This is in line with the constitutional obligation of the Dominican State, as established in Article 50.1 of the Constitution, which mandates the promotion and protection of free competition.

112. The primary objective of merger and acquisition control is to preserve the competitive structure of markets. When two companies merge, there is a risk that the new entity could exclude competitors or impose unfair conditions or excessive prices that ultimately harm consumers. Competition authorities must analyze the potential impact of these operations on relevant markets and, if they identify significant risks to competition, may impose conditions or, in extreme cases, prohibit the merger.

113. This mechanism is also essential to ensure that foreign companies entering a market through mergers or acquisitions do not unfairly displace local competitors. In many countries, the entry of large multinational companies can create an imbalance in markets, potentially threatening the survival of small and medium-sized enterprises. Competition authorities must balance the need to attract foreign investment with the protection of local competitors and the preservation of a competitive environment.

114. The current trend is that countries with a competition law also have a merger control regime. In Latin America, only four (4) jurisdictions had concentration control in 2000, increasing to twenty (20) by 2020. Merger control requests in most cases, as observed in the Latin American region, are approved in 90% of cases administratively by the responsible competition agency (Burnier Da Silva & Ianeli, 2023).

115. In the peer review conducted by the OECD and the IDB on the competition policies of the Dominican Republic in 2023, one of the main recommendations was the inclusion of this tool in its legislation to strengthen the country's national competition defense system.

116. Indeed, the recommendation report from the peer review highlights that “the Dominican Republic does not have an extensive regime of merger control applicable to the entire economy, although there are certain merger control mechanisms in the telecommunications, electricity, and financial sectors. Only the telecommunications regulator analyzes the effects of transactions on competition, while the electricity and financial sectors focus on regulatory aspects (...) Adopting a general ex ante merger control regime in line with OECD standards and international best practices” (OECD-IDB Peer Review Report on Competition Law and Policy: Dominican Republic, 2023).

117. In this sense, it is important to note that, as of the date of this article, a reform project to the *Ley 42-08* on Competition Defense is being drafted, which includes a chapter proposing a merger control procedure, based on the following elements:

- **Economic Threshold:** Determine an economic threshold beyond which it is mandatory to obtain authorization from the competition agency for the validity of the merger, concentration, or business acquisition. In this regard, several options may be considered, such as setting a fixed transaction sum or a percentage of the relevant market share of a product or service within the national scope or in a defined geographic market.
- **Notification Requirement:** The obligation to notify the competition agency of the merger agreement, a requirement that conditions the execution of the agreement. The competition agency would have the authority to review the merger ex officio if it was not notified.
- **Legal Evaluation Criteria:** The agency's decision would be subject to the evaluation of legal criteria for substantive assessment, such as the structure of all relevant markets; the market position of the affected companies; their economic and financial strength; the real or potential competition from companies inside or outside the national territory; the existence of barriers to market access, among other criteria.
- **Preliminary Consultation:** The competition agency would have the authority to be consulted prior to any merger or economic concentration to determine whether it must be submitted for the agency's authorization.
- **Rectification of Information:** The regulation would include the possibility of rectifying missing information or documentation before the agency issues its decision on the merger.
- **Third-Party Consultation:** The competition agency may request information from third parties regarding the merger or business concentration operation.
- **Two-Phase Authorization Process:** The authorization procedure would consist of two phases: a first phase, where the merger does not pose a threat to free competition, and a second phase, in which the agency determines that the merger

may negatively affect free competition or requires the companies to comply with certain conditions.

- **Public Hearing in Second Phase:** In the second phase, the competition agency would convene a session where potentially affected parties could participate.
- **Special Procedure for Cross-Border Mergers:** The legal reform would include a special procedure for cross-border or transnational mergers.

118. By implementing these mechanisms, the Dominican Republic would be moving toward a more comprehensive and effective regulatory framework for merger control, ensuring that both local and international business operations do not harm market competition, the economy, or consumers. This regulatory framework would help foster a competitive environment conducive to innovation, investment, and sustainable economic growth.

11. Final Reflections

119. Mergers, concentrations, and business acquisitions not only represent a highly important and valuable strategy for economic expansion, but they also constitute a legitimate dimension of the right to free enterprise, which inherently includes the right to associate for economic purposes.

120. However, empirical experience and legal and economic studies demonstrate that mergers may involve the risk of generating an economic concentration of such magnitude within markets that it could undermine other legitimate rights, such as the right to free competition and consumer rights.

121. Therefore, the preventive merger control mechanism emerges as a reasonable tool to ensure a balance between these competing rights (free enterprise, free competition, and consumer rights).

122. Economic studies have unequivocally shown the beneficial side effects that the practice of preventive merger control can foster for the economy. On the other hand, the negative impacts of not having such a preventive mechanism are equally clear.

123. The Dominican Republic is not exempt from suffering the economic damage caused by business mergers that negatively impact its markets if there is no preventive mechanism in place to ensure the necessary evaluation to prevent economic disaster. While the country does have a merger control model, it is fragmented and atomized across sectoral markets and their respective regulatory agencies, leaving other markets unprotected and lacking evaluation systems capable of shielding national markets from the impact of cross-border mergers.

124. This is where the importance of having such a mechanism becomes evident, particularly in a market that is becoming increasingly globalized, but also affected by the emergence of digital markets, which lack geographic identity.

125. There is a clear need for a general and uniform mechanism for controlling both domestic and cross-border business mergers, under the authority of the country's competition agency, which should prioritize pro-competitive criteria in evaluating mergers.

126. The national competition law must be updated so that the Dominican Republic can successfully confront the reality of an increasingly globalized and digital market, in which multinational companies, under the guise of mergers, could undermine the legitimate right of economic agents to compete in an environment of equality and free competition, as well

as violate the sacred right of consumers to access higher-quality products and services at fair and affordable prices.

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