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Global Forum on Competition

Cross-border Mergers – Contribution from Chile

- Session II -

2-3 December 2024

This contribution is submitted by Chile under Session II of the Global Forum on Competition to be held on 2-3 December 2024.

More documentation related to this discussion can be found at: oe.cd/gfc24.

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Cross-border Mergers

- Contribution from Chile -

1. Notification and procedure of cross-border mergers

1. The Regulation for Notification of a Concentration¹ expressly requires the notifying parties to inform other jurisdictions where the transaction has been or must be notified, and solicits the notifying parties to attach waiver documents, authorising the FNE to share confidential information with foreign agencies. Nonetheless, it is voluntary for the notifying parties to grant a waiver to the FNE.

2. It is a common practice for the FNE to engage with other agencies (e.g. European Commission, Department of Justice, Indecopi, CADE) and share experiences and opinions on a confidential or non-confidential basis, regarding the analysis of the transaction, the theory of harm, previous cases, jurisprudence, etcetera.

3. Regarding timelines of investigation, the Chilean Competition Act² does not consider any special circumstances in respect to cross-border transactions. The law establishes terms³ that can only be suspended after mutual agreement between the FNE and the notifying parties⁴; or by the FNE if the parties offer remedies⁵. However, it has been common for the timelines to be an issue in complicated cross-border transactions, particularly when the agency is among the last jurisdictions to be notified. In many of these cases, legal deadlines tend to match or surpass the transaction timings designed by the parties, which put a stress on the agency. Thus, the FNE has advocated in international fora that it is advisable for notifying parties to submit notifications simultaneously to all competition authorities.

2. Assessment of cross-border mergers

4. When analysing any concentration, the FNE might define geographic market with a local, national, supra national or global scope, according to the economic rationale applicable. Nonetheless, the agency considers the effects of the transaction in Chile. In fact, the FNE has approved several transactions that did not lessen competition in Chile but

¹ *Reglamento de Notificación de Operaciones de Concentración*, hereinafter "**Regulation**". Available in Spanish at: <https://www.fne.gob.cl/wp-content/uploads/2021/11/Reglamento-N%C2%B041-D.O.-02.11.2021.pdf>

² *Decreto Ley N°211 de 1973, Fija Normas Para la Defensa de la Libre Competencia*. Available in Spanish at: <https://www.bcn.cl/leychile/navegar?idNorma=5872>

³ 30 business days in phase 1 and 90 business days in phase 2.

⁴ 30 business days in phase 1 and 60 in phase 2.

⁵ 10 days in phase 1 and 15 in phase 2.

might did so in other jurisdictions (e.g. Siemens / Alstom⁶ and Microsoft / Activision Blizzard⁷).

5. The scope for the analysis does not change for national and cross-border concentrations. The only additional proceeding, particularly in more complicated transactions, involves the request of waivers and conversations with foreign agencies. When waivers are granted, the FNE commonly consults and shares detailed reasoning with foreign agencies regarding definitions of relevant markets, theories of harm and share our timelines of the investigation.

6. The FNE also has some cases where waivers were not granted. In these cases, the FNE might co-operate with other jurisdictions, but focusing the conversation on public information available. For example, in Onnet / Entel, the Chilean authority and the Peruvian authority were analysing a very similar transaction, but the parties did not provide waivers to share confidential information. This circumstance diffculted the co-operation between agencies even though it is highly probable that both agencies had access to similar information in each one of their merger control procedures.

3. Remedies

7. According to the Chilean Competition Act, remedies are not designed by the competition authority but offered by the merging parties. The FNE communicates to the parties the competition concerns raised by the transaction, before taking a final decision. It is the attribution of the parties to offer remedies to mitigate the FNE's concerns.

8. When it is useful to the investigation, the FNE might contact and co-operate with other jurisdictions to analyse the remedies proposed by the parties. The exchange of information depends on the authorization of the merging parties, that might waive the FNE to share confidential information.

9. There are some cases where the FNE either consults foreign agencies on their experiences or openly cooperates with them in the design of the remedies. For example, the FNE has met with the U.S. DoJ on several occasions to discuss previous cases of the latter, regarding the healthcare sector (particularly, DoJ' support was very helpful in the analysis of the competition concerns and remedies proposed by the parties in Colmena / Nueva MasVida case (2021)⁸). In other cases, such as Dow / Dupont (2017)⁹,

⁶ Report available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2018/12/inap1_F134_2018-1.pdf

⁷ Report available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2023/01/inap1_F320_2022.pdf

⁸ Report available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2022/02/inf_prohib_F271_2021.pdf

⁹ Report available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2017/07/inf_aprob_F80_2017.pdf

Bayer/Monsanto (2018)¹⁰, Linde / Praxair (2018)¹¹, and Fiat / Peugeot (2020)¹², the FNE met with the European Commission to discuss about possible concerns raised by the concentration as well remedies, especially when they had been offered simultaneously to both jurisdictions. These cases entailed more detailed conversations of the case and hence waivers were required.

10. There are some cases where cooperation between jurisdictions went beyond remedy negotiations. For example, in the case of Hamburg Sud / Hapag Lloyd, the FNE agreed to accept the monitoring trustee that was already appointed by the European Commission and received the same reporting to the European Commission. Nonetheless, this was accepted only because in this case both jurisdictions applied the same remedies and the relevant market in both cases was defined as the liner routes between Europe and the West Coast of South America, which included Chile, thus affecting both jurisdictions.

4. Challenges

11. In our experience the challenges posed by cross-border transactions can be summarised in three main issues: timings, the size of our economy, and access to information.

12. The issue of timing has already been mentioned above and is mainly related to the fact that notifying parties do not take into consideration legal timelines for investigation and on occasions the timings of the transaction designed by the parties end up being shorter than the legal timings required for the analysis.

13. Chile is a small economy that usually represents a minimum percentage of the cross-border transactions. This can be particularly challenging when Chile is the only market where concerns are raised¹³, or when the competition concerns raised by Chile include additional relevant markets that do not apply to the rest of the agencies. This was for example the case of Bayern Monsanto, where the notifying parties offered global remedies to the transaction but where the FNE raised further concerns not considered by other jurisdictions. The parties in this case proposed to the FNE additional remedies to eliminate further concerns. This was also the case in EssilorLuxotica / GrandVision where in Chile, among other countries, the parties offered to local carve out subsidiaries from the global agreement in addition to several other behavioural remedies to ensure that these subsidiaries remained a competitive player in the market.

14. We consider that the most important problem in international co-operation for cross-border mergers is the impossibility to share information between different agencies. Many times, in cross-border concentrations, competitors, suppliers and/or clients do not have offices or local subsidiaries in our jurisdiction, so it is very difficult to receive complete information within the 30 business days of investigation. For example, in Microsoft / Activision Blizzard, important competitors as Nintendo and Sony did not have

¹⁰ Report available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2018/06/inap1_F97_2017.pdf

¹¹ Report available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2018/11/inap1_F108_2017.pdf

¹² Report available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2021/02/inap2_F233_2020.pdf

¹³ This is for example the case of Bunge/CJ Selecta, where Chile was the only jurisdiction that ordered a Phase 2 in depth investigation of the case.

offices or agencies in our country, so it was very difficult to obtain their information. Recently, in Bunge / CJ Selecta, important companies that were providers and competitors of the merging parties did not have offices in Chile which made it difficult to obtain data on time.

15. It is also worth noting that international cooperation does not imply that the results of our investigations are always in line with other competition agencies. In fact, in times the analysis of the FNE differs significantly from that of other jurisdictions. For example, in Microsoft / Activision Blizzard, during the term of our investigation, we talked to the CMA and the European Commission and were aware of the concerns they raised to the parties. Nonetheless, the FNE analysed the affected market with a local scope, evaluating the competition effects of the merger to Chilean consumers. The FNE decided to make a survey to local consumers to determine if the Activision Blizzard's games were as important in our country as they were elsewhere. This survey allowed the FNE to conclude that other videogames developers had a relevant position in the market, and this circumstance was important to clear the concentration. Therefore, the FNE approved the acquisition of Activision Blizzard by Microsoft without any condition. This transaction was initially constrained by the CMA and, later, approved subject to commitments. The same situation occurred in the European Union, where the Commission approved this transaction conditioned by remedies.

16. We consider cross agency cooperation to be crucial when dealing with international mergers. We benefit from the cooperation both improving and/or validating the lines of the investigation as well as the quality of the remedies accepted. Nonetheless, cross agency cooperation does not guarantee that the conclusions of our analysis will coincide with that of foreign agencies, as evidence-based analysis on the local competitive conditions might differ for each country.