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Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Background paper by the OECD Secretariat --

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

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Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

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BACKGROUND PAPER BY THE SECRETARIAT*

Abstract

Although merger control in Latin America and the Caribbean is a recent phenomenon (except for very few jurisdictions), it has become an important aspect of competition law regimes in the region. Since the 2000s, the number of countries that have adopted a pre-merger notification system increased dramatically. The region has also seen a wave of amendments to conform with international best practices. This landscape demonstrates that Latin American and Caribbean countries recognise the benefits to their economies of adopting strong merger control systems.

Countries in the region have been able to test the effectiveness of their merger laws and identify the need for further reform. The decisions issued by competition agencies across the region have allowed the competition community to identify lessons learned and future challenges in the field of merger control.

The purpose of this paper is to present the key features of merger control regimes in Latin America and the Caribbean, including recent developments in the area. For such purposes, this paper will (i) outline a theoretical framework for merger control; (ii) provide an overview of merger control in Latin America and the Caribbean; (iii) identify recent developments in merger control in Latin America and the Caribbean; (iv) describe relevant merger transactions in the region; and (v) identify common practices and future challenges for the region when designing and implementing merger control provisions.

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1. Introduction

1. Merger control has become a key aspect for competition law regimes in Latin America. From 2005, more than seven countries in the region have either introduced amendments to their merger laws or incorporated for the first-time merger provisions to their competition rules.

2. The development of merger control in Latin America and the Caribbean may, however, substantially differ from country to country. The salient differences depend on whether merger notifications are mandatory or voluntary; on whether merging parties shall refrain from consummating the merger before it has been authorised by the competition authority; and on the nature of the merger remedies imposed by the authorities.

3. Some Latin American countries have been able to test the effectiveness of their programs and identify the need for further reform. The practice of competition authorities across the region has allowed the competition community to identify lessons learned and future challenges related to merger review.

4. The purpose of this paper is to present the key features of merger control regimes in Latin America and the Caribbean, including recent developments in the area of merger control. For such purpose, this paper will (i) outline a theoretical framework for merger control; (ii) provide an overview of merger control in Latin America and the Caribbean; (iii) identify recent developments in merger control in the region; (iv) describe relevant merger transactions in Latin America and the Caribbean; and (v) ascertain common practices and future challenges for the region when designing and implementing merger control provisions.

5. Although this paper does not explore the challenges faced by countries without merger controls regimes, nor does it exhausts the reasons for adopting merger control, certain aspects of it may provide useful guidance for countries in the region to further amend their regimes or to introduce merger control altogether.

2. Theoretical framework for Merger Control

2.1. The concept of "merger"

6. The determination of what type of transactions constitute a merger may vary from one jurisdiction to another. Nonetheless, common to all merger control regimes is the need to define the type of transactions that fall within the scope of their merger review regime. A well-functioning merger regime should "target the 'right' type of transactions, i.e., those that lead to structural, more durable changes in the market place and could ultimately jeopardise the policy goals of a competition law regime."[1]

7. In Latin America and the Caribbean, merger review laws invariably consider that the outright acquisition of all shares, or the majority of shares of a previously independent target company is the quintessential example of a merger transaction. There is no much difference if the merging parties merge into a new entity or continue to operate independently in the market, if the result is that the acquiring party can control the affairs of the target. For example, the all-stock transaction that merged Brazilian carrier TAM into Chile's Lan Airlines by consolidating the economic interest of these two airlines under a new parent entity, LATAM Airlines Group S.A.[2], is a good illustration of the typical merger examined by a competition authority. Merger review laws would also typically apply when one firm acquires substantially all the target's assets or when merging firms combine previously independent lines of business into a new jointly-controlled entity.

8. However, merger control regimes tend to differ on the breath of the definition of merger transactions. In particular, joint ventures, other forms of association, and the acquisition of a limited number of the target firm's assets that do not represent an operational business, are not consistently characterised as merger transactions in all jurisdictions.[3] For example, Brazil's Competition law expressly regards joint

ventures, association agreements or consortiums as merger transactions subject to review,[4] while under Colombia's competition law not all joint ventures constitute a merger.[5] Moreover, jurisdictions differ on whether they consider the acquisition of minority shareholdings may be subject for merger review or not.

9. In Latin America and the Caribbean countries mainly rely on two criteria to determine the type of business transactions that constitute a merger transaction subject to review, namely, the "economic" criteria and the "objective" or "numerical" criteria.

10. A considerable number of jurisdictions in the region have adopted an economic criterion that focuses on whether a business transaction would enable a firm to exercise some form of control over a previously independent and distinct firm.[6] Different legal systems use different intensities of control, such as "decisive influence," "material influence" and "significant influence". Merger Guidelines are a useful instrument to clarify the concept of what constitutes control in some jurisdictions.

11. In the past, some countries with merger control regimes have adopted an objective approach to the definition of merger transactions. Percentage thresholds for share acquisition are the most common examples of this objective approach. For example, Brazil's former competition law provided that all transactions resulting in a market share equal to or above 20% in the relevant market were subject to merger control.

2.2. The Effects of Mergers on Market Structure

12. Competition law is concerned with the possibility that a merger may alter the structure of the market to the detriment of competition. A merger may create adverse horizontal, vertical and/or conglomerate effects on the competitive structure of markets.[7] In Latin America and the Caribbean, not all merger control regimes are concerned with all types of effects; in fact, some jurisdictions have adopted the policy decision not to be concerned with conglomerate mergers.[8]

Horizontal Effects

13. Horizontal effects occur where the merging firms are in the same product and geographic market. A horizontal merger may provide the merged entity with the incentive and the ability to exercise market power in a way that would harm competition and decrease consumer welfare (the so-called "unilateral effects").[9] The typical examples of exercise of market power are the ability to increase prices and to reduce quality, output or innovation. Additionally, horizontal mergers may facilitate the remaining firms in the market to co-ordinate their competitive behavior, restrict competition and jointly exercise market power (the so-called "co-ordinated effects").[10]

Vertical Effects

14. Vertical effects occur where the merging firms operate at different but complementary levels in the chain of production or distribution of the same product.[11] As a general proposition, vertical mergers tend to generate substantial efficiencies and are rarely a cause of concern. However, a vertical merger may produce adverse effects where: (i) the possibility of foreclosure arises (i.e., the merged entity may exclude competitors from the market or raise their costs); and/or (ii) the merger facilitates the potential for output or price co-ordination.

Conglomerate Effects

15. Conglomerate mergers do not involve parties that are actual or potential competitors, nor do parties that have any type of customer-supplier relationship.[12] This type of mergers occurs between parties involved in different relevant markets. Conglomerate mergers do not involve the removal of an actual or potential competitor from the market as in horizontal mergers, nor do they involve firms at different but complementary levels of production or distribution chains as in vertical mergers.

16. In practice, competition authorities usually focus on conglomerate mergers where parties are active in complementary markets (e.g., mergers involving suppliers of printers and cartridges fast food and of soft beverages, etc.) or neighboring markets.[13] Merger review in the area of conglomerate mergers is controversial, given that conglomerate mergers do not result in a direct loss of competition and typically create efficiencies (e.g., pricing efficiencies and better compatibility and quality assurance of complementary components). Notwithstanding, conglomerate mergers may raise competition concerns if they facilitate the merged firm's ability to foreclose competitors by tying or bundling two or more complementary products.[14]

2.3. The Underlying Policy Objectives of Merger Control

17. Merger control regimes are concern with maintaining competitive market structures. Although the specific objectives may vary in different jurisdictions,[15] the consensus of competition authorities and the competition community is that the objective of merger control is maintaining competitive market structures to maximise, or at least safeguard, consumer welfare.[16]

18. Through merger control, competition authorities may maintain a competitive market structure and guarantee effective competition. In fact, the core purpose of merger control provisions "is to prevent the prospective anti-competitive effects of such mergers through appropriate remedies, including prohibition if necessary."[17] Thus, merger control provisions prevent the loss of consumer welfare, the creation of incentives and opportunities for collusion, abuse of market dominance and other anti-competitive behaviors, at least insofar as they result from (or are strengthened by) mergers.

19. Merger control provisions also seek to diminish the risk of infringement of competition law prohibitions. The enforcement of behavioral antitrust rules – those that apply to restrictive agreements and abuse of dominance – is imperfect. There is no guarantee that the anticompetitive effects that may arise from a merger are remedied by competition law prohibitions. In fact, experience of competition authorities suggests that only one in three cartels are discovered and the number may be as low as one in six[18]. Moreover, structural remedies are considered to be more effective than behavioral remedies, at least in the merger context.[19]

3. An Overview of Merger Control in Latin America and the Caribbean

20. In Latin America and the Caribbean many jurisdictions have adopted some type of merger control regime, but there are still countries in the region where such laws are absent.[20] The differences among the regimes in place and the experience in enforcing these provisions may be substantial. Indeed, some jurisdictions have just recently introduced merger control provisions and others have overhauled their existing regimes to align their practice to the one existing in jurisdictions with mature merger review procedures.

21. Latin American and Caribbean countries have adopted different forms of merger control regimes: (i) mandatory pre-merger notification; (ii) mandatory post-merger notification; and (iii) voluntary notification regimes.

3.1. Mandatory pre-merger notification regimes

22. This method of merger control requires merging parties to report their agreement before the consummation of the merger and typically to refrain from consummating the merger until the competition agency has approved it or after the expiration of a specific time-period. Nonetheless, not all mergers are subject to mandatory notification, but solely those that satisfy the notification thresholds, which are typically based on the merging parties' total gross revenue or business turnover. Failure to notify mergers that meet the notification thresholds results in the imposition of fines and other sanctions set forth in the relevant laws.

23. Since 2005, the number of Latin American and Caribbean countries that employ mandatory pre-merger notification has considerably increased. On 2005, only three countries employed mandatory pre-merger notification – Colombia, Barbados and Mexico.[21] Since then, Brazil (2012), Chile (2016), Ecuador (2011), Honduras (2006), Uruguay (2007), and Costa Rica (2012),[22] among others, have adopted pre-merger notification systems. Additionally, the Guatemalan and Argentinean Congress are currently reviewing competition law bills that include a pre-merger notification system.[23] The Caribbean Community and Common Market (CARICOM), which inaugurated its Competition Commission in 2008, is in the process of developing a policy on merger control regulation for the region. The Andean Community, for its part, has not developed a regime for merger control, focusing only on anticompetitive conduct (both agreements and unilateral conduct).

3.2. Mandatory post-merger notification regimes

24. This type of merger review system is less common than mandatory pre-merger notification. Although the merging parties are obliged to notify, the parties can file the notification after the merger has been consummated. Therefore, this system creates the risk that the competition authority rejects a merger that has already been consummated. In this scenario, the authority's ability to protect competition may be diminished, given that in some cases the outright rejection of the merger would be the only effective decision to protect the competitive structure of the market. Post-merger control increases the costs of reversing a merger and parties may have the incentive to delay notification and not to collaborate in accelerating the review process.[24]

25. Argentina, Paraguay and Costa Rica[25] have adopted variants of the post-merger notification system.[26] In Argentina, Article 8 of the Competition Law[27] requires notification to be made, at the latest, within one week from the earliest of: "the conclusion of the [merger] agreement, the publication of the acquisition or exchange offer or the acquisition of a controlling share." In Paraguay, Article 14 of the Competition Law is similarly worded.[28]

26. Under these provisions, the parties of the merger may arguably consummate a merger before it is notified since, in some scenarios, the one-week period begins with the consummation of the merger transaction. Moreover, there is no express provision in the laws that requires the merging parties to refrain from consummating mergers pending authorization of the competition authority.

27. Against this background, the scenario that a competition authority disapproves a merger after it has been consummated is not hypothetical. In fact, in 2002, the Argentinian Secretariat for Competition Defense prohibited a consummated vertical merger, whereby the shareholders of one of the major operators of airports in Argentina acquired, among others, a company that controlled a major airline in the country. The agency opposed the transaction on the basis that the vertical merger would allow the airport operator, which had monopoly power at the airport level, to exclude competitors of the acquired airline. In this case, the agency determined that opposing the merger was not sufficient, given that the merger had

already been consummated. Thus, in its decision, the agency ordered the acquiring parties to sale their shares in the target airline within a period of 10 months.[29]

3.3. Voluntary merger notification regimes

28. Under voluntary notification regimes the merging parties are not required to notify a merger to the competition authority. The obvious advantage of this system is that it places fewer burdens on both businesses and the competition agency. The downside of such a system is that it impairs the ability of the competition agency to learn of anticompetitive mergers prior to their consummation and to address effectively their adverse effects, including jeopardising the possibility to impose an outright rejection of the merger.[30]

29. Panama and Venezuela[31] are examples of voluntary notification regimes. In the past, Chile was a major Latin American economy that applied this system until it shifted towards a pre-merger notification system, as will be explained below.

30. Panama's merger control regime is an illustrative example of a voluntary merger notification regime. In 2007, Panama enacted a new competition law that included a voluntary merger notification regime. Article 23 of Panama's Competition Law establishes that a merger *may* be notified before it is consummated, but such notification is not mandatory.[32] However, the law has created incentives to encourage parties to notify their intended merger transactions. The competition agency has the authority to challenge merger transactions that have not been notified within the first three years from the date of consummation of the merger.[33] Contrariwise, mergers that have been approved by the competition agency may not be subsequently challenged on grounds that were already subject of review.[34]

31. An important benefit of Panama's voluntary notification system is that it has reduced the number of notifications that Panama's competition authority would otherwise have received under a mandatory pre-merger notification system. In turn, the reduced workload has enable the authority to focus its limited resources in investigations of anticompetitive conducts where there can be a greater return on its investment of resources, rather than to clear a great number of transactions that do not result in serious competitive concerns.[35]

4. Recent Developments in Merger Control in Latin America and the Caribbean

4.1. Reasons for introducing mandatory pre-merger review

32. As mentioned above, a considerable number of jurisdictions in Latin America and the Caribbean have mandatory pre-merger control regimes. In some cases, the introduction of pre-merger control was not preceded by any merger control regime. For example, Ecuador had no merger control provisions before it made the policy decision to introduce a pre-merger control system in 2011. In other cases, countries have made the policy decision to abandon other merger control systems in favor of mandatory pre-merger control. Chile and Brazil are important examples of this last type of countries.

33. In Chile and Brazil, pre-merger control was introduced to remedy many of the enforcement problems of its previous merger control systems. In doing so, these countries heavily relied on specific recommendations of the Organisation for Economic Co-operation and Development (OECD).

34. In Chile, the new mandatory pre-merger notification system was designed to conform to many of the recommendations advanced by the OECD Secretariat, as evidenced in the legislative history of its new competition law, Law 20945 of 2016.[36]

35. Chile's new pre-merger notification system was introduced to increase predictability and solve the institutional difficulties of the previous voluntary notification system.[37] In a nutshell, the challenges of Chile's voluntary notification system were, among others: (i) multiple notification procedures before different authorities (i.e., National Economic Prosecutor - FNE - and the Competition Tribunal - TDLC), each one with its own set of standards on how a merger ought to be notified; (iii) the legal standing of third parties to submit a merger for review and challenge consummated mergers; (iv) the authority of the FNE to challenge consummated mergers; and (iv) the limited number of cases that were voluntary submitted to competition authorities. In fact, most of FNE's merger investigations were initiated *ex officio*.[38]

36. In view of this background, Chile replaced its voluntary system with a pre-merger mandatory notification regime introduced by Law 20945 of 2016, which amended its competition law. This new system specifically targeted many of the above-mentioned problems. As per the amendment, the FNE is the sole competent authority to review merger notifications, and TDLC has no longer that overlapping authority.[39] The TDLC solely has the competence to review FNE's decisions that prohibit a merger and only upon request of the merging parties.[40] Moreover, pending the FNE's approval of the merger, the parties may not consummate the merger. Finally, third parties have no longer the possibility to submit a merger for review.

37. The legislative history of Law 20945 of 2016 evidences that an underlying policy rationale of the law was to increase FNE's ability to both catch anticompetitive mergers and impose remedies on anticompetitive transactions.[41] First, Chile's voluntary system of notification did not create the incentives for merging parties to notify their mergers before they consummated the transaction. Second, merger review of consummated transactions diminished FNE's capacity to impose remedies, given that it is more inefficient and costly to break consummated mergers than to impose conditions on planned transactions. Law 20945 of 2016 solved this problem by introducing a pre-merger notification system and prohibiting the parties to consummate the merger pending FNE's approval.[42] Failure to notify or consummate a merger before the FNE's approval is subject to fines.

38. As in Chile, Brazil had also amended its merger control system to address many of the challenges of its previous system. In 2011, Brazil enacted a new competition law, Law 12529 of 2011, which came into force on 29 May 2012. This new regime replaced Brazil's previous post-merger notification system, which did not require merging parties to rest their merger pending the competition authority's approval.

39. The most important challenges of Brazil's post-merger control regime were, among others: (i) broad, subjective and burdensome notification thresholds; (ii) the absence of an obligation to suspend a transaction pending merger review, which effectively limited the range of remedies the Administrative Council for Economic Defense (CADE) could impose (e.g., block the merger); and (iii) delay problems due to Brazil previous tri-partite structure (i.e., CADE, the Secretariat for Economic Monitoring - SEAE - and the Secretariat of Economic Law – SDE – , the last two were divisions of the Ministry of Justice).[43]

40. To address these issues, Law 12529 of 2011 strengthened legal certainty and streamlined procedures to review mergers. First, the law eliminated the tri-partite structure by unifying the three existing competition authorities into a single authority (i.e., CADE). Second, it introduced a mandatory pre-merger notification system. This system prohibits merging parties to consummate their merger pending approval, except when CADE issues an interim order authorising the merger under conditions that preserve the reversibility of the transaction.[44] Failure to notify results in the imposition of gun-jumping fines ranging from BRL 60 000 to BRL 60 million.

41. Currently, Argentina is in the process of introducing a new competition law that contains mandatory pre-merger control and a simplified fast-track procedure. The main reasons invoked by the government to justify the adoption of a pre-merger control system are: (i) to enhance the competitive performance of Argentinean companies; (ii) to decrease concentration of markets; (iii) to encourage transparency;[45] and (iv) to adopt best international practices that conform with OECD's recommendation.[46]

4.2. Modifications to Notification Thresholds

42. An important consideration when designing and implementing a merger control regime is to define the jurisdictional thresholds that trigger notification to the relevant competition authority, especially in mandatory pre-merger notification systems. Notification thresholds may be based on turnover, asset or market-share thresholds. Criteria such as turnover and assets are considered objective and quantitative, whereas market share and potential transaction-related effects criteria are considered subjective.[47]

43. In Latin America and the Caribbean, the majority of jurisdictions with merger control regimes have based their notification thresholds on turnover and asset figures, including Colombia, Chile, Mexico and Brazil.

44. Brazil is a notable example of a jurisdiction that recently introduced changes to its notification thresholds. A significant change was the elimination of a market-share threshold. Under the previous regime, a transaction had to be notified when: (i) the merged firm or group of companies "accounts for twenty per cent (20%) of a relevant market," or the transaction "results in gross revenue of BRL 400 million" (approximately, USD 232 million).[48]

45. The 20% market share was subject to strong criticism from the business community and competition practitioners. It was regarded as too strict and uncertain, among others, for the following reasons: (i) it required notifications of very small mergers by large firms that already met one of those criteria, given that it was only necessary that the resulting firm possessed the required participation; and (ii) the 20% market share included a subjective element: the pre-definition of the relevant market to properly assess the market share. Therefore, the merging parties and CADE could have a reasonable disagreement on how to define the relevant market, thus creating uncertainty on the transactions that had to be notified.[49]

46. In 2011, Brazil enacted a new competition law, Law 12529 of 2011, which came into force on 29 May 2012. The new competition law eliminated the 20% market share threshold and exclusively relies on turnover or gross-revenue thresholds to determine the transaction that must be notified. Furthermore, the new threshold has two higher financial thresholds than the previous regime, which are based on annual turnover and the merging parties' revenue derived in Brazil, conforming to the International Competition Network's (ICN) recommended practices.[50]

47. Under the Brazil's new Competition Law, a "concentration" must be notified to CADE's review when (i) one of the economic groups involved registered annual gross sales or total turnover equivalent or above BRL 400 million in Brazil, in the year preceding the transaction; and (ii) another group involved registered gross annual sales or total turnover equivalent or above BRL 30 million in the year preceding the proposed transaction.[51] Following the enactment of the new competition law, the Ministries of Justice and Finance issued Interministerial Ordinance No. 994 of 2012 to increase the former thresholds to BRL 750 million and BRL 75 million, respectively. The new thresholds seek to reduce the submission of insignificant transactions.

48. In 2012, CADE issued Resolution No. 2 of 2012 to establish the rules and information requirements for notifying transactions, including a new notification form. In October 2014, CADE issued a series of amendments to its merger control rules. CADE's Resolution No. 9 of 2014 modified the definition of an "economic group" for purposes of calculating turnover. Pursuant to this definition, an

"economic group" comprises the companies that are under the common control, internal or external, of another company; and (ii) these companies hold, directly or indirectly, at least 20% of the stock or voting capital of the companies involved in the transaction.[52]

49. Additionally, CADE's 2014 amendments modified Resolution No. 2 of 2012, establishing new criteria for the definition of economic group when investments funds are concerned.[53] Pursuant to Resolution No. 10 of 2014, all associative contracts with a duration exceeding 2 years are subject to CADE's approval, provided that such agreements create a vertical or horizontal overlap, or create an interdependent relationship between the parties. In any event, CADE's prior approval is solely required if the parties to the agreements of association satisfy the turnover thresholds of the new competition law.

50. Colombia is another jurisdiction that recently modified its merger control regime, including its notification thresholds. In 2009, Colombia enacted its new competition law, Law 1340 of 2009, that bestowed in Colombia's competition authority (SIC) the responsibility to review mergers, which was previously exercised by a myriad of sectorial agencies. However, Article 9 of Law 1340 of 2009 still provides the Superintendence of Finance the authority to review mergers in the financial sector and the Aeronautic Board the ability to review transactions between airlines.

51. Law 1340 of 2009 also introduced bright-line notification thresholds. Under the new law, transactions between parties whose combined operating income or assets exceeded 100 000 times the monthly minimum wage (approximately, USD 22 million) had to be notified for approval to the SIC. In December 2016, the SIC lowered the afore-mentioned thresholds to 60 000 times the minimum wage (approximately, USD 14 million). These new thresholds will remain in force until 31 December 2017, when they will be adjusted once more, at least, to account for inflation.

52. An important reason behind the SIC's decision to lower its thresholds is to maintain the exiting level of coverage of its notification system. If 2016 thresholds were maintained for the year 2017, the number of Colombian companies that satisfied the operating income and assets thresholds would decrease 52,7% and 48,7%, respectively, when compared to 2014 statistics.[54] These sharp decreases might be explained by Colombia's sluggish economic growth during 2016 and Colombian companies migrating to international accounting standards. Thus, the new thresholds seek to maintain the level of companies covered by its notification system, rather than to aggressively expand the number of transactions subject to merger control.

53. In Chile, the new merger control regime introduced by Law 20945 of 2016 is expected to come into force in May or June 2017. Under Article 48 of the law, a "concentration" must be notified when: (i) the sales in Chile of the economic agents that plan the transaction is equivalent or exceeds, in the preceding year, the threshold set by the FNE; and (ii) the individual sales of at least two of the agents that plan the transaction is equivalent or exceeds, in the preceding year, the threshold set by the FNE. On 24 November 2016, the FNE issued Resolution No. 667 which set threshold for 2017 at 1 800 000 *Unidades de Fomento* (approximately, USD 70 million) and 290 000 *Unidades de Fomento* (approximately, USD 11 million).

54. Mexico is another jurisdiction where notification thresholds have been recently modified, as part of an overhaul of its merger control regime. In 2013, Mexico amended its constitution to create two independent administrative agencies to enforce its competition law and merger control provisions, namely, the Federal Telecommunications Institute (IFT) and the Federal Competition Commission (COFECE). IFT regulates and supervises the telecommunications, radio and TV industries, while COFECE is responsible for competition matters in all other sectors.

55. In July 2014, Mexico introduced a new competition law, the Federal Economic Competition Law. Pursuant to Article 86 of the law, the following concentrations have to be notified when: (i) the transaction, irrespective of the place of execution, produces directly or indirectly a value that exceeds 18 million times the minimum daily wage (MDG) (approximately, MXN 1.3 billion) in Mexico; (ii) the transaction results in the acquisition of 35% or more of the assets or shares of an economic agent, whose annual assets or sales are equal to more than 18 million times the MDG (approximately, MXN 1.3 billion) in Mexico; and (iii) the transaction results in the accumulation of assets or capital that exceeds 8.4 millions times the MDG (approximately, MXN 613 536 000) in Mexico, and at least two of the participating economic agents have assets or annual sales that produce a value that exceeds 48 times de minimum daily wage (approximately, MXN 3.5 billion) in Mexico.

56. The first two thresholds are referred to the target's assets located in Mexico, target companies located in Mexico, or target's sales that originate in Mexico. The third threshold, considers a combination of the merging parties' sales and assets in Mexico, and an accumulation of merging parties' assets or stock capital in Mexico. Accordingly, there is no filing obligation if the target or seller company has no presence (assets or sales or both) in (or into) Mexico. Another important characteristic of Mexico's merger regime is that there is no *de minimis* doctrine, thus if one of the above-mentioned thresholds is met, the transaction must be notified, even if one of the parties has insignificant operations in the country.

4.4. Cross-border Merger Control

57. The number of mergers with a cross-border dimension has substantially increased in Latin America and the Caribbean, together with the number of jurisdictions that have pre-merger control regimes.[55]

58. Noteworthy examples of intra-regional deals include Brazil's COSAN acquiring Latin-American assets of logistics company *America Latina Logística* in a USD 4.7 billion deal in 2014.[56] Also in 2014, Brazilian Itaú Unibanco acquired the Chilean Corpbanca bank in a USD 3 billion deal, combining the merging parties' business in Chile and Colombia.[57] In 2015, Colombia's *Empresas Públicas de* Medellin of Colombia acquired the water division of Chilean Antofagasta in a USD 960 million deal.[58] The same year, Colombian retailer *Almacenes Exito* acquired Argentina's Libertad grocery chain and half of Casino's stake in Brazil's *Cia. Brasileira de Distribuicao* in a USD 1.8 billion deal, as part of the reorganization of French Casino Group's business activities in Latin America.[59]

59. In this new landscape, a merger transaction that produces effects in different jurisdiction is typically subject to merger control in multiple jurisdictions. Consequently, international co-operation between the competition authorities is essential to ensure an effective review of cross-border transaction and to ensure consistent decisions.

60. In Latin America and the Caribbean, bilateral co-operation has developed into an important tool through which competition authorities engage in enforcement and merger-related activities. Bilateral co-operation among competition agencies has proven valuable in reviewing the anticompetitive effects of mergers and designing remedies. A series of cases show that co-operation in merger cases is increasingly common and typically adopts the form of informal exchanges of information and discussions of ideas.

61. A landmark example is the *Nestle/Pfizer* merger notified in Mexico, Colombia and Chile in 2012. The Mexican Federal Competition Commission (CFC, now COFECE) opposed the merger because it led to a very high concentration in the infant nutritional formula market. The CFC reached a deal with Nestlé requiring it to sell Pfizer's Mexican infant nutrition business and license Pfizer's trademarks to a third-party competitor. The CFC deemed these remedies sufficient since it *de facto* prevented the merger of Nestlé and Pfizer in the Mexican market and, thus, maintained competition in the market.

62. In this case, both merging parties granted confidentiality waivers to facilitate the CFC co-operation with other jurisdictions and, in particular, with the agencies of Chile and Colombia. Pursuant to these waivers, the CFC shared information related to the transaction and discussed the remedy package with the competition authorities of Colombia and Chile.[60] In this case, Colombia's SIC[61] and Chile's FNE imposed similar remedies which allowed the transaction to go through. Moreover, the FNE and the SIC found informal co-operation with the CFC very important. A relevant aspect of the remedies proposed by the merging parties in Chile was the sale of one of Pfizer's production factories located in Mexico.

63. Another important case is the LAN/TAM merger. Between 2010 and 2011, several competition authorities in the region were reviewing the LAN/TAM merger, including the competition agencies in Brazil and Chile. The competition authorities engaged in informal co-operation to address the potential anticompetitive effects of the merger during the early stages of the proceedings. In particular, the Brazilian CADE provided the Chilean FNE with information on the definition of the relevant market in the Brazilian air transport sector. These information exchanges were done under a co-operation agreement in force since 2008.[62]

64. The previous cases illustrate the value of informal case-by-case co-operation and consultations between competition authorities in cross-border mergers. In particular, the *Nestle/Pfizer* case illustrates the importance of co-operation in designing remedies in cross-border mergers. Co-operation reduces the potential for conflict between competition authorities that may arise, among others, when: (i) competition authorities reach contradictory conclusions concerning the need for remedies; (ii) the jurisdiction where the merger has its "center of gravity" may allow it on non-competition grounds, while other jurisdictions may seek to impose remedies; and (iii) the competition concerns of two relevant authorities may differ and, thus, the remedies imposed by one agency would differ from those impose by the other agency.[63]

65. Confidentiality of information may raise serious challenges to the ability of competition authorities to share information. Competition agencies would be unable to share confidential information without the consent of the merging parties or a clear authorization under its domestic law or an international treaty. In practice, the prevailing solution has been to encourage the merging parties to grant a confidentiality waiver to enable competition authorities to co-operate fully.[64] As previously explained, this was the solution adopted by the CFC in the Nestle/Pfizer merger that allow it to co-operate with the Chilean and Colombian competition authorities.

66. In Latin America and the Caribbean, bilateral co-operation may take place under a bilateral co-operation agreement. Bilateral co-operation agreement are competition-specific and typically non-binding instruments, which should be distinguished from binding international instruments, including Free Trade Agreement (FTA).[65] These agreements are signed by competition authorities with their foreign counterparts to foster international co-operation. Brazil, Chile,[66] Mexico,[67] Colombia[68] have entered into several co-operation agreements and memorandums of understanding with foreign competition authorities. The content of these document reveals an attempt to implement the OECD and ICN's recommendations on international co-operation between authorities of different jurisdictions, including in the field of merger review.

67. The co-operation agreement between the competition agencies of Chile (FNE) and Peru (IDECOPI) contains a series of clauses that promote exchange of information related to the application of competition provisions, including merger control provisions.

68. Pursuant to Section 6 of the agreement, the competition agencies should notify any enforcement activity that may affect the interest of the other party, including: (i) merger operations that partially took place or which effects might take place in the other party's territory; and (ii) enforcement activities related to merger authorisation or the imposition of remedies. This notification ought to be accompanied with relevant information that allows the competition authority to assess the impact of the operation in its jurisdiction. Moreover, Section 9 of the agreement, provides that the competition authorities should

co-ordinate their enforcement activities, including merger control. Finally, Section 11 of the agreement establishes that any confidential information may solely be shared with a confidentiality waiver of the proprietor of the information.[69]

69. The co-operation agreements between competition agencies of Chile (FNE) and Brazil (CADE, SDE and SAE) and Chile (FNE) and Mexico (CFC, now COFECE) contain more detailed provisions on notification of cross-border mergers and on the imposition of remedies. Pursuant to these agreements, competition authorities must notify mergers to the other party's competition authority when one of the merging parties, or its parent company, is a company of that other party.[70] Additionally, the agreements establish that competition authorities must minimise any harmful effects over the other Party's interest derived from the imposition of remedies.[71]

70. The above-mentioned clauses are widely used in co-operation agreements and memorandums of understanding signed by competition authorities in Latin America and the Caribbean. These clauses evidence that competition authorities across the region consider important to: (i) notify foreign competition authorities of mergers that have cross-border effects; (ii) exchange information related to the review of cross-border mergers; and (iii) co-ordinate the design of merger remedies in cross-border transactions.

71. Bilateral agreements between competition authorities in Latin America and the Caribbean also evidence that authorities are concerned with the exchange of confidential information due to the existence of statutory restrictions on its use. The prevailing solution to this conundrum in existing co-operation agreements is for competition authorities to obtain a confidentiality waiver from the merging parties, before sharing any confidential information with foreign authorities.

72. Aside from bilateral co-operation agreements, there also exist regional efforts to foster co-operation in the review of cross-border mergers in Latin America and the Caribbean.

73. A notable example of these efforts is the Southern Common Market (MERCOSUR). In 1996, the then members of MERCOSUR, Argentina, Brazil, Paraguay and Uruguay, signed in Fortaleza the Protocol to Defend Competition (Fortaleza Protocol). Although the Protocol does not include a system of merger control, it advocates for adoption of common rules of merger control by all MERCOSUR members. The Protocol was only ratified by Brazil and Paraguay and, thus, was not implemented in practice.

74. To overcome the failure of the Fortaleza Protocol, the *Consejo del Mercado Común* (CMC) of MERCOSUR adopted Decision 15 of 2006. This decision established a system of exchange of non-confidential information in the field of merger control and required MERCOSUR members to notify mergers that produced effects in the other member's market to other members.[72] In 2010, the CMC adopted Decision 43 of 2010, which abrogated the Fortaleza Protocol. This decision created a system for competition authorities to hold consultations and co-ordinate their review of cross-border mergers.[73] Under this system, a competition authority may request another competition authority of MERCOSUR to hold consultations related to a cross-border merger investigation that it considers affects its interests.

75. A practical example of bilateral co-operation under the framework of MERCOSUR is Brazilian CADE's notification to other MERCOSUR members of its decision to block the merger between Owens Corning and Saint Gobain. CADE decided to notify other MERCOSUR authorities because Owens Corning supplied a great part of the MERCOSUR market.[74]

76. Another recent regional effort to streamline co-operation in the review of cross-border mergers in the region is the Declaration of Lima between Chile, Colombia and Peru. This instrument created an informal forum of discussion that seeks to encourage collaboration and build trust between the competition

agencies of the signatory countries.[75] However, the Declaration of Lima contains no detailed provision on how to deal with cross-border mergers.

77. Against this background, co-operation in dealing with cross-border mergers is on the rise in Latin America and the Caribbean. This co-operation is characterised by informal contacts between the competition authorities and is typically on a case-by-case basis. Recent merger cases have established the value of co-operation in the field of reviewing the merger's anticompetitive effects and designing remedies. Additionally, bilateral co-operation agreements in the region have attempted to streamline co-operation in dealing with cross-border mergers. Nonetheless, the differences in the level of development of competition authorities, concerns for sharing confidential information and no formal proceedings must be overcome for the region to truly benefit from co-operation in dealing with cross-border mergers.

5. Relevant Cases involving remedies in Latin America and the Caribbean

5.1. Brazil

Joint Venture between GlaxoSmithKline PLC. – GSK – Novartis AG

78. In February 2015, CADE approved the creation of a joint venture agreement between GlaxoSmithKline PLC. (GSK) and Novartis, but imposed a series of structural and behavioral remedies.

79. The transaction was designed so that GSK would own 63,5% and Novartis 35,5% of the joint venture's shares. The joint venture was part of a global partnership of GSK and Novartis to trade over the counter healthcare products.

80. CADE concluded that the transaction would result in horizontal overlap in the sectors of dermatological antifungals, non-narcotic analgesics, antipyretics, and anti-smoking products. Additionally, CADE found that the merger led to high concentrations in the market of antismoking drugs.

81. To mitigate the anticompetitive effects, CADE and the merging parties signed a merger control agreement, whereby GSK committed to divest a package of assets related to its main antismoking product. The package of assets comprised divestiture of tangible assets, intellectual property rights, licenses and contracts. The merging parties further committed to adopt a series of measures to avoid exchanges of sensible information between the joint venture and its minority shareholder, Novartis.[76]

Continental Aktiengesellschaft's acquisition of Veyance Technologies

82. In January 2015, CADE approved Continental Aktiengesellschaft acquisition of control in Veyance Technologies, subject to the implementation of remedies in other jurisdictions. The merging parties manufactured, among others, auto parts, rubber products, hoses and industrial equipment.

83. In its analysis, CADE concluded that the transaction created the incentives for the merged firm to exercise market power in the markets of heavyweight steel conveyor belts (used in the construction and mining sectors) and air spring (used in heavy load vehicles). CADE noted that in both sectors the merger led to high concentrations. In these sectors, the merging parties were the leader and third competitor in the market, and the merged firm would have more than 50% of the market share.

84. To address the anticompetitive effects of the merger, CADE and the parties signed a merger control agreement. This agreement required Veyance to divest its air springs plant in Mexico and its heavyweight conveyor belt factory in Brazil. The divestiture of these plants further comprises the transfer of brands, contracts, software and all other assets necessary for a third party to effectively compete in the market. CADE

sought with these remedies to ensure the entrance of a new competitor that would be capable of effectively competing in the market, and challenge any abuse of dominance by the merged firm.[77]

5.2. Chile

Merger of Lan and Tam Airlines

85. In 2010, FNE launched an investigation into the acquisition by LAN (a Chilean air carrier) of TAM (a Brazilian air carrier) following the parties' notification of the planned transaction to the securities regulators in Chile, Brazil and the United States. The merged entity would be denominated "LATAM" creating the largest airline in South America. In January 2011, the FNE and the parties reached an extra-judicial agreement addressing the competition risk arising from the transaction.

86. Before the extra-judicial agreement was submitted to the TDLC for approval, a consumer association (*Corporación Nacional de Consumidores y Usuarios de Chile*) requested consultation with the TDLC regarding the merger between LAN and TAM. The third-party action was considered admissible by the TDLC under the Competition Law. The TDLC rejected the Parties and the FNE's settlement agreement and opened a judicial review of the merger.

87. The TDLC was especially concerned with the "real and concrete" risk that LATAM would abuse its post-merger market power.[78] Nonetheless, the tribunal was persuaded that some of the efficiencies produced by the merger partially compensated the anticompetitive effects.

88. In reviewing the efficiencies, the TDLC reaffirmed the minimum requirements for efficiencies to compensate for the anticompetitive effects of mergers, namely: (i) the efficiencies must be verifiable based on an standard of reasonable and objective evidence, and that the efficiencies would probably materialise; (ii) the efficiencies must be inherent to the merger, thus they could not be obtained by other means; and (iii) the efficiencies must not arise from anticompetitive reductions in the quality and quantity of products.[79]

89. In September 2011, the TDLC approved the merger, subject to structural and behavioral remedies. The TDLC imposed, among others, the following remedies: (i) divestment of airport slots in the Santiago-Sao Paolo route; (ii) extension of LATAM's frequent flyers program benefits to passenger of other interested airlines; (iii) establishment of non-exclusionary commercialization conditions with distributors and travel agencies; (iv) the obligation to withdraw from one of the global alliances to which LAN or TAM belonged; and (v) a prohibition to increase the availability of seats in the Santiago – Sao Paulo route. These remedies sought to reduce the risk of entry barriers and increase of fares in certain routs (i.e., the relevant markets) affected by the transaction.

90. The TDLC's decision was confirmed on appeal by the Supreme Court on 5 April 2012.

Merger of SMU and Supermercados del Sur

91. The merger between SMU and *Supermercados del Sur* (SDS), two of the biggest supermarket chains in Chile, was consummated without the prior approval of the TDLC. After the merger, SMU requested the TDLC to approve certain remedies to mitigate the anticompetitive effects created by the merger. The TDLC found additional anticompetitive effects to those identified by SMU and, thus, decided to review the entire transaction. This case is a unique example of remedies that targeted consummated mergers under Chile's former merger control regime.

92. A notable aspect of the Tribunal's reasoning was to apply the analysis of "upward pressure on price index" to determine the adverse unilateral effects of the merger on competition. This procedure involves comparing the upward price pressure produced by the merger, which results from the loss of direct competition between the merging parties, and downward pricing pressure, created by marginal-cost savings from the merger. If the downward pricing pressure prevails the adverse unilateral effects are offset.[80]

93. Additionally, in reviewing the efficiencies created by the merger, the Tribunal reaffirmed the criteria set forth in the LAN/LATAM. It further clarified that efficiencies ought to be transferred to the consumer, at least partially, by lowering prices in a reasonable term.[81]

94. In December 2012, TDLC concluded that the merger created adverse unilateral and co-ordinated effects in the market and the efficiencies it created were not sufficient to compensate these effects.[82] Accordingly, the TDLC imposed, among others, the following remedies: (i) the divestiture of several local supermarkets and distribution hubs, including selling SMU's participation in a small competitor, Monserrat;[83] (ii) modify the non-compete clauses agreed with companies that sold supermarkets to SDS; and (iii) the merger entity must notify any future merger in the supermarket industry to Chile's competition authorities, notwithstanding the voluntary nature of the merger notification system.

95. In the interim, the TDLC required the merged firm to set competitive prices to consumers and suppliers in several local markets, where divestitures were required.[84] Chile's Supreme Court confirmed the decision of the TDLC.

96. In December 2015, upon request of the FNE, the TDLC imposed a fine of US$ 1.8 million on SMU for not complying with two of the remedies imposed, namely, the divestiture of supermarkets and sale its participation in Monserrat. The TDLC determined that SMU had not violated the interim remedy to maintain competitive prices in the local markets affected by the merger. In this decision, the TLDC determine for the first time the criterion to assess the value of fines for failure to comply with remedies. The TDLC established that fines must be calculated considering (i) the seriousness of the infraction; (ii) its effects on the market; and (iii) other relevant circumstances. In extreme cases, the TDLC may decide to deprive the merger of all legal effects (i.e., break the merger firm).[85]

97. In September 2016, Chile's Supreme Court confirmed the fine imposed by the TDLC and reversed the TDLC's finding that SMU had not breach the interim remedy. Therefore, the Supreme Court decided to increase the fine to approximately US$ 2.2 million.[86]

5.3. Colombia

EEB bid for ISAGEN

98. In October 2013, *Empresa de Energía de Bogotá* (EEB), a power transmission company, notified SIC of its intention to bid for 57% of the shares of ISAGEN, a state-owned company that generated and commercialised energy in Colombia.

99. In reviewing the effects of the merger, the SIC analysed if EEB's minority shareholdings in generation, distribution and commercialization companies would allow it to exercise control over them.

100. In this landmark decision, the SIC determined that the controlling element of the definition of control is that a firm has the possibility to "influence" the competitive conduct of another firm. The SIC further established that minority shareholdings may give rise to a situation of control, if the minority shareholder is able to influence the competitive conduct of a firm.[87]

101. The SIC also established that minority shareholders can exercise control over another firm, independently or jointly with other shareholders.[88] The agency then proceeded to determine that joint control exists whenever two or more shareholders have the possibility to influence the competitive conduct of a firm. Joint control comprises situations in which two or more minority shareholders have the power to adopt essential decisions on the competitive strategy of the firm. Joint control may arise, among others, through joint exercise of voting rights by two minority shareholders; equal distribution of voting rights in a firm; and veto rights over decisions that are essential for the firm to compete in the market (e.g., investment decisions, election and destitution of board member, decision to sale core assets and rights, etc.).[89]

102. The SIC determined that the merger would produce adverse horizontal effects in the electricity generation and commercialization markets. The acquisition would lead to EEB holding considerable participation in two energy generators (EMGESA and ISAGEN), creating incentives for EEB to adopt anticompetitive strategies to maximise its utility through these two companies. In addition, the corporate influence that EEB would be able to exert over ISAGEN and EMGESA increases the possibility of co-ordination in the electricity generation market. Likewise, the merger would have created structural links between EEB and three commercialization companies (ISAGEN, EMGESA and CODENSA) and reduced ISAGEN’s incentives to compete in the commercialization market.

103. In addition, the merger would also produce adverse vertical effects. In particular, the merger would breach a regulatory prohibition to integrate transportation of gas with electricity generation activities. Moreover, the acquisition would allow EEB to control companies in the power generation and electric power transmission sectors, increasing the risk of exclusion of competitors.

104. For these reasons, the SIC ordered the following remedies: (i) ISAGEN had to divest its assets in gas generation (i.e., a gas generation plant) to avoid the prohibited vertical integration; (ii) EEB was required to forfeit its political rights in EMGESA and CODENSA accruing from its shareholding in these companies; and (iii) EEB had to reduce its participation in EMGESA to an undisclosed participation.

105. After the SIC issued its decision, EEB decided not to participate in the bid to acquire 57% of the stocks of ISAGEN.

Nestlé acquisition of Pfizer’s nutritional infant formulas

106. In July 2012, Nestlé and Pfizer notified the SIC that Nestlé planned to acquire the global business of Pfizer´s infant nutrition division, including its pregnancy and prenatal vitamins business. As mentioned above, this transaction was part of a global acquisition of part of Pfizer´s business that was notified in several jurisdictions, including Colombia, Mexico and Chile.

107. The SIC determined that the transaction would lead to high concentrations in all the relevant markets, which correspond to the three infant nutritional formulas affected by the transaction. The SIC noted that Pfizer was one of the first three competitors in these markets, thus the merger eliminated the competitive pressure that it exerted over other competitors. Consequently, the SIC concluded that the transaction would enable Nestlé to determine market conditions, including to unilaterally set prices, and would facilitate co-ordination among the remaining leaders of the market to engage in anticompetitive conducts.[90]

108. During the review of the transaction, the merging parties submitted to the SIC a proposal of structural and behavioral remedies. These remedies were to be executed in other Latin American jurisdiction, including Mexico and Chile, and sought to address the anticompetitive effects of the merger in Latin America. The remedies proposes were, among others, the following: (i) divestment to a third-party competitor of Pfizer’s nutritional infant formulas division in Colombia; (ii) to license certain Pfizer’s nutritional brands to a third-party competitor for a 10-year period; (iii) the licensing period would be

followed by a 10-year period during which Nestlé would refrain to reintroduce the divested brands in Colombia; and (iv) to license intellectual property rights and to transfer any asset or employees necessary for the third-party competitor to effectively compete in the market.[91] It is worth noting that some of the remedies had to be executed in other jurisdictions, for example the divestment of a production factory located in Mexico.

109. After reviewing the proposed remedies, the SIC determined that the remedies were sufficient to address the anticompetitive effects created by the transaction. Therefore, the SIC decided to approve the transaction, subject to the above-mentioned remedies.

5.4. Mexico

Acquisition of DIRECTV by AT&T

110. In November 2014, the IFT, which is the competition authority in the telecommunications sector, authorised the acquisition of DIRECTV by AT&T, subject to a series of behavioral remedies. This transaction was part of an international merger between DIRECTV and Steam Merger Sub LLC, a subsidiary of AT&T in the United States.

111. The IFT's analysis focused on assessing the economic and informal links that the transaction would create between AT&T, *Grupo Televisa* and *América Móvil* (AMX), all key players in the telecommunication and broadcasting sectors in Mexico. On one hand, DIRECTV had an indirect non-controlling stake in the capital of SKY Mexico, a company also owned by *Grupo Televisa*. On the other hand, AT&T had 8.4% of the shares of AMX which allow it to appoint two board members. AMX was also the holding company of Telcel and Telmex, major competitors in the Mexican telecommunications sector.

112. During IFT's review, AT&T divested its shareholding in AMX and withdrew its representation in AMX's board of directors to facilitate the authorization of the merger in Latin America. Notwithstanding the divestiture, IFT found that AT&T's relationship of more than 10 years with AMX had allowed it to form strong contacts and relationships with persons that continue to have influence in business, legal, financial, operative and commercial decisions of AMX. Additionally, the IFT determined that AT&T had a strong business connection with Grupo Televisa due to its joint investment in SKY Mexico.[92]

113. Against this background, IFT determined that the transaction enabled AT&T's business group, AMX and *Group Televisa* to co-ordinate through their formal and informal links with AT&T. Consequently, the IFT found risks of co-ordinated effects in several markets arising from the transaction.[93] As part of its reasoning, the IFT established that an economic agent's participation in two or more companies that participated in the same or related economic activities could create a risk, provided such participations enable it to influence or co-ordinate the decisions of one or both companies to maximise its benefits through anticompetitive actions.[94]

114. The IFT decided to authorise the merger through a series of undisclosed behavioral remedies.

Nestlé acquisition of Pfizer (Mexican Chapter)

115. In June 2012, Nestlé notified the CFC (today, COFECE) of its intention to acquire Pfizer in Mexico, including Pfizer's rights to commercialise nutritional infant formulas and Pfizer's only production plant of these products in Latin America. This transaction was part of a global operation through which Nestlé acquired the worldwide business of Pfizer nutritional division.

116. The CFC decided to block the merger, given that the post-merger market shares of Nestlé and Pfizer would allow the merged firm to unilaterally raise prices and substantially restrict supply of the products in the relevant market. Moreover, the merger would have eliminated an effective competitor in the market (i.e., Pfizer) that exerts a considerable competitive pressure on the other market participants.[95]

117. In reaching its decision, the CFC rejected the undisclosed remedies proposed by the merging parties arguing that they were not sufficient to address the anticompetitive effects of the merger. In analysing the remedies, the CFC was of the view that structural remedies are preferred over behavioral remedies in horizontal mergers in highly concentrated markets. It reasoned that behavioral remedies are ineffective and costly to monitor. [96]

118. After CFC's decision to block the merger, the merging parties proposed new remedies. The CFC accepted the remedies, requiring, among others, the divestment to a third party of all assets that comprise Pfizer's infant formula division in Mexico, including Pfizer's production plant in Mexico, and licensing the trademarks of such products to a third party.[97] These remedies were designed to ensure the entry of a new competitor capable of exerting competitive pressure over the merged firm.

6. Conclusions: Lessons Learned and Future Challenges

119. Although merger-control in Latin America and the Caribbean is a recent phenomenon, except for very few jurisdictions, it has become an important aspect of competition law regimes in the region. Since the 2000s, the number of jurisdictions that have adopted a pre-merger notification systems increased dramatically.

120. The region has also seen a wave of amendments to conform to best international practices, including specific recommendations of the ICN and OECD. This landscape demonstrates that Latin American and Caribbean countries recognise the benefits to their economies of adopting strong merger control systems. Although the experience between jurisdictions varies greatly, there are common trends in the enforcement of merger review provisions in the region.

121. First, the new competition laws and amendments in the region show that mandatory pre-merger control is the prevailing system in the region, including among countries that, in the past, had made the policy choice to adopt voluntary or post-merger control regimes.

122. Second, competition authorities across the region impose both behavioral and structural remedies. However, most competition authorities prefer to impose structural remedies over behavioral remedies in horizontal mergers that take place in highly concentrated markets.

123. Third, cross-border mergers are on the rise in Latin America and the Caribbean. The recent experience of competition authorities reviewing cross-border mergers demonstrates the benefits of co-operating with foreign agencies. These cases have shown that international co-operation is key to fully assess the adverse effects of cross-border mergers and design effective mergers.

124. Fourth, in the region, international co-operation in reviewing cross-border mergers is reduced to informal co-operation, on a case-by-case basis. The existing network of co-operation agreements between competition authorities is vastly comprised of non-binding agreements that do not provide an effective instrument to ensure comprehensive exchange of information. For example, most co-operation agreements, as well as domestic laws, do not allow competition authorities to share confidential information, without a confidential waiver from the merging parties. Likewise, regional fora have proven to be ill equipped to become an effective tool to promote co-operation in reviewing cross-border mergers.

ENDNOTES

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11 Organisation for Economic Co-operation and Development (OECD), Competition Policy Roundtables: Definition of Transaction for the Purpose of Merger Control Review, June 2013, DAF/COMP(2013)25, 12.

2 Competition Tribunal of Chile (*Tribunal de Defensa de la Libre Competencia*), Resolution No. 37/2011, 21 September 2011, ¶ 25.

3 Organisation for Economic Co-operation and Development (OECD), Competition Policy Roundtables: Definition of Transaction for the Purpose of Merger Control Review, June 2013, DAF/COMP(2013)25, 12.

4 National Congress of Brazil, Law 12520 of 2011, Article 90.

5 *See* Superintendence of Industry and Commerce (*Superintendencia de Industria y Comercio)*, Resolution 4851 of 2013, 15 February 2013, *Roma-Axxa Case*. Pursuant to the Superintendence of Industry and Commerce, a joint venture between competitors constitutes a merger when the following elements are present: (i) the operation is designed as permanent and it eliminates definitively, or at least substantially, the competition between the parties; (ii) the agreement results in the union of a line of business or a market, rather than the sole transfer of specific business functions between the parties; and (iii) the resulting entity should be capable of operating as a separate business entity in the market, that is, it must have its own resources or at least have the potential capacity to operate independently in the market.

6 For example, Argentina, Barbados, Brazil, Colombia, Costa Rica, Ecuador, Mexico and Panama.

7 Whish, Richard, *Competition Law*, Oxford University Press 2009, 799-800.

8 Colombia is an example of a jurisdiction where the competition agency is not concerned with conglomerate effects.

9 Organisation for Economic Co-operation and Development (OECD), Competition Policy Roundtables: Vertical Mergers, February 2007, DAF/COMP(2007)21, 20.

10 Ibid.

11 International Competition Network (ICN), Merger Working Group: Investigation and Analysis Subgroup, ICN Merger Guidelines Workbook, April 2006, 72.

12 Organisation for Economic Co-operation and Development (OECD), Competition Policy Roundtables: Portfolio Effects in Conglomerate Mergers, October 2001, DAFFE/COMP(2002)5, 21.

13 International Competition Network (ICN), Merger Working Group: Investigation and Analysis Subgroup, ICN Merger Guidelines Workbook, April 2006, 12.

14 ICN Merger Working Group: Investigation and Analysis Subgroup, ICN Merger Guidelines Workbook, April 2006, 12. and Whish, Richard, *Competition Law*, Oxford University Press 2009, 810.

15 In some jurisdictions, competition authorities may be concerned with non-competition objectives, such as protecting employment, promotion of local or small and medium size competitors, building national champions, achieving socio-economic policy objectives, and preventing foreign takeovers of domestic industries. Sectors where non-competition considerations typically apply are defense, public utilities and media.

16 Organisation for Economic Co-operation and Development OECD, Competition Policy Roundtables: Cross-Border Merger Control: Challenges for Developing and Emerging Economies, February 2011, DAF/COMP/GF(2011)13, 23.

17 International Competition Network (ICN), Merger Working Group: Analytical Framework Sub-group, The Analytical Framework of Merger Control, September 2002, ¶ 7.

18 Interamerican Development Bank and Organisation for Economic Cooperation and Development, Merger Control Laws and Procedures in Latin America and the Caribbean, July 2005, ¶ 13.

19 International Competition Network (ICN), Merger Working Group, Merger Remedies Guide, April 2016, 9.

20 For example, Bolivia, Dominican Republic, Guatemala, Guyana, Jamaica and Peru have no general merger control regimes. In the case of Bolivia and Peru, these jurisdictions only have sector-specific merger control provisions. Peru has sector-specific merger control in the electricity sector, and Bolivia in the electricity, telecommunications, financial, hydrocarbon and insurance sectors.

21 Interamerican Development Bank and Organisation for Economic Co-operation and Development, Merger Control Laws and Procedures in Latin America and the Caribbean, July 2005, ¶ 22.

22 *See* Legislative Assembly of Costa Rica, Law 7472 of 1995, Article 16 Bis, as modified by Law 9072 of 2012, Article 2.

23 Congress of the Republic of Guatemala, Bill No. 5074 of 2016, Article 14. The Guatemalan government submitted the bill to Congress to comply with its commitment to adopt a competition law under Article 279.2 of the EU-Central America Association Agreement. *See* Francisco Jueguen, "Claves de la nueva ley de Defensa de la Competencia: Suma la posibilidad de multas millonarias y la figura del arrepentimiento," *La Nación*, 27 September 2016, *available at* http://www.lanacion.com.ar/1941828-claves-de-la-nueva-ley-de-defensa-a-la-competencia-suma-la-posibilidad-multas-millonarias-y-la-figura-del-arrepentido (accessed 20 February 2017).

24 Interamerican Development Bank and Organisation for Economic Co-operation and Development, Merger Control Laws and Procedures in Latin America and the Caribbean, July 2005, ¶ 23.

25 Although Costa Rica's merger control regime is sometimes described as pre-merger, its competition law still allows for a merger to be notified up to five business days after its execution. *See* Legislative Assembly of Costa Rica, Law 7472 of 1995, Article 16 Bis, as modified by Law 9072 of 2012, Article 2. Costa Rica's Peer Review on Competition Law and Policy regards the possibility that merging parties notify after the date of consummation of the merger as a problem of the system and has recommended to ban this possibility. *See* Organisation for Economic Cooperation and Development, Country Studies: Peer Review of Competition Law and Policy in Costa Rica, 2014, 11 and 39. Currently, a bill of law has been introduced to Costa Rica's Congress to ban the possibility to notify a merger after it has been consummated and to require that the execution of any merger agreement is suspended until the final determination of the competition authority. Legislative Assembly of Costa Rica, Bill No. 19996 of 2016.

26 Brazil used to be a mandatory-post merger system until it shifted to a mandatory pre-merger notification system with its new competition law.

27 Congress of the Argentine Nation, Law 25.156 of 1999, Article 8. Decree 89 of 2001 further clarifies that the "trigger date" that marks the beginning of the one-week period is (i) the date of the conclusion of a merger agreement; (ii) the closing date established in the sale agreement of stock or property; (iii) the date when the transfer of commercial funds is registered; or, in any other event, (iv) the date of perfection of the operation.

28 Congress of the Republic of Paraguay, Law 4956 of 2013, Article 14.

29 National Commission for the Defense of Competition, Decision No. 323 of 15 July 2012. *See* also Organisation for Economic Cooperation and Development, Country Studies: Argentina Peer Review of Competition Law and Policy, 2006, 22 - 23.

30 Interamerican Development Bank and Organisation for Economic Cooperation and Development, Merger Control Laws and Procedures in Latin America and the Caribbean, July 2005, ¶ 25.

31 *See* President of Venezuela, Presidential Decree 1415 of 2014 (The Antimonopoly Law), Article 10; and President of Venezuela, Presidential Decree 1311 of 1996 (*Reglamento No. 2 de la Ley para Promover y Proteger el Ejercicio de la Libre Competencia*), published in Official Gazette No. 35,963 dated 21 May 1996, Articles 6 – 14.

32 National Assembly of Panama, Law 45 of 2007, Article 23.

33 Panama's competition authority has undertaken investigations related to consummated mergers in the past. For example, it investigated the merger of car distributors Ricardo Pérez/Toyopan and TESA, financial services merger Banco Uno/Citi Bank, and in the milk market UHT "La Chiricana"/Refrescos Nacionale. In these cases, the authority decided not to proceed with the challenge and did not order a post-merger divestment or a break-up of the consummated merger.

34 National Assembly of Panama, Law 45 of 2006, Article 24.

35 Organisation for Economic Co-operation and Development, Country Studies: Peer Review of Competition Law and Policy in Panama, 2010, 27.

36 Mensaje No. 009-363, *Mensaje de s.e. la Presidenta de la Republica con el que inicia un Proyecto de Ley que modifica el Decreto con Fuerza de Ley N° 1 de 2004, del Ministerio de Economía, Fomento y Reconstrucción, que fija el texto refundido, coordinado y sistematizado del Decreto Ley Nº 211, de 1973*, 16 March 2015, 14-22.

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38 Organisation for Economic Co-operation and Development Secretariat, Assessment of Merger Control in Chile, 2010, 64

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