

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Chile****27 November 2018**

This document reproduces a written contribution from Chile submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Chile

1. New mandatory merger regulation

1. Up to the year 2017, Chile had a voluntary merger control system. This meant that companies decided whether to initiate a consultation before the Competition Tribunal (“TDLC”) to have the transaction reviewed in order to avoid *ex post* investigations. However, Law No. 20.945 emended the Chilean Competition Act (Decree-Law No. 211) in 2016,¹ introducing a mandatory merger control system, which came into force in June 2017. This regulation also trespassed the merger control system from the TDLC to the National Economic Prosecutor’s Office (“FNE”). Similarly to other jurisdictions, under the new merger regulation, investigations are structured in two phases, and mergers that are blocked by the FNE may be subject to review by the TDLC.

2. After more than a year of implementation of the new merger regulation, the FNE has reviewed more than sixty-one transactions: fifty-nine were cleared and two have been blocked. Given the short life of the new merger control regulation, the FNE has not had the opportunity to investigate many gun-jumping cases yet. As will be explained below, the FNE has only prosecuted one case of gun jumping (the *Minerva/JBS* transaction) based on the violation of the standstill obligation.

2. Legal framework

3. Under the current legal framework, mergers that meet the thresholds are subject to mandatory notification, while transactions that do not meet the thresholds can be reviewed through a voluntary notification process, as is stated in Article 48 of the Competition Act. The former Article also states that voluntary transactions may be reviewed by the FNE up to one year after the date in which the transaction has been taken place. Finally, under Article 3 bis of the Competition Act, it is possible for the competition authorities to review a closed transaction when parties have failed to notify a transaction that meets the thresholds. However, to date, the FNE has not yet identified nor challenged transactions that have failed to be notified.

4. Under the Competition Act, gun jumping occurs when parties breach the duty to notify the FNE of a transaction that triggers merger thresholds, according to Article 48 of the Competition Act, and when they complete a merger before receiving clearance from the FNE, breaking the standstill obligation stated in Article 49. Both prohibitions are established in Article 3 bis of the Competition Act (in the hypothesis contained in letters a) and b), respectively). According to the Competition Act, transactions are implemented when competitors cease to be independent in any respect. In transaction involving interests or rights, the acquisition will take place if it confers the possibility of exercising decisive influence on the other’s administration. Unlike other jurisdictions, the Competition Act does not provide any exception to the standstill obligation.

5. The merger regulation contained in the Competition Act does not provide specific provisions concerning co-ordinate conducts or information exchanges between the parties

1 Full text available in: http://www.fne.gob.cl/wp-content/uploads/2018/09/DL_211_English.pdf

prior to the FNE's clearance. Nevertheless, the mentioned conducts could imply infringements to Article 3 of the Competition Act, which applies to any deed, act or agreement that impedes, restricts or limits competition, or tends to produce such effects. It is worth saying that the FNE has not prosecuted any case of gun jumping under the aforementioned provision.

6. Normally, the FNE investigates cases (including gun jumping) using public information, information provided by customers, competitors and/or the parties. The agency has the authority to request the information and records that it may deem necessary from private parties within the context of the investigations that it is conducting. Failure to respond at all or to respond completely could be penalized with a fine, while hindering, diverting, or eluding the authority of the FNE by concealing information that it has requested, or submitting false information, could be penalized with imprisonment, both under Article 38 h) of the Competition Act. Investigation tools such as dawn raids are only intended to investigate cartels, and require prior approval from the TDLC and the Appeal Court of Santiago.

3. Legal consequences and fining of gun jumping

7. Violations to gun jumping provisions contained in Article 3 bis of the Competition Act are prosecuted by the FNE through a complaint before the TDLC.

8. Infringements of gun jumping provisions may be subject to the measures established in Article 26 of the Competition Act. According to this article, the TDLC may: modify or terminate acts, contracts, covenants, systems or agreements; order the modification or dissolution of partnerships, corporations and other legal persons of private law involved in the acts, contracts, covenants, systems or agreements referred to; and/or impose fines.

9. Fines imposed by the TDLC can be up to 30% of the of the offender within the product or service line associated with the infringement during the period in which the infringement was being perpetrated, or up to the double of the economic benefit received as a result of the infringement. In the event that it is not possible to determine the sales nor the economic benefit gained by the offender, the TDLC shall be authorized to impose fines for a maximum amount equivalent to sixty thousand Annual Tax Units (60,000 UTA, about 52,436,705 USD). The following circumstances shall be taken into consideration for the purposes of determining the fines: seriousness of the conduct, the deterrent effect, the recidivist character of the perpetrator due to having been previously found guilty of anticompetitive violations during the last ten years, the economic capacity of the offender, and the collaboration that the latter has provided to the FNE prior to or during the investigation.

10. If the violation consists in failing to notify a transaction, the TDLC may impose, in addition to the sanctions explained above, a fine of up to twenty Annual Tax Units for each day of delay (20 UTA, about 17,478 USD), as from the day in which the concentration is consummated.

11. The TDLC has not yet imposed any measure or fine, since the only gun jumping case brought by the FNE ended in a settlement with the parties, which was approved by the Tribunal.

4. TDLC Case C-346-2018. FNE v. Minerva S.A. and JBS S.A. (2018)

12. As mentioned above, the FNE has only prosecuted one case of gun jumping in the frame of the new mandatory merger regulation in the *Minerva/JBS* transaction in 2018. Minerva and JBS were corporations that participated in the markets of production, processing and commercialization of carnic products abroad, and that operate in Chile through Minerva Foods Chile SpA and JBS Chile Limited, respectively. On 14 July 2017, both parties filed a notification before the FNE announcing Minerva's plan to acquire all shares in JBS and its subsidiaries located in Argentina, Paraguay and Uruguay, all of which exported carnic products to Chile.

13. However, on 31 July 2017, the parties informed to the FNE that the transaction had been closed, which occurred before the FNE's clearance decision and without observing the mandatory waiting period. The parties argued that a carve-out agreement, established unilaterally and then communicated to the FNE, was enough to avoid the effects of the transaction in Chile.

14. Thus, on 6 April 2018, the FNE filed a complaint against Minerva and JBS before the TDLC for having infringed the legal prohibition of closing an operation notified to the FNE before receiving due authorization by this entity. According to the complaint brought by FNE, the infringement gave Minerva the possibility to exercise a decisive influence on the administration of JBS's subsidiaries acquired by the former, in their relations with JBS Chile Limited and the Chilean market. The FNE argued that the existence of a carve-out agreement did not change this reality, as it has been acknowledged by different jurisdictions.

15. On 31 August 2018, the TDLC approved the Conciliatory Agreement subscribed between the FNE, Minerva and JBS. In his resolution, the TDLC stated that Minerva and JBS recognized in the settlement that after they notified the proposed acquisition in Chile, they proceeded to close the operation abroad, before getting the administrative authorization. At the same time, the TDLC announced that both companies assumed the obligation of paying the unique amount of US\$1.000.000 approximately.

16. It is worth mentioning that on 10 October 2017 the FNE cleared the operation between Minerva and JBS without remedies, as the transaction did not give rise to competition concerns.