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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Serial Acquisitions and Industry Roll-ups – Note by Chile

6 December 2023

This document reproduces a written contribution from Chile submitted for Item 11 of the 141st OECD Competition Committee meeting on 5-6 December 2023.

More documents related to this discussion can be found at
www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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1. Introduction

1. In 2016, Law N°20.945 was passed, which modified the Chilean Competition Act (Decree-Law N°211), establishing a mandatory pre-merger notification system. This Law rules that the National Economic Prosecutor's Office (hereinafter, "FNE") shall be the agency in charge of reviewing all transactions that exceed certain income thresholds. The merger control procedure begins with the filing of a Notification Form, in which the merging parties attach all relevant information regarding the transaction, the parties, and the affected market.¹

2. The investigation procedure has two possible phases. An ordinary procedure or phase 1, that starts after the notification period is completed successfully, and has an overall duration of 30 business days. Phase 1 may conclude with the approval of the transaction (with or without remedies) or with an extension of the investigation to phase 2, if the FNE concludes that the concentration may raise competition concerns. Phase 2 is an extraordinary procedure that lasts up to 90 business days. During this time, the FNE will conduct an in-depth investigation, after which the transaction can be approved, with or without remedies, or prohibited.

3. In June 2017, the FNE published its "Guidelines on Jurisdiction" (in Spanish, "*Guía de Competencia*", hereinafter, the "Guidelines on Jurisdiction"²), that provide certainty to undertakings about when the FNE has jurisdiction to analyze a transaction and, specifically, when an agreement or business qualifies as a market concentration in legal terms.

4. In the Guidelines on Jurisdiction, the FNE defines both successive transactions as well as interrelated transactions; as it was deemed necessary to establish in which case transactions which were not considered concentrations on their own, would still be under the scope of its jurisdiction.

5. The following document intends to present the successive and interrelated transaction cases assessed by the FNE Mergers Division.

2. Successive transactions

6. The Guidelines on Jurisdiction define successive transactions as: "Those where two or more transactions involving the same parties take place within a period of two years, being reasonable to conclude that such tend towards a single concentration. Thus, for example, two or more independent acts, which individually considered does not grant an undertaking control over all or a relevant part of the assets of another, could grant said

¹ The information that the parties must submit during notification is considered in article 48 of the Decree-Law N°211 and is complemented by the "*Reglamento sobre Notificación de una Operación de Concentración*" published in 2021.

² The English version of the Guidelines on Jurisdiction is available at: <https://www.fne.gob.cl/wp-content/uploads/2017/11/Guidelines-on-Jurisdiction.pdf>.

control if they are cumulatively considered and, in such case, should be assessed as a single concentration”.³

7. This definition is consistent with other competition agencies’ guidelines. For example, the U.S. Department of Justice and the Federal Trade Commission recently included in their Merger Guidelines Draft, Guideline N°9, which establishes that multiple acquisitions may be analyzed as a whole by the agency if they are “part of a firm’s pattern or strategy”.⁴ In the same line, the European Commission determined that: “two or more transactions [...] which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction”.⁵⁻⁶

8. Since 2017, the FNE has had one successive transactions case that consisted in four different notifications by the same parties in less than a year:

2.1. Acquisition of assets from Inmobiliaria Santander S.A. by Walmart Chile S.A. in the municipality of Colina and the acquisition of assets from Inmobiliaria Santander S.A. by Walmart Chile S.A. in the municipality of Calera de Tango⁷

9. This case consisted in the acquisition of two supermarket stores from Inmobiliaria Santander S.A. (hereinafter, “Inmobiliaria Santander”) by Walmart Chile S.A. (hereinafter, “Walmart”). These stores used to be part of a supermarket chain that was forced to close.

10. Inmobiliaria Santander and Walmart (hereinafter the “Parties”) notified the acquisitions separately, both on March 25, 2021, but in two different and independent documents, one regarding a store located in Colina, and another regarding a store located in Calera de Tango; both towns located near Santiago. The Merger Division dictated, on April 9, 2021, a resolution of “*accumulation and incompleteness*” based on the article 33° of Law N°19.880 (Chilean Administrative Proceedings Act) and paragraph 31 of the Guidelines on Jurisdiction.

11. The FNE stated that the notifications were not complete and thus had to be reviewed together based on article 33° of Law N°19.880 which states that: “*The administrative body that initiates or processes a proceeding, regardless of the manner in which it was initiated, may order its accumulation to other older proceedings with which it is substantially identical or closely connected*”. They also based their decision on the Guidelines on Jurisdiction which had previously defined successive transactions.

³ Guidelines on Jurisdiction, p. 11.

⁴ Merger Guidelines Draft, available in: https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

⁵ European Commission, Council Regulation (EC) N°139/2004 on the control of concentration between undertakings, article 5.

⁶ Other jurisdictions that mention multiple acquisitions are Perú in their “*Guidelines for the qualification and analysis of mergers*” p. 27; Germany in their “*Act against Restraints of Competition*” and the Netherlands in their “*Dutch Competition Act*”, article 30, amongst others.

⁷ Adquisición de control sobre activos de Inmobiliaria Santander S.A. por parte de Walmart Chile S.A. Rol FNE F268-2021 (acumulado con FNE F269-2021).

12. As a result, both procedures were accumulated and the operation was analyzed jointly and was approved on June 18, 2021.⁸

2.2. Acquisition of assets from Inmobiliaria Santander S.A. by Walmart Chile S.A. in the municipality of Macul⁹

13. This transaction was notified on June 30, 2021, regarding the acquisition of a supermarket store in Macul, Santiago. Through the information provided by the Parties in the notification, the FNE found that Walmart intended to acquire another two stores from Inmobiliaria Santander, which they have failed to inform in the current procedure. As such, on August 11, 2021, the FNE resolved that the notification was not filed because the Parties had not given all the necessary information for the FNE to analyze the transaction.¹⁰ Furthermore, the FNE stated that: *“acts and contracts between the Parties, regarding stores belonging to Inmobiliaria Santander on which there is a real and serious intention of renting to Walmart are part of the same concentration, in the form of multiple acquisitions, thus those transactions must be notified by the Parties and analyzed jointly by the FNE”*.¹¹

14. As a result, the Parties decided to notify the acquisition of three stores together.

2.3. Acquisition of assets from Inmobiliaria Santander S.A. by Walmart Chile S.A. in the municipalities of Macul, Independencia and Pirque¹²

15. On August 24, 2021, the Parties notified the acquisition of three stores by Walmart from Inmobiliaria Santander. During phase 1, the FNE considered that the merger could substantially lessen competition and decided to extend the investigation to phase 2, in order to conduct an in-depth investigation. Among other reasons for extending the investigation, it was deemed that the transaction could increase Walmart’s negotiation power given the fact that Walmart was the most relevant player in the market. The analysis made by the FNE in phase 1 considered the transactions described in sections 2.1 and 2.2 of this document.

16. Later on, the Parties desisted on the acquisition, due to commercial reasons.

3. Interrelated transactions

17. Interrelated transactions are defined in the Guidelines on Jurisdiction as: “Those in which between each of the involved facts, acts or conventions exist a mutual conditionality

⁸ Approval report available on the FNE website: https://www.fne.gob.cl/wp-content/uploads/2021/06/inap_F268_2021.pdf.

⁹ Adquisición de control sobre activos de Inmobiliaria Santander S.A. por parte de Walmart Chile S.A. Rol FNE F285-2021.

¹⁰ According to article 50° of the Decree Law N°211, when the parties do not provide complete information in a notification, the FNE has the faculty to declare the notification as “not filed”.

¹¹ Resolution issued by the FNE in investigation F285-2021; Adquisición de activos de Inmobiliaria Santander S.A. por parte de Walmart Chile S.A.

¹² Adquisición de control sobre activos de Inmobiliaria Santander S.A. por parte de Walmart Chile S.A. Rol FNE F287-2021.

and/or accessory relation, in such a manner that one of them could not take place without the other, whether at a factual, legal or economic rationality level”.¹³

18. Another jurisdiction that refers to these transactions is the European Commission, which states that: “Its moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time”.¹⁴

19. Since 2017, the FNE has had one interrelated transactions case:

3.1. Association between Aguas de Marubeni SpA and Transelec Holdings Rentas Limitada, and between Aguas Nuevas S.A., IDE Water Assets Ltd. and Transelec Holdings Rentas Limitada¹⁵

20. In this case, the FNE was notified of two interrelated transactions. The first consisted of the creation of a Joint Venture to fund, build, develop and then transfer of a desalinization plant, while the second referred to the creation of another Joint Venture that would operate and maintain the plant. Because the transactions were conditional to each other and were part of the same business plan, they were presented and analyzed together.

21. The FNE argued that even though the second Joint Venture might not be considered a merger on its own, since it was part of a series of interrelated acts, the Joint Venture was analyzed with the rest of the association and constituted a sole merger.

22. Later on, the operation was approved in phase 1, without remedies.

¹⁴ European Commission, Council Regulation (EC) N°139/2004 on the control of concentration between undertakings, paragraph 20.

¹⁵ Asociación entre Aguas de Marubeni SpA y Transelec Holdings Rentas Limitada, y entre Aguas Nuevas S.A., IDE Water Assets Ltd. y Transelec Holdings Rentas Limitada. Rol FNE F306-2022.