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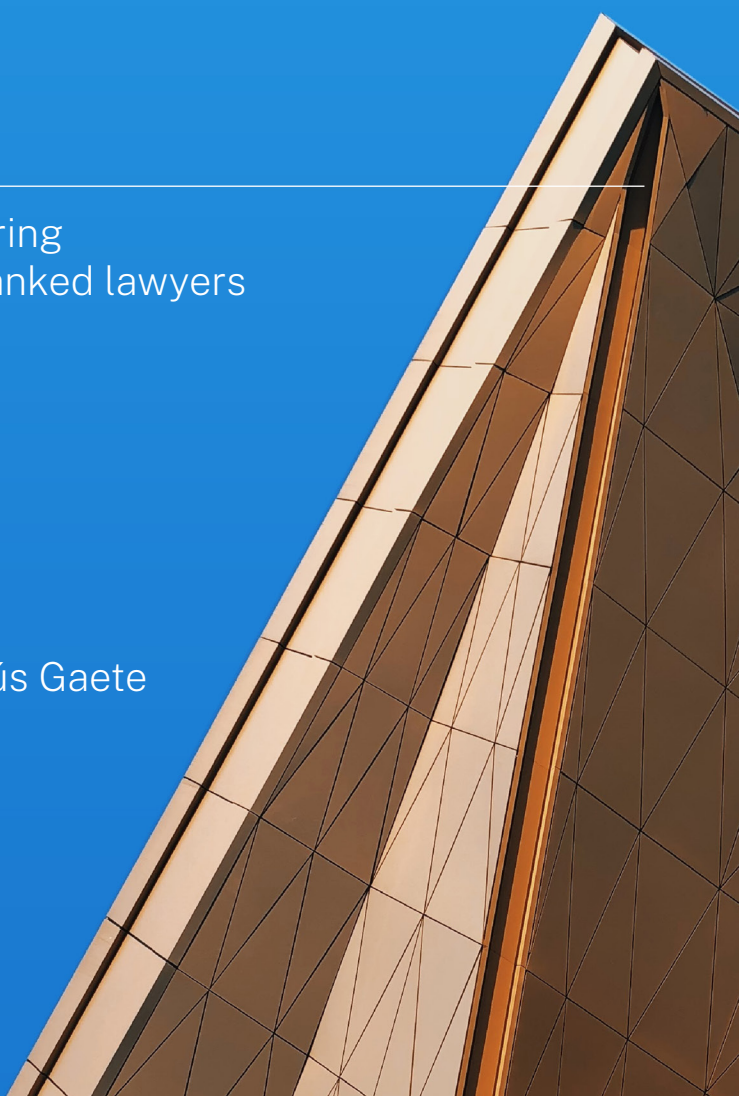

Chile: Law & Practice and Trends and Developments

Claudio Lizana, Daniela León, Tomás Appelgren and María Jesús Gaete
Estudio Lizana

CHILE

Law and Practice

Contributed by:
Claudio Lizana, Daniela León, Tomás Appelgren and María Jesús Gaete
Estudio Lizana

Contents

Estudio Lizana is a boutique law firm headquartered in Santiago, Chile, specialising in competition, regulatory and compliance matters, as well as corporate law. The team is made up of three partners, three associates and one paralegal. It has comprehensive expertise in competition law matters, including merger control, investigations by the Fiscalía Nacional Económica (FNE) on cartels, abuses of dominance, and unfair competition, as well as litigation before the Chilean Competition Court (TDLC) and the Supreme Court. Recent relevant work includes advising both Brink's Chile and Indura (Air Products) in their defences in ongoing cartel litigations (historical cases due to the high fines requested); Mastercard in a TDLC proceeding regarding the issuance of regulations for the payment cards industry, and ongoing litigation against several payment facilitators; Minerva Foods in the merger control review of an acquisition of assets from Marfrig; and a large technological company in an ongoing antitrust investigation.

Authors

Claudio Lizana is the founding partner of Estudio Lizana. For more than 30 years, his practice has focused on antitrust matters, including litigation before the TDLC and the Supreme Court, investigations on cartels and abuse of dominance, and merger control proceedings before the FNE. He also has extensive experience in corporate matters. Previously, he was partner of the law firm Carey for more than 20 years. He is a member of the American Bar Association.

Daniela León has been a partner at Estudio Lizana since 2023. Her practice focuses on antitrust and regulation, with extensive experience in merger control proceedings before the FNE, as well as investigations of the antitrust, cartel and compliance divisions of the same authority. She has also represented important national and international companies in contentious and non-contentious proceedings before the TDLC and the Supreme Court. Previously, she worked as an associate in Carey's antitrust and regulation group for five years and then joined Estudio Lizana as an associate, before being named partner. She is a member of the American Bar Association.

Tomás Appelgren has been a partner at Estudio Lizana since 2023, after joining the firm as an associate. His practice focuses on antitrust and regulated markets, advising clients in investigations carried out by the FNE, as well as in contentious and non-contentious matters before the TDLC. He also has experience in corporate law, mergers and acquisitions. Before joining Estudio Lizana, he worked as an associate in Carey's antitrust and regulated markets group for four years.

María Jesús Gaete has been an associate at Estudio Lizana since 2022. Since joining the firm, her work has focused on competition and regulation matters, with special focus on judicial matters before the TDLC. She actively participates and collaborates in the work of partners in all types of court cases, both contentious and non-contentious, as well as in FNE investigations. Previously, she worked as a paralegal in Baker McKenzie Chile.

Estudio Lizana

Candelaria Goyenechea 3900
Of. 303
Vitacura
Santiago de Chile
Chile

Tel: +56 9 9237 1671
Email: clizana@estudiolizana.cl
Web: www.estudiolizana.cl

ESTUDIO LIZANA
ABOGADOS

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The following is the relevant merger control legislation in Chile:

- Chapter IV of Law Decree No. 211 of 1973, as amended ("DL 211"), which establishes the mechanism for preventive and mandatory merger control.
- Decree No. 41/2021 of the Ministry of Economy, Development and Tourism, which establishes the Regulation on the Notification of Concentrations ("Regulation").

Additional Guidance

- Exempt Resolution No. 157 of 2019, through which the National Economic Prosecutor's Office ("FNE") set the jurisdictional thresholds effective to this date.
- FNE Guidelines on the Analysis of Horizontal Concentrations (2021).
- FNE Guidelines on Threshold Interpretation (2019).
- FNE Guidelines on Jurisdiction (2017).
- FNE Guidelines on Remedies (2017).
- FNE Notification Form for Concentrations (2019).

1.2 Legislation Relating to Particular Sectors

Relevant Legislation for Foreign Investments

In general, foreign investments are not subject to approval but only to registration formalities (post facto) before the Central Bank of Chile to materialise the investment, according to Chapter XIV of the Compendium of International Exchange Regulations, which establishes the rules applicable to credits, deposits, investments and capital contributions from abroad. In accordance with such regulations, for amounts over USD10,000, investors have the obligation to enter foreign currency through the formal exchange market and to inform the Central Bank in writing of the transaction. By virtue of this regulation, the Central Bank is not authorised to reject the investments (ie, it is just a notification mechanism, not an approval).

There are no mandatory/suspensory restrictions on foreign ownership over non-regulated Chilean companies.

Legislation Relating to Particular Economic Sectors

Regulated entities: banking and other regulated institutions

In Chile, there are different regulatory authorisations required for changes in the ownership of regulated entities or institutions.

For example, there are several types of transactions in the banking sector that require prior authorisation from the Commission for the Financial Market ("CMF"):

- Article 35 bis of the General Banking Law requires banks or controlling persons or groups, as appropriate, to request special prior authorisation from the CMF when the resulting bank or group of banks may achieve "systemic importance" as a result of some or several of the following acts.
  - (a) Merger of banks.
  - (b) Acquisition of all the assets and liabilities of one bank by another.
  - (c) Acquisition of a substantial part of the assets and liabilities of one bank by another. "Substantial" means equal to or greater than one third of their book value.
  - (d) Takeover of two or more banks by the same person or controlling group. It is understood that this case includes the

takeover of a bank by a person or group that already controls another.

(e) Substantial increase in the participation of one of the banks controlled by the same person or group. This is understood when the controller acquires the majority or two thirds of the shares, as applicable.

The bank's systemic importance will be determined by the CMF, with the prior favourable agreement of the Council of the Central Bank of Chile, for which it will take into consideration the bank's size, market share, interconnectivity with other financial institutions, the degree of substitution in the provision of financial services, or any other objective criterion considered relevant for such purpose.

- In addition, pursuant to Article 36 of the General Banking Law, no person may acquire, directly or through third parties, shares of a bank that, alone or added to those they already own, represent more than 10% of the bank's capital, without having previously obtained authorisation from the CMF.
- Furthermore, as per Article 49(5) of the General Banking Law, in order for a bank to acquire shares of another bank with the aim of carrying out a merger between both institutions, it must meet a series of requirements, including obtaining prior authorisation from the CMF, which can only be granted when it is demonstrated that the acquiring company has assured control of two thirds of the issued shares with voting rights of the company whose shares it intends to acquire.

Other examples are found in the pension and insurance industries: according to the relevant regulations, the acquisition of shares that represent 10% or more of the ownership of a Pension Fund Administrator (AFP) must be authorised by the Pension Superintendency, while the transfer of a significant ownership interest (10% or more) in an insurance or reinsurance company must be authorised by the CMF.

Thus, depending on the type of regulated entity in question, there will be various prior approval requirements for ownership changes.

Media

According to Law No. 19,733 on Freedom of Opinion and Information, any significant modification in the ownership of media companies must be reported to the FNE within 30 days of completion.

Nevertheless, in the case of media companies subject to state-granted concessions, the relevant event or act by which the change in the ownership of the company becomes effective must obtain a favourable report from the FNE concerning its impact on competition, prior to closing. The FNE must issue this report within 30 days after receiving all the relevant background.

If the report is unfavourable, the FNE must submit the relevant event or act to a public consultation process before the Chilean Competition Court ("TDLC"), so that the latter can decide whether it has the ability to infringe competition laws and, if applicable, impose the conditions necessary to ensure that the change in the ownership of the company does not restrict competition.

1.3 Enforcement Authorities

The FNE is the authority in charge of reviewing merger notifications and then conducting the corresponding merger control investigation, both in Phase 1 and in Phase 2 (where applicable). Once the merger investigation is concluded, the FNE decides whether to clear or block the concentration.

In the event that the FNE blocks the concentration, the parties have the right to file a special review appeal before the TDLC within ten days from the notification of the FNE's prohibition decision.

In addition, although this is not provided for in DL 211, it is possible to file a 'complaint appeal' (*recurso de queja*) against the TDLC's final ruling before the Supreme Court. The complaint appeal is a very special remedy that is exercised directly before the highest court, whose sole purpose is to correct serious faults or abuses committed by judges in the issuance of judicial decisions and to enforce their disciplinary liability. By accepting this appeal, the Supreme Court may amend the TDLC's ruling. There has only been one case so far in which this type of appeal has been used in a merger control review (Colmena/Nueva Mas-Vida).

The FNE is also the authority in charge of ensuring compliance with the merger control regime, initiating investigations for gun jumping and, when applicable, suing legal entities that engage in this type of conduct before the TDLC. According to the general rules of DL 211, the TDLC's condemnatory or acquittal ruling can be challenged before the Supreme Court, by means of an appeal.

2. Jurisdiction

2.1 Notification

In Chile, the pre-closing notification of a transaction to the FNE is only compulsory when (i) it amounts to a 'concentration' (*operación de concentración*), as per Article 47 of DL 211, and (ii) the sales of the undertakings involved meet the relevant jurisdictional thresholds. Note that there are no exceptions if the relevant thresholds are met.

If the parties' sales are below the thresholds, they are not obligated to file a merger notification. However, they are allowed voluntarily notify the concentration to the FNE, in which case they will be subject to the same procedural rules as mandatory notifications. Voluntary notifications may be advisable when, for example, the parties' sales are very close to the thresholds; when the parties have high combined shares in the relevant market involved in the transaction; among other cases.

2.2 Failure to Notify

If the parties fail to notify a concentration that falls under the scope of mandatory merger control, they can be subject to a fine of up to 20 Annual Tax Units ("UTA") (today, approximately. USD17,180) for each day of delay counted from the completion of the transaction (without a maximum). In addition, the TDLC may also impose other types of corrective, preventive, or prohibitive measures, including modifying or even terminating the acts, contracts, or agreements that violate the provisions of the law. This means that, if the concentration creates anti-competitive effects, the court can impose remedies or, if these are insufficient, even order the reversal of the transaction.

To date, no fines have yet been imposed for failure to notify in Chile. Nevertheless, the FNE has investigated this type of behaviour. As for recent cases, we can mention three investigations initiated in the last few months:

- In November 2023, the FNE initiated an ex officio investigation regarding the Public Tender Offer through which the Canadian pension fund manager, Public Sector Pen-

sion Investment Board, increased its stake in Hortifrut, a Chilean fruit company considered the world's largest blueberry producer, from 4.88% to 49.56%.
- In March 2024, the FNE started an inquiry regarding the acquisition of 65% of the Chilean company Punto Ticket by a joint venture between CTS Eventim and the American multinational Sony Music.
- Finally, in May 2024, based on a third-party complaint, the FNE initiated an investigation concerning the acquisition of control over Cuenca del Maipo Servicios de Salud S.A. by the Chilean Association of Security ("ACHS").

With respect to all these cases, the FNE pointed out that, based on the available data on the corresponding companies and industries, it was necessary to examine whether the transactions should have been notified prior to their closing pursuant to the mandatory merger control regime, as well as whether they could have significantly reduced competition in their respective markets.

2.3 Types of Transactions

Pursuant to Article 47 of DL 211, only the following transactions amount to 'concentrations' and therefore fall within the scope of merger control, provided that they involve two or more previously independent undertakings (nor part of the same corporate group):

- mergers;
- acquisitions of decisive influence (control) over other undertakings;
- full-function joint ventures; and
- acquisitions of control over the assets of other entities.

Based on the above concept, intra-group restructurings or reorganisations are not subject to merger control.

2.4 Definition of "Control"

The FNE Guidelines on Jurisdiction define the concept of control or decisive influence as "the legal or de facto possibility of determining – or vetoing – the implementation of decisions regarding the competitive behaviour and strategy of an undertaking. Such control implies, among other things, the decisive influence or control over its management's composition, veto rights, strategic or business decisions or, in general, in its competitive performance."

Therefore, acquisitions of minority interests are caught by this concept provided that they allow the exercise of decisive influence (eg, if the minority interest involves veto rights over the target's strategic decisions, such as the entry to a new market, the company's business plans or budget, appointment of managers and key executives, authorisation to carry out certain investments). The FNE Guidelines on Jurisdiction explicitly state that "it is possible for a minority shareholder, based on the existence of acts or agreements in regard of the controlled undertaking, or otherwise as per the faculties it holds under the bylaws, to have the possibility of exercising a decisive influence."

2.5 Jurisdictional Thresholds

Chile's jurisdictional thresholds are calculated in *Unidades de Fomento* ("UF") (a unit of account used in Chile, adjustable according to inflation) and apply to all economic sectors, without distinctions.

Thresholds currently in force are as follows.

- Individual threshold: UF450,000 (USD19,730,350).
- Combined threshold: UF2,500,000 (USD109,613,056).

The currency conversion is based on the value of the UF as of December 31st of the previous year (2023) and the average exchange rate of the same year.

2.6 Calculations of Jurisdictional Thresholds

As mentioned, the thresholds are set in UF, and must be met by the amount of sales in Chile of the undertakings that intend to concentrate.

Sales relevant to the calculation of thresholds are those made in the calendar year prior to the notification. These sales must exclude taxes directly related to sales volume, such as VAT, tariffs, customs charges, specific taxes, etc.

Sales recorded in a foreign currency must be converted into Chilean pesos, in accordance with the average annual exchange rate published by the Central Bank of Chile. Subsequently, sales are converted from Chilean pesos to UF, based on its value as of December 31st of the year preceding the notification.

As mentioned above, there are two types of threshold, both of which must be met to trigger a mandatory filing:

- the combined threshold must be met by the sum of the sales of the undertakings that intend to concentrate; and
- the individual threshold must be met, separately, by the sales of at least two of the undertakings that intend to concentrate.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

If the concentration is a merger, the combined thresholds calculation shall consider the sum of the sales of the merging parties, as well as those of their respective business groups. The individual threshold, in turn, must be met separately by each of the two merging parties, including in each case their corresponding business group. If there are more than two parties to the merger, it is sufficient for only two to meet the thresholds.

The same rule described above applies to joint ventures, with respect to the parents and their corresponding business groups.

If the concentration is an acquisition of decisive influence or control over another undertaking, the individual threshold must be met, (i) on the one hand, by the sales of the acquiring entity and its entire business group, and (ii) on the other hand, by the sales of the target and all the entities controlled by it. The combined threshold must be met by the sum of the sales of all the above.

Finally, if the transaction refers to the acquisition of assets, the individual threshold must be met, (i) on the one hand, by the sales of the acquiring entity and its entire business group, and (ii) on the other hand, by the sales generated by the target assets. The combined threshold must be met by the sum of the sales of all the above.

2.8 Foreign-to-Foreign Transactions

According to the FNE Guidelines on Jurisdiction, transactions are only subject to merger control when it is likely that the concentration will affect the market and competition in Chile, which requires a geographical link to Chile.

The geographical link is established by the notification thresholds, which consider sales in Chile for their determination. Thus, all concentrations producing effects in Chile and meeting or exceeding the sales thresholds in Chile must be notified to the FNE.

According to the rules described above, if the target asset or undertaking has no sales in Chile, the transaction will not trigger a mandatory notification, because the individual threshold will not be met.

2.9 Market Share Jurisdictional Threshold

Chilean legislation does not establish a market share threshold. Although market share will be considered in the assessment of the concentration levels to determine potential effects on competition, only the thresholds related to the parties' sales are considered to determine whether a concentration must be notified to the FNE.

2.10 Joint Ventures

Only full-function joint ventures are considered as concentrations. Therefore, only this type of joint venture is subject to merger control, as long as it meets the jurisdictional thresholds.

Specifically, Article 47 (c) of DL 211 provides that a concentration shall exist when two or more undertakings (the "parents") associate with each other through any fact, act or agreement that creates an independent undertaking, separate from its parents, on a lasting basis. This new entity or association is usually referred to as a "joint venture".

According to the FNE Guidelines on Jurisdiction, to consider a joint venture as a concentration, the FNE will assess: (i) creation of a new economic entity; and (ii) the full-functionality criterion.

As for the first condition, the FNE explains that "the creation and entry into the market of a new undertaking, different from its parent companies is needed. The created undertaking, though, can be totally new or also arise from previously owned activities or assets, contributed by the parent companies with such purposes." Importantly, "the parent companies may or may not control the joint venture."

The full-functionality criterion requires the creation of "an independent undertaking, which carries out all its functions on a lasting basis. That is to say, the joint venture must be completely autonomous from a functional and operational viewpoint and have the possibility of performing full functions in the market."

The rules for determining whether a joint venture meets the jurisdictional thresholds are described in **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

2.11 Power of Authorities to Investigate a Transaction

Below-Threshold Concentrations

In the case of concentrations that do not meet the jurisdictional thresholds, the FNE still has the power to open an investigation to assess the transaction within one year of closing, to determine whether it may substantially reduce competition. If the FNE concludes that it does, it can challenge the transaction by filing a lawsuit with the TDLC, requesting the imposition of mitigation measures or even the reversal of the transaction.

Note that the investigation must be formally initiated within one year of closing; however, the

FNE can then challenge the transaction in court at any time as long as the statute of limitations has not expired, which, pursuant to DL 211, is three years from the execution of the corresponding anticompetitive conduct (which, in this case, should be understood as the implementation of the transaction).

2.12 Requirement for Clearance Before Implementation

Standstill Obligation

In Chile, the mandatory merger control regime imposes a strict prohibition on early implementation of concentrations. In other words, the parties may only implement (close) the notified transaction once the FNE (or the court) has issued its clearance decision.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Implementation Before Clearance

If the transaction is implemented before clearance, the FNE may file a lawsuit before the TDLC requesting the imposition of fines and/or other types of corrective, preventive or prohibitive measures. Specifically, violations of the standstill obligation are subject to the general fine regime for antitrust violations established by Article 26(c) of DL 211, which involves fines of up to (i) 30% of the sales of the offender corresponding to the line of products or services associated with the infringement for the period for which it was extended or (ii) up to twice the economic benefit obtained by the offender due to the infringement. If it is not possible to determine the sales and economic benefit obtained by the offender, the TDLC may impose a fine of up to UTA60,000 (today, approximately. USD50 million).

To date, there has only been one case of this type brought to court (FNE vs Minerva and JBS), in which the FNE accused the parties of closing the deal before obtaining clearance. However, no fines were ultimately imposed, because the case was settled, with the accused companies agreeing to pay a sum of money for tax benefits equivalent to USD1 million.

2.14 Exceptions to Suspensive Effect

There are no exceptions to the suspensive effect of merger notifications. Therefore, the parties are always obliged to wait until clearance to implement the transaction.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The law does not provide for any circumstance or exception that allows closing the transaction before clearance.

There are no specific rules on carving out the Chilean part of a transaction, but the FNE has generally stated that it does not consider "carve-outs" to be a viable mechanism to avoid merger control and that it is therefore likely to consider it a gun-jumping breach of Chilean merger regulation.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The parties may file the notification at any time before the closing of the deal, as long as there is a serious intention to carry out the transaction. Therefore, there are no deadlines, provided that the parties do not breach the duty to notify the transaction and comply with the standstill obligation.

3.2 Type of Agreement Required Prior to Notification

The notification can be filed as soon as the parties have a serious intention to carry out the transaction, which may be demonstrated by a letter of intent, a memorandum of understanding, a commitment letter, a public announcement of the transaction, a draft/signed agreement, etc. Therefore, a binding agreement is not required.

3.3 Filing Fees

There are no filing fees.

3.4 Parties Responsible for Filing

Pursuant to the applicable regulation, the notifying parties are "the entities, companies, or people that sign the corresponding act, contract or convention where the transaction is recorded, and the undertakings that carry out the transaction through them."

Accordingly, as a rule of thumb, all the parties to the transaction must file a joint notification. An exception to this rule exists, however, when one of the entities that are intended to be part of the transaction has not yet given its agreement for it to take effect, as occurs in cases of hostile takeovers and public tenders, in which only the acquiring party "carries out" the transaction and is therefore required to file the merger notification.

3.5 Information Included in a Filing

There are three types of notification forms: ordinary, simplified, or simplified with no overlaps. These forms vary in the amount and type of information that must be included in the notification.

FNE's Notification Form for Concentrations lists the information and documents required for the various types of notification. In general, the FNE requires the following information.

- Information about the notifying parties and their business groups.
- Description of the transaction, including its objectives and justifications.
- Description of the economic activities developed in Chile by the parties and their groups.
- Definition of the relevant markets, market shares, sales data and main clients.
- In the case of an ordinary form: a more in-depth description of the markets involved, including demand and offer structures, production capacities, conditions of entry, expansion and entry, among others.

Documents Required to Be Submitted

Regarding documents to be submitted, whether simplified or ordinary, the following should always be included.

- All the documents related to the concentration and/or its effects in Chile, such as minutes of shareholders' meetings or board meetings, or equivalent bodies, that show discussions, projections or analysis carried out with respect to the transaction.
- All the reports, commercial programmes, business plans, studies, minutes or presentations (either internal or external) that have been prepared or commissioned by the parties to evaluate, analyse or negotiate the transaction.
- All the documentation used by the parties to define the affected market and assess market shares.
- The balance sheets and financial statements of the entities within the party's group active in the markets affected by the concentration, including (if they exist) their annual reports.

- A group chart showing the corporate structure for each party involved in the merger.
- Powers of attorney.
- A statement from the notifying parties indicating that, in good faith, they intend to carry out the notified concentration (Bona Fide Affidavit).
- A declaration by the notifying parties of the truthfulness, sufficiency and completeness of the information provided, as well as the fact that they are aware of the administrative and criminal sanctions that apply in the event of providing false information or hiding information (Veracity Affidavit).

The ordinary notification requires more detailed documents and a longer time range for the above (eg, the last three balance sheets and financial statements). Importantly, along with the ordinary notification, the parties must also provide copies of studies, reports, analyses, surveys and any comparable document prepared in the last three years that analyses the relevant affected market, competitive conditions, actual or potential competitors, consumer preferences, brand strength and potential growth or expansion to new products or geographic areas, among others.

Language

The information to be submitted with a notification must be presented in Spanish, unless there is a special authorisation from the FNE. However, the regulation provides an exception to this rule, allowing certain information to always be submitted in English without prior authorisation.

The exempted documents are:

- existing documentation regarding the merger and other projections and/or its effects in Chile;
- copies of studies, reports, analyses, surveys and any comparable documents prepared in the last three years that analyse the relevant affected market, competitive conditions, actual or potential competitors, consumer preferences, brand strength, and potential growth or expansion into new products or geographic areas, among others; and
- identification of the legal representatives and agents of the notifying parties, along with their contact details, the original document confirming the power of attorney under which the agents act, and a simple copy of the documents that support it.

Specific Requirements

All digital copies must be submitted in a format that allows for review using search criteria. Qualitative information should be provided in a standard text format compatible with Microsoft Word, Adobe Acrobat, or similar software. Quantitative information should be submitted using standard spreadsheet processors like Microsoft Excel or comparable software.

All attached documents must be originals or true copies of the originals. The Bona Fide and Veracity Affidavits require a simple signature, and a scanned copy can be provided. In the case of the Power of Attorney, if it is issued in Chile, it requires being notarised, and if it is issued abroad, it must be notarised and apostilled (or legalised, in the case of countries without an apostille).

3.6 Penalties/Consequences of Incomplete Notification

Once the FNE receives the notification, it has a period of ten working days to review it. If it considers that the notification is complete, it will begin the investigation. On the other hand, if it is deemed incomplete, the FNE will issue a resolu-

tion of lack of completeness, and the parties will be granted ten working days to add or clarify the information as requested by the FNE. Therefore, no penalties are imposed, but the parties are required to provide the missing information.

However, the authority only accepts the issuance of up to three resolutions of lack of completeness. If, after that, the parties do not adequately amend the notification, the FNE will dismiss the notification and order to have it refiled.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Article 3 bis(e) of DL 211 states that those who notify a concentration by providing false information may also be subject to the sanctions described in Article 26 of DL 211, as well as any necessary preventive, corrective or prohibitive measures.

Therefore, if the parties notify a concentration but provide false information, the FNE may file a lawsuit before the TDLC requesting the imposition of fines, pursuant to the general fine regime for antitrust violations established by Article 26(c) of DL 211 (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**), as well as other measures.

In addition to the aforementioned fines, pursuant to Article 39(h) of DL 211, individuals responsible for providing false information or withholding information from the FNE during the investigation may be subject to a criminal penalty of imprisonment for a period ranging from 61 days to three years.

In recent years, the FNE has filed complaints against TWDC Enterprises 18 Corp (2022) and Cadena Comercial Andina (2023) for providing false information during the notification of a merger and therefore violating Article 3 bis(e) of DL 211. In the first case, the TDLC imposed a fine of UTA3,000 (approximately. USD2.5 million), plus legal fees. The second case is still ongoing.

By contrast, no case has been made public in which the authority has reported any individual to the criminal prosecutor for the criminal offence provided for in Article 39(h).

3.8 Review Process

Once the notification is filed, the FNE has up to ten working days – ie, excluding Saturdays, Sundays and holidays – for reviewing whether the notification is complete (ie, if it meets all the information requirements of the applicable form).

After that review period, the FNE can open the merger investigation or declare the notification incomplete. If the notification is declared incomplete, the parties have up to ten working days to supplement the notification with the missing information.

The review process is then repeated (in practice, up to three times), until the FNE considers the notification complete and decides to open the merger investigation. Otherwise, the FNE will dismiss the notification and order to have it refiled.

Phase I: After opening an investigation, the FNE has up to 30 working days to carry out its investigative steps. Within this deadline, it can then either: (i) grant conditional or unconditional clearance, or (ii) extend the investigation to Phase II, for up to 90 additional working days.

Phase II: Within the Phase II deadline, the FNE must either (i) grant conditional or unconditional clearance or (ii) prohibit (block) the transaction.

In case of prohibition, the parties can file a special review appeal before the TDLC.

If the parties offer mitigation measures, the above legal deadlines can be suspended for up to ten working days in Phase I, and up to 15 working days in Phase II.

These deadlines can also be suspended by mutual agreement between the FNE and the parties, for up to 30 working days in Phase I and up to 60 working days in Phase II (only once per phase).

Overall Timeline

Regarding the overall timeline, a distinction must be made between approval in Phase I of the investigation or extension to Phase I. If approved in Phase I, the total timeframe should range between two to four months, while if the investigation extends to Phase II, it will usually take between seven to eight months. However, this will all depend on the number of incompleteness decisions, whether a suspension is agreed with the FNE, and whether (and how many times) the parties offer remedies.

3.9 Pre-notification Discussions With Authorities

There is an informal and collaborative pre-notification procedure whereby the parties can ask questions to the FNE and clarify any doubts.

The parties can bring up any procedural or substantive questions that they may have (for example, whether the transaction qualifies as a concentration operation, whether the ordinary or the simplified notification form applies, whether the parties may be exempted from providing certain information required by the regulation, etc).

The FNE encourages pre-notification discussions to prevent any mistakes and thus to expedite the process.

The pre-notification stage is entirely confidential.

3.10 Requests for Information During the Review Process

The FNE typically requests additional information from the parties, as well as third parties (such as competitors and clients), during the course of its investigation. These requests for information do not stop the clock or suspend the review, which is why the deadlines to provide responses are usually very tight.

The FNE's requests for information can be from very simple to quite burdensome, which will depend on the complexity of the concentration, the markets involved and the amount of public information available.

3.11 Accelerated Procedure

As stated above, the sole difference between the ordinary and simplified notifications is the amount and type of information that must be included in the notification. Therefore, all notifications are subject to the same legal deadlines, regardless of the type of form used. In other words, formally speaking, there is no "fast-track" procedure.

However, the FNE's review of a simplified notification with no overlaps will usually take, in practice, a substantially shorter time than an ordinary notification with several complex overlaps.

4. Substance of the Review

4.1 Substantive Test

The legal test to clear a transaction is that it is not able to substantially reduce competition, whether without conditions or subject to the remedies offered by the parties.

4.2 Markets Affected by a Transaction

The parties are only required to notify under the ordinary notification mechanism when the transaction involves an affected relevant market. This is because the existence of affected markets requires a more in-depth analysis of the possible effects on competition, which requires the FNE to have more information from the outset.

A market is considered "affected" by the transaction in the following cases.

- The transaction gives rise to a horizontal overlap, in which the combined market share is equal to or greater than 20%. (Nevertheless, as an exception to the above, the parties are allowed to file a simplified form instead of an ordinary form when their combined market share is below 50% and the HHI delta is below 150. This is because usually such a small increase in market concentration is incapable of raising competitive concerns.)
- The transaction gives rise to a vertical relation, in which the individual or combined share in the upstream or downstream market is equal to or greater than 30%, regardless of whether there is an actual or past customer-supplier relationship between the parties.
- The transaction involves:
  (a) a market in which one of the parties has a market share of 30% or more, and another party is a potential competitor in the same market;
  (b) a market in which one of the parties has a market share of 30% or more, and another party, while not being active in the same market, owns intellectual or industrial property rights important to that market; or
  (c) the situation in which any of the parties is active in a product market that is closely related to one in which another party is active, and their individual or combined market shares are equal to or greater than 30% in any of them.

4.3 Reliance on Case Law

The FNE often relies on case law from the European Commission and the Federal Trade Commission. It also relies in some cases on precedents from other competition authorities in the region, such as CADE or COFECE.

4.4 Competition Concerns

According to the FNE's Guidelines on the Analysis of Horizontal Concentrations ("Guidelines on Horizontal Mergers"), in a merger control review, the FNE will investigate a wide range of competition concerns, including unilateral effects, coordinated effects, conglomerate effects, vertical concerns, and elimination of potential competition. The FNE will also consider how the transaction may affect dynamic competition and whether it may reduce the parties' incentives to innovate.

There is also a special chapter in the guidelines regarding digital platforms and markets, where the FNE outlines its distinctive features and elements that make its assessment different from traditional market analysis. In this section, the FNE mentions additional competition concerns, including risks of undermining non-price variables, such as platforms' terms of use (eg, privacy policies); possible monetisation strategies for non-transactional platforms; as well as the

raising of barriers to entry or expansion that may generate a weakening of competition as a result of the combination of certain information assets of the merging parties (eg, databases of their consumers and their preferences).

4.5 Economic Efficiencies

The parties can describe and submit information evidencing consumer benefits or efficiencies. The FNE will deem them sufficient provided that they are:

- verifiable;
- inherent to the transaction;
- capable of compensating for the increased market power of the resulting entity; and
- transferred to consumers.

The FNE considers both productive and dynamic efficiencies. The Guidelines on Horizontal Mergers provide in this connection that, in markets where the loss of dynamic competition may imply a substantial reduction in competition, dynamic efficiencies will generally have greater importance, given that innovation and continuous improvement of products are fundamental elements in such markets. However, in markets in which the competitive risks associated with concentration are not mostly dynamic, these types of efficiencies generally only counterbalance the risks indirectly. Therefore, in these cases, dynamic efficiencies will be considered by the FNE within the overall analysis of the concentration and both effects will be qualitatively weighted in light of their competitive risks.

4.6 Non-competition Issues

Chilean legislation, in line with the practices suggested by the OECD and the International Competition Network, does not consider the analysis of non-competition issues.

Furthermore, there is a relevant precedent in this connection. In the State Grid/CGE case, the FNE stated that the institutional design of the merger control regime in Chile does not grant the FNE authority to rule on the basis of national or public interest considerations, such as geopolitical strategy, defence or national security, etc, concluding that the FNE can only determine whether a concentration is likely to substantially reduce competition.

Regarding foreign direct investment, Law No. 20,848 establishes that foreign investors shall be treated in the same manner as local investors. Notwithstanding the above, there are two restrictions regarding foreign investment, which are completely separate from merger control rules.

- Prohibition to acquire the domain or any other right, possession or tenancy of real estate bordering a neighbouring country, which only affects the nationals (persons and corporations) of the respective country.
- Ban on private investment in hydrocarbon exploitation. According to the Political Constitution of the Republic of Chile, the State of Chile owns all hydrocarbons, whether liquid or gaseous, existing on the national territory, having the exclusive right to extract or exploit such hydrocarbon deposits. This restriction affects both nationals and foreigners.

There are no filings required for foreign direct investments. In connection with reporting obligations to the Central Bank, please see **1.2 Legislation Relating to Particular Sectors**.

4.7 Special Consideration for Joint Ventures

Pursuant to the Guidelines on Horizontal Mergers, for joint ventures, the FNE focuses on

assessing potential coordinated effects, as these associations create or strengthen structural links between the parent companies. This potentially increases their ability to coordinate competitive behaviour, both within the joint venture's market and in other markets, especially if their activities overlap.

If any party participates in the same market as the joint venture or if the joint venture consolidates the parties' activities in the same market, the FNE will also examine potential unilateral effects. This involves considering how each party's competitive incentives are altered, given that any consumer switching would be partially recaptured through their participation in the joint venture, and assessing the degree of influence each party has over the joint venture's competitive behaviour.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

During the investigation, the FNE may approach the parties in order to discuss potential remedies or for the parties to amend those they already offered.

Furthermore, once the investigation has concluded (and if the remedies offered are considered insufficient, when applicable), the FNE is entitled to block the transaction. For this purpose, the FNE will issue a well-founded resolution supported by a report detailing the elements considered, the findings of the investigations, as well as its conclusions, explaining why the transaction has the ability to significantly reduce competition.

As mentioned above, if the FNE blocks a transaction, the parties have the right to file a special review appeal with the TDLC. In this instance, the TDLC, through a reasoned judgment and after listening to the parties' arguments, will decide whether to clear or block the transaction.

Although DL 211 does not establish appeals against this judgment, there is a precedent in which a prohibition decision was reviewed and reversed by the Supreme Court through the filing of a complaint appeal (see **1.3 Enforcement Authorities**).

5.2 Parties' Ability to Negotiate Remedies

Remedies

The FNE must communicate to the parties the anticompetitive risks arising from the transaction based on the background of the investigation, before deciding to extend the investigation to Phase II and also before issuing a prohibition decision. The parties will then have the right to offer remedies to mitigate those risks.

The parties may offer structural remedies (divestment), either by the sale of assets to a suitable buyer or by removing links between competitors.

On the other hand, they can also offer behavioural remedies, which, according to the FNE Guidelines on Remedies, can be divided into:

- quasi-structural measures focused on the market structure affected by the concentration (eg, access and licensing obligations);
- pure behavioural measures (eg, prohibitions on exclusivity clauses, conditional discounts, tying, arbitrary discrimination, among other matters);

- obligations to prevent the internal transfer of information within the merging entities and their affiliates (Chinese walls);
- remedies that focus on the regulation of market power; and
- obligations regarding the buyer of the divested package.

Remedies Unrelated to Competition

The FNE is not entitled to request or accept measures that are not directly associated with competition concerns.

5.3 Legal Standard

According to the Guidelines on Remedies, remedies must be effective in preventing the concentration's ability to substantially lessen competition.

Secondly, the FNE will assess whether the proposed commitments, in addition to being effective, are feasible to implement, execute and monitor.

Finally, in addition to eliminating the transaction's ability to substantially lessen competition, the remedies must be proportional to the detected competition concern.

5.4 Negotiating Remedies With Authorities

Parties may offer remedies in Phase I and/or Phase II of the investigation.

The FNE may approach the parties to suggest remedies and discuss those offered by the parties, but it cannot impose remedies against the parties' will. However, if the parties do not accept the remedies that the FNE considers necessary to properly safeguard competition, the FNE may block it.

As for the procedural steps that must be taken, the parties can file their first remedy proposal at any time prior to the FNE's final decision. Once the proposal is submitted, the reviewing period will be suspended up to ten days in Phase I and up to 15 days in Phase II.

During that term, the FNE must assess the proposed remedies to determine whether the transaction, subject to such remedies, is likely to substantially reduce competition. If the FNE does not consider the remedies sufficient, it will communicate this to the parties before issuing the Phase II or the prohibition decision, as applicable. The parties can prevent the FNE from issuing such decision by filing a new improved proposal, in which case the same procedure will be repeated.

If the remedies are sufficient, the FNE must approve the transaction subject to the proposed remedies.

When assessing the remedies, the FNE shall focus on their effectiveness in solving the identified competition concerns, their practicality for implementation, execution and monitoring, and their proportionality.

5.5 Conditions and Timing for Divestitures

In general, the FNE will prefer structural remedies rather than behavioural remedies, since there is no need to monitor such measures. In this connection, the FNE will seek to ensure that the remedies are effective, practical, executable and proportional.

The parties may close the transaction before complying with the remedies depending entirely on the terms agreed with the FNE – especially

considering that some remedies might require the transaction to be completed beforehand.

Specifically in the case of divestitures, the Guidelines on Remedies provide for different possible scenarios.

- Scenario I (preliminary solution): The parties identify the buyer in the remedy proposal and enter into a binding commitment with such buyer during the investigation and before implementing the notified transaction. In this case, the identity of the buyer will be included in the clearance resolution.
- Scenario II (initial buyer solution): The parties identify the buyer and enter into a binding commitment with such buyer after the issuance of the clearance resolution and before the notified transaction is completed. In this case, after the approval of the buyer by the FNE, the parties may close the notified concentration.
- Scenario III (post-closing solution): In this case, the clearance resolution will be issued beforehand, leaving the identification of the appropriate buyer and the approval of the buyer by the FNE for after the closing. However, in this scenario, the FNE will require that the parties obtain approval of the buyer and complete the divestment within a period of nine months from the closing.

Compliance with the remedies shall be monitored by the FNE, which can take place through the appointment of a designated compliance officer, who will be responsible for informing the FNE. The FNE usually initiates compliance investigations shortly after ending the corresponding merger control investigations.

Lastly, if the parties do not comply with the remedies, the FNE may file a lawsuit before the TDLC, and the parties will be subject to the general fine regime provided by Article 26(c) of DL 211 (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**).

5.6 Issuance of Decisions

In a merger control review, the FNE issues its approval or prohibition decision through a formal resolution, together with a report indicating the reasons for clearing or blocking the transaction.

Both the final resolution and the supporting report are first notified to the parties and shortly thereafter made public on the FNE's website. However, prior to this publication, the parties are granted the opportunity to make confidentiality comments to these documents, requesting that certain passages be redacted, to the extent that their disclosure to third parties may affect their competitive performance.

The law provides that, if the FNE does not issue any resolution within the legal period, the transaction will be deemed approved. However, the FNE's usual practice is to always issue a grounded resolution, even in the simplest cases.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As stated above, foreign-to-foreign transactions will only be subject to merger control if there is a geographical link, determined by the jurisdictional thresholds.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Clearance decisions will address all aspects of the transaction, including ancillary restraints,

such as non-compete or exclusivity clauses, among others. In its analysis, the FNE will review if these arrangements have the potential to affect competition and, subsequently, include in the clearance decision their conclusions regarding that aspect. The FNE may even request remedies only in connection with ancillary restraints (for example, case Minerva/Marfrig).

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third-Party Rights to Make Representations

Third parties can be requested to answer official requests for information from the FNE during the merger review. When answering the requests for information, they provide comments and make representations if the FNE asks them whether, in their opinion, the transaction raises any antitrust concerns.

Furthermore, when the file becomes public in Phase II, any third party with an interest in the investigation can voluntarily provide information and make submissions expressing their concerns.

Document Access

In Phase I investigations, third parties can request access to the investigation file, but the parties can oppose this request, in which case the FNE will deny the access.

In Phase II, the file becomes public, and therefore third parties can access the entire file, including the public versions of all the confidential documents (where all competitively sensitive information has been redacted).

7.2 Contacting Third Parties

The FNE typically contacts third parties to gain a better understanding of the industry and the competitive implications of the merger. Accordingly, the parties are asked to identify in the notification their main competitors and clients, providing their contact details. The FNE may then reach out to these contacts or other relevant third parties through RFIs. It can also require these third parties to give a statement, in the form of questions and answers, which is recorded and incorporated into the investigation file.

7.3 Confidentiality

Merger investigations are kept confidential during the pre-notification contacts. Furthermore, the fact of the notification is kept confidential until the FNE initiates the investigation. At that time, the FNE will publish a short decision including a description of the transaction and its parties, declaring the filing complete, and opening Phase I of the merger review.

The investigation file itself is confidential during Phase I. At the end of Phase I, the FNE's approval report and decision are made public.

If the FNE decides to extend the investigation to Phase II, the file becomes public, and third parties may request access to it. Nevertheless, the parties can request that certain information be kept confidential, in which case they must provide redacted public versions of the corresponding documents.

7.4 Co-operation With Other Jurisdictions

The FNE co-operates with other agencies when reviewing international transactions by exchanging information.

In this connection, according to the regulation, the parties must report in the notification in which jurisdictions they are filing other merger notifications. Based on this, the FNE may request the parties to submit a waiver, allowing them to contact other competition agencies. The parties can also voluntarily submit a waiver along with the notification or at any other time during the merger review.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Only the FNE's decision to block a concentration can be appealed before the TDLC. Furthermore, the TDLC's final ruling can be subject to a complaint appeal before the Supreme Court. See **1.3 Enforcement Authorities**.

8.2 Typical Timeline for Appeals

The parties must file the special review appeal with the TDLC within ten days of the notice of the prohibition resolution. The TDLC will then summon a public hearing in which the appellant, the FNE, and those who have contributed information to the investigation may participate. The TDLC will issue a ruling within 60 days from the hearing, either confirming the prohibition or revoking the FNE's decision.

Since the entry into force of the new legislation on mandatory merger control in 2017, this special review appeal has been filed only in two cases: in the Ideal/Nutrabien case, in which the TDLC accepted the appeal, and in the Colmena/Nueva MasVida case, in which the TDLC rejected the appeal, but then the Supreme Court reversed the ruling, thereby approving the transaction.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties do not have the right to appeal a clearance decision. However, the Colmena/Nueva Mas Vida precedent leaves the door open for a third party who has intervened in a special review appeal before the TDLC to file a complaint appeal before the Supreme Court.

9. Foreign Direct Investment/Subsidies Review

9.1 Legislation and Filing Requirements

There is no foreign direct investment or foreign subsidies legislation that may require separate filings for transactions beyond that which is necessary under merger control law.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There have been no recent modifications to the relevant legislation on merger control. The last regulation issued was Decree No. 41/2021 of the Ministry of Economy, Development and Tourism, which establishes the Regulation, published on 2 November 2021.

Furthermore, there have been no actions or communications from the authorities that suggest the possibility of any changes in this area, at least in the foreseeable future.

10.2 Recent Enforcement Record

Fines

Regarding the imposition of fines, on 27 February 2024, the TDLC accepted the complaint filed by the FNE against TWDC Enterprises 18 Corp ("TWDC"), stating that TWDC infringed Article 3

bis(e) of DL 211 by providing false information to the FNE during the notification of the merger between TWDC and Twenty-First Century Fox, Inc. As a result, the TDLC imposed a fine of UTA3,000 (approximately. USD2.5 million), plus legal fees.

In January 2023, the FNE filed a lawsuit against the company Cadena Comercial Andina ("CCA"), parent company of Oxxo Chile and OK Market (two chains of convenience stores), for providing false information during the review process of the merger through which the latter chain was acquired, and for failing to comply with one of the measures adopted during the approval of that transaction. However, in July 2023, the TDLC approved the partial settlement submitted by the parties, which included the payment of UTA500 (approximately. USD420,000), to put an end to the part of the complaint concerning the breach of mitigation measures. The trial is still ongoing for the accusation of providing false information when notifying the merger.

Prohibitions

On the other hand, regarding the prohibition of concentrations, the most recent case took place on 22 February 2022, when the FNE prohibited the acquisition by Nexus Chile SpA ("Nexus"), the parent company of Isapre Nueva MasVida ("Nueva MasVida"), of Colmena Golden Cross S.A. ("Colmena"). The decision was appealed before the TDLC, which ultimately rejected the appeal and confirmed the prohibition.

However, Nexus submitted a complaint appeal before the Supreme Court against the TDLC's judges who issued the ruling, accusing them of serious misconduct and abuse in the issuance of the decision. In March 2023, the Supreme Court issued its ruling and annulled the TDLC's resolution, approving the merger between Nueva MasVida and Colmena, subject to a series of mitigation measures.

Demand for Remedies

Out of the 43 transactions notified to the FNE between January 2023 and March 2024, 35 were approved with no remedies required, and six were approved subject to mitigation measures.

The implemented remedies included divestiture measures for the acquiring economic agent; reduction of the term of exclusivity, non-compete, non-solicitation, right to first offer and right to match clauses; and limitations on the geographic and material scope of expansion restrictions.

10.3 Current Competition Concerns

The FNE has reported that, between January 2023 and March 2024, there was a 10% increase in notifications of concentrations compared to the same timeframe in the previous year. The operations were 31 acquisitions of decisive influence over other undertakings; seven acquisitions of control over assets; four joint ventures; and one merger.

The notifications reviewed by the FNE during that period referred to relevant and diverse markets (eg, energy, telecommunications, etc).

Regarding the duration of the investigations, the FNE stated that it was reduced in comparison to the previous period, with an average of 25 working days for unconditional approval in Phase I, which means five days below the maximum legal limit. As for investigations carried out through the simplified notification mechanism without overlaps, the average duration was 21 working days when the investigation was not suspended.

During the same period, three investigations concluded in Phase II, and were assessed in greater depth by the FNE. These involved the acquisition of control over the SAAM port concessionaire by the shipping company Hapag-Lloyd, the acquisition of Entel's assets by OnNet Fibra, and the merger between retail companies La Polar and Abcdin. Of these, two were approved unconditionally, and one was subject to mitigation measures regarding the divestiture of network assets in specific areas where the parties held a significant market share with high entry barriers.

The FNE has also stated that the review of ancillary clauses has made their analysis more complex, and that they have paid special attention to non-compete clauses, commonly agreed upon in merger agreements. The same precaution is applied to non-solicitation clauses, which are likely to impact labour markets, an area on which the FNE has focused.

In addition to investigations initiated by requirement of the law and notification from the parties, the FNE has been actively monitoring diverse markets. In this regard, over the past year, the FNE initiated three ex officio investigations after identifying different concentrations that were not notified.

Likewise, the FNE filed two lawsuits before the TDLC for the infringement of Article 3 bis(e) of DL 211, for providing false information when notifying a concentration.

Trends and Developments

Contributed by:
Claudio Lizana, Daniela León, Tomás Appelgren and María Jesús Gaete
Estudio Lizana

Estudio Lizana is a boutique law firm headquartered in Santiago, Chile, specialising in competition, regulatory and compliance matters, as well as corporate law. The team is made up of three partners, three associates and one paralegal. It has comprehensive expertise in competition law matters, including merger control, investigations by the Fiscalía Nacional Económica (FNE) on cartels, abuses of dominance, and unfair competition, as well as litigation before the Chilean Competition Court (TDLC) and the Supreme Court. Recent relevant work includes advising both Brink's Chile and Indura (Air Products) in their defences in ongoing cartel litigations (historical cases due to the high fines requested); Mastercard in a TDLC proceeding regarding the issuance of regulations for the payment cards industry, and ongoing litigation against several payment facilitators; Minerva Foods in the merger control review of an acquisition of assets from Marfrig; and a large technological company in an ongoing antitrust investigation.

Authors

Claudio Lizana is the founding partner of Estudio Lizana. For more than 30 years, his practice has focused on antitrust matters, including litigation before the TDLC and the Supreme Court, investigations on cartels and abuse of dominance, and merger control proceedings before the FNE. He also has extensive experience in corporate matters. Previously, he was partner of the law firm Carey for more than 20 years. He is a member of the American Bar Association.

Daniela León has been a partner at Estudio Lizana since 2023. Her practice focuses on antitrust and regulation, with extensive experience in merger control proceedings before the FNE, as well as investigations of the antitrust, cartel and compliance divisions of the same authority. She has also represented important national and international companies in contentious and non-contentious proceedings before the TDLC and the Supreme Court. Previously, she worked as an associate in Carey's antitrust and regulation group for five years and then joined Estudio Lizana as an associate, before being named partner. She is a member of the American Bar Association.

Tomás Appelgren has been a partner at Estudio Lizana since 2023, after joining the firm as an associate. His practice focuses on antitrust and regulated markets, advising clients in investigations carried out by the FNE, as well as in contentious and non-contentious matters before the TDLC. He also has experience in corporate law, mergers and acquisitions. Before joining Estudio Lizana, he worked as an associate in Carey's antitrust and regulated markets group for four years.

María Jesús Gaete has been an associate at Estudio Lizana since 2022. Since joining the firm, her work has focused on competition and regulation matters, with special focus on judicial matters before the TDLC. She actively participates and collaborates in the work of partners in all types of court cases, both contentious and non-contentious, as well as in FNE investigations. Previously, she worked as a paralegal in Baker McKenzie Chile.

Estudio Lizana

Candelaria Goyenechea 3900
Of. 303, Vitacura
Santiago de Chile
Chile

Tel: +56 9 9237 1671
Email: clizana@estudiolizana.cl
Web: www.estudiolizana.cl

ESTUDIO LIZANA
ABOGADOS

Contributed by: Claudio Lizana, Daniela León, Tomás Appelgren and María Jesús Gaete, **Estudio Lizana**

Introduction: General Statistics on Merger Control in Chile

The merger control regime in force in Chile, established by Law 20,945, of 30 August 2016, came into force just over seven years ago, specifically, as of 1 June 2017. Since then, and until 31 March 2024 (the most recent date for which statistics have been published by the authority exist), a total of 279 concentrations have been notified to the Chilean Competition Agency (*Fiscalía Nacional Económica*, FNE).

Only four of these concentrations have been blocked by the FNE. However, two of these prohibition decisions were subsequently reversed by court rulings: one by the Chilean Competition Court (*Tribunal de Defensa de la Libre Competencia*, TDLC), and the other, by the Supreme Court.

Among the transactions approved by the FNE, only 23 have been subject to remedies, which implies that, in the vast majority of cases, the FNE has approved the notified concentrations without conditions. In line with the above, the investigations extended to Phase II (an in-depth analysis of the merger's effects on competition, which requires more time) have reached 18, with all the others being approved in Phase I (which implies a shorter and more expedited review).

It should also be noted that, in March 2019, the FNE raised the thresholds for mandatory notification (thresholds which entered into force in August of the same year). This substantially reduced the number of concentrations under the authority's scrutiny. Since then, only one case (FNE v Navimag) is known in which this authority has challenged a below-threshold merger – ie, a concentration that was not subject to mandatory merger control, but was still investigated by the FNE post-closing, because it raised competition concerns.

The above allows us to conclude that, so far, the Chilean competition authorities have not had an interventionist approach to merger control. The question remains, however, whether this trend could change in the near future, in the light of the phenomenon observed in other reference jurisdictions, such as the United States, the European Union, and the United Kingdom, where regulators are showing a growing inclination to scrutinise and challenge concentrations.

This article provides an overview of different aspects of the merger control regime in Chile that are of particular importance, so that companies planning to take part in concentrations with effects in Chile take them into account.

The Anomaly of the Appeal to the Supreme Court

As mentioned, one of the few prohibition decisions issued by the FNE so far was finally reversed by the Supreme Court of Chile. This is quite anomalous, as Decree Law No 211 ("DL 211") – Chile's competition law – does not provide for any appeal to the highest court to reverse decisions related to the merger control regime. On the contrary, pursuant to DL 211, in the event of a prohibition decision by the FNE, the parties may only file a special appeal for review before the TDLC.

The case in question was the merger between two private social security health institutions, Nueva Masvida and Colmena. The FNE had prohibited the merger, for which the parties filed a special appeal for review before the TDLC. The latter agreed with the FNE's analysis, concluding that the transaction would involve unilateral and co-ordinated risks, which would not be suf-

ficiently mitigated by the remedies proposed by the parties. Thus, the TDLC rejected the appeal, and the concentration was therefore blocked (with one of the court's judges voting against).

However, one of the parties challenged the TDLC's ruling through a complaint appeal (*recurso de queja*) filed with the Supreme Court. A complaint appeal is a very special appeal that must be filed directly with the hierarchical higher court, the purpose of which is to correct serious faults or abuses committed by judges in the issuance of judicial decisions and to enforce their disciplinary liability.

On 27 March 2023, the Supreme Court revoked, in a unanimous ruling, the TDLC's blocking decision, and instead approved the concentration, accepting the remedies proposed by the parties and imposing additional ones.

This Supreme Court ruling is certainly a very important precedent for the merger control regime in Chile, since it seems to imply that, through the hearing of complaint appeals, said court will be able to review any merger blocking decision as a sort of "third instance" — a matter not provided for, however, in DL 211.

The Few (Yet Noteworthy) Gun-Jumping Cases

Just like most jurisdictions, Chile has an ex ante merger control regime, providing for mandatory pre-closing notification of concentrations above certain thresholds. The regime prohibits implementing the notified concentration until the FNE has approved it, which is known as a "standstill obligation".

Gun-jumping is an infringement of the merger control regime and usually refers to two types of conduct: implementing a concentration in violation of the duty of notification (known as "failure to notify") or prior to obtaining the authority's clearance (violation of the standstill obligation). In Chile, both behaviours are outlined, respectively, in Article 3 bis(a) and (b) of DL 211.

Pursuant to Article 26(e) of DL 211, failure to notify is subject to a fine of up to 20 "annual tax units" (*Unidades Tributarias Anuales*, UTAs) (approximatelyimately USD17,180) for each day of delay counted from the completion of the transaction (without a maximum). In turn, violations of the standstill obligation are subject to the general fine regime for antitrust violations established by Article 26(c) of DL 211, which involves fines of up to (i) 30% of the sales of the offender corresponding to the line of products or services associated with the infringement for the period for which it was extended or (ii) up to twice the economic benefit obtained by the offender due to the infringement. If it is not possible to determine the sales and economic benefit obtained by the offender, the TDLC may impose a fine of up to 60,000 UTAs (today, approximatelyimately USD50 million).

In addition, the TDLC may also impose other types of corrective, preventive, or prohibitive measures, including modifying or even terminating the acts, contracts, or agreements that violate the provisions of the law. This means that, if the concentration creates anti-competitive effects, the court can impose remedies or, if these are insufficient, even order the reversal of the transaction.

Since the mandatory merger control regime came into force in 2017, the FNE has conducted a few known gun-jumping investigations, exercising its authority to investigate transactions within one year of their completion, as per Article 48 para. 9 of DL 211.

Minerva/JBS

The first case was the Minerva/JBS merger (2018), in which the FNE claimed that the parties closed the deal prior to approval – ie, they violated the standstill obligation. In the end, no fines were imposed because the FNE and the parties reached a settlement agreement, whereby the latter had to pay approximatelyimately USD1 million in total for fiscal benefit. Prior to the settlement, the transaction was unconditionally cleared by the FNE.

GSK/Pfizer

In April 2020, the FNE started an ex officio investigation after learning, based on the parties' own public statements, of the completion of a transaction between GSK and Pfizer to combine their over-the-counter drug portfolios. Since this transaction was not notified in Chile, but was subject to merger control in other jurisdictions, the FNE decided to scrutinise the deal. Ultimately, the FNE determined that, despite what had been reported in the media, the transaction was not a joint venture but rather an acquisition of rights by GSK over Pfizer's "consumer healthcare" segment. Consequently, the transaction did not meet the thresholds, since the target assets did not have significant sales in Chile, and the case was closed without further actions. However, the authority took the opportunity to emphasise, in its resolution to close the case, the importance of using the pre-notification system to avoid problems of regulatory interpretation that could eventually lead to a gun-jumping hypothesis.

Equifax/SIISA

In September 2020, the FNE initiated another investigation based on a complaint from a third party, regarding a deal between Equifax and SIISA, to determine whether the parties had breached the duty to notify the concentration. The FNE concluded that, although Equifax was the main agent in the credit bureau market, SII-SA's sales did not exceed the individual threshold required by law, and therefore, parties were not required to notify the transaction. Despite ruling out a failure to notify, the FNE conducted an ex post analysis to determine whether the transaction created actual or potential competition concerns, punishable under the general antitrust rules, but ultimately closed the case without finding any anti-competitive offence.

Carozzi/Unilever

Also in 2020, following another third-party complaint, the FNE initiated a gun-jumping investigation to review Carozzi's acquisition of Unilever's ice cream business. The FNE concluded that Unilever's sales did not exceed the individual threshold required for mandatory notification. The FNE also conducted a substantiative competition review, finally ruling out any anti-competitive effects arising from the transaction. Nonetheless, in its resolution to close the case, the FNE noted that, since the sales were very close to the thresholds and involved a significant market player, a voluntary notification would have been advisable, to avoid ex post scrutiny.

Recent investigations

Lastly, the FNE recently initiated three gun-jumping ex officio investigations:

- The first one, initiated in November 2023 (but only made public in March 2024), involves a transaction between Hortifrut and the Public Sector Pension Investment Board, where the latter acquired a 49.56% stake in the former. This acquisition was brought to the FNE's notice through an essential fact submitted by Hortifrut to the Financial Market Commission.
- The second investigation, initiated in March 2024, concerns the acquisition of a 65%

stake in Punto Ticket by a joint venture between CTS Eventim and Sony Music. This transaction, once again, came to the FNE's attention through media reports.
- Finally, the third transaction came to the FNE's attention through a third-party complaint, which was supported by media reports, and refers to the acquisition of control over Cuenca del Maipo Servicios de Salud S.A. by the Chilean Association of Security. The FNE initiated this ex officio investigation in May 2024.

FNE gun-jumping policy

Based on the cases mentioned above, some conclusions relevant to companies considering mergers with market effects in Chile can be drawn. Firstly, the FNE can initiate a gun-jumping investigation based on a wide range of sources, such as media reports, public company statements, third-party complaints, as well as information gathered in the context of an ongoing merger control proceeding. Moreover, in the absence of a gun-jumping infringement, the FNE can still conduct an ex post competitive analysis of the transaction, because DL 211 allows it to initiate an investigation on a non-notifiable transaction within one year of closing. If, as a result, the FNE concludes that the deal raises competition concerns, it may challenge it before the TDLC. Finally, parties to a non-notifiable transaction should always assess whether a voluntary notification or a pre-notification consultation, as the case may be, is advisable to avoid an ex post review of the proposed transaction.

Submission of False Information in the Context of Merger Control

Article 3 bis(e) of DL 211 penalises those who notify a concentration by providing false information. This conduct may be subject to fine (according to the general fine regime for antitrust violations described above), as well as other corrective, preventive, or prohibitive measures.

In recent years, the FNE has filed lawsuits against two different companies, for allegedly providing false information during a merger investigation, thus enforcing the above provision.

Disney/Fox

In the first case, concerning the Disney/Fox merger, the FNE cleared the transaction, but then filed a lawsuit with the TDLC seeking the imposition of a fine against TWDC Enterprises 18 Corp ("Disney") amounting to approximatelyimately USD4.3 million.

The FNE claimed that Disney violated Article 3 bis(e) of DL 211 because it failed to disclose relevant internal documents during the merger investigation. Specifically, the FNE held that the infringement occurred because Disney initially stated that it had no internal documents analysing the affected market – which must be provided as part of the merger filing according to the applicable regulation – and then reported that it had only two of such documents. Later, however, the FNE determined that Disney was in possession of at least thirty studies, analyses, reports, surveys, or comparable documents containing information of the affected market.

The TDLC fined Disney 3,000 UTAs (approximatelyimately USD2.5 million). Disney appealed this decision to the Supreme Court, and its final ruling is still pending.

CCA/OK Market

In the second case, the FNE filed a lawsuit against Cadena Comercial Andina (CCA) for providing false information during the merger investigation involving the acquisition of OK Market (a convenience store chain) and requested the

imposition of a fine of 6,500 UTA (approximatelyimately USD5.5 million).

According to the FNE, CCA did not submit all the internal background documents analysing the affected market, just like in the Disney case. Initially, CCA stated that only six documents existed, but subsequently, through a supplement to the notification, CCA disclosed another 34 documents, which were not originally submitted. Ultimately, the FNE found that there were at least 60 additional documents that clearly met the criteria and were not submitted in a timely and proper manner. The TDLC has not yet issued a final ruling in this case.

These cases are interesting, because they demonstrate that, in the FNE's view, failure to produce internal documents relevant to its investigation is a serious infraction, and that the authority is prepared to pursue the liabilities associated with this conduct, even if the merger is ultimately cleared. Indeed, this is an infringement that deserves a separate analysis from the substance of the notified concentration. It is also important to note that the TDLC's ruling in the Disney case fully agrees with the FNE's analysis, asserting that the statement by the accused companies that they did not have other documents amounts to the delivery of false information, without it being necessary to have manipulated or adulterated the documents for this purpose. Because of the above, companies must take maximum care and diligence when notifying a concentration to the FNE, without omitting any information or document required by the applicable regulation, because any claim of not having certain background information, without this being effective, may involve sanctions.

Increased severity of penalties under the New Economic Crime Act

To conclude this segment, it is relevant to highlight a legislative change of which companies must be aware in connection with the above-mentioned violation. Specifically, Act No 21,595 (the "Economic Crime Act") was recently enacted in Chile, broadening the categories of conduct for which legal entities may be held criminally liable, including (among many others) concealing information requested by the FNE or providing false information in the context of any type of FNE investigation – therefore, including merger control investigations.

Today, Article 39(h) of DL 211 provides that the individuals responsible for providing false information or withholding information from the FNE during an investigation may be subject to a criminal penalty of imprisonment, for a period ranging from 61 days to three years. However, this provision has never been enforced. The reasons for this are not publicly known, but it is possible to guess that this has to do with the high standard of proof in criminal matters ("beyond any reasonable doubt") and also with the fact that a clear culprit in the case of behaviour such as this is usually not an easy task. Nevertheless, the Economic Crime Act opens the possibility that this provision will begin to be applied, not with respect to individuals, but to the legal entities investigated by the FNE.

In this connection, it should be noted that, pursuant to the Economic Crime Act, criminal liability of the legal person is autonomous with respect to the liability of the individuals who committed the crime. For this reason, the law provides that the lack of identification of the individuals who perpetrated the crime (which may prove difficult in the context of an FNE investigation) will not prevent the criminal liability of the legal person,

provided it can be demonstrated that the conduct could only have been perpetrated by or with the intervention of a person within the company.

This law will come into force in September 2024, authorising the FNE to report the alleged infringement to the Criminal Prosecutor's Office. If a criminal conviction is obtained, the competent criminal court can assess a fine from 11 to 100 "fine-days" for this crime, with each "fine-day" being up to 5,000 "monthly tax units" (*Unidades Tributarias Mensuales*, UTMs), although this depends on the company's income. Therefore, the maximum criminal fine could amount to 500,000 UTMs (approximatelyimately USD35 million). In addition, the court may impose penalties of loss of tax benefits, disqualification from contracting with the State, confiscation, and the obligation to publish an extract of the conviction.

Importantly, criminal prosecution does not prevent prosecution before the TDLC, which means that the offending company could be subject to two different fines for the same conduct, if it withholds or provides false information in the context of a merger control investigation: a fine for the crime of concealing information or delivering false information in an FNE investigation, and another for violating the provision of Article 3 bis(e) of DL 211, which penalises the notification of a concentration by providing false information. However, in such a case, the law provides that the administrative fine will be attributed to the criminal fine, or vice versa, which implies that if the company had already paid one of the two fines, it would only have to pay the remainder after the second conviction, if applicable.

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