International Joint Ventures in Latin America

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Introduction

The globalisation of markets has led to the internationalisation of competition. As competition becomes stronger and more dynamic, so do different types of alliances among competitors. Alliances and collaboration arrangements allow companies to gain competitive advantage through access to a partner's resources, including markets, technologies, capital and people. By doing so, market players reduce production costs, share risks in uncertain investments, and are in a better position to fund expensive innovation efforts.

There is no strict definition for the term 'joint venture' (JV), as multiple arrangements with different characteristics may exist, from the formation of new entities to the execution of contractual alliances. JVs can cover a wide array of business activities, including research and development, production, marketing, distribution, purchasing and sales. From an antitrust law perspective, it is key to assess whether the transaction will result in concentration among market players (concentrative JV) or if it refers to collaboration among competitors (collaborative JV).

Pro-competitive effects that may result from a JV, such as economies of scale and scope and increased innovation to the benefit of consumers, are widely accepted by

antitrust doctrine and jurisprudence around the world. Likewise, antitrust agencies are also aware that such arrangements may lead to anti-competitive effects primarily by providing a channel through which market players may collude, reducing actual or potential competition among competitors. The assessment of the objectives and specific terms of the JV, which includes the governance structure adopted, the JV's duration, the freedom maintained by the parent companies to compete with the JV, among other topics, has therefore been at the crux of the antitrust review.

This article provides an overview of antitrust law and practice on JVs in key countries in Latin America, where multiple forms of collaboration among competitors play an important role in promoting the entry of foreign investments. The first part reviews the current institutional framework and case law on JVs in Brazil; the second section brings forth a brief summary on the applicable law and policy on JVs in Mexico; and the third part describes the rules in Chile. The final section of the article includes our conclusions.

Brazil

Law No 8,884 of 11 June 1994 ('Law No 8,884/1994' or the 'previous Law') was enacted in the midst of some liberalising reforms of the 1990s and at the aftermath of the end of the price control regime that had been in place in Brazil for a number of years. Some of the behaviour defined as anti-competitive reflected government concerns of that time, such as 'abandon or destroy crops or harvests without proven good cause'; 'discontinue or significantly reduce production, without proven good cause'; and 'abusive pricing'.

Not long after it took effect, enforcers and practitioners alike acknowledged the need to review some of the key provisions with the purpose of eliminating inefficiencies and of further streamlining the review of mergers and of other business associations, such as JVs, in line with international best practice. After many years of discussion within the Brazilian government and six years of congressional review by the House of Representatives and the Senate, a new competition law was enacted in 2011.

The new competition law

Brazil's new competition law (Law No 12,529/2011) entered into force on 29 May 2012 and significantly changed the landscape of competition enforcement in Brazil. Brazil's antitrust agency, CADE, was restructured to include: (i) a tribunal composed of six commissioners and a President; (ii) a Directorate General for Competition (DG); and (iii) an economics department.

Brazil's new antitrust law introduced a mandatory pre-merger notification system, that is, transactions that meet the Brazilian merger filing thresholds cannot be consummated before CADE's clearance. Penalties for 'gun jumping' include fines ranging from BRL60,000 to BRL60m and the transaction may be also declared null and void by the authority. The new law does not specifically determine what constitutes gun jumping, generally stating that '[t]he parties should maintain their physical structures and competitive conditions unaltered until CADE's final approval, being prohibited any transfer of shares or any influence of one party over another's business, as well as the exchange of competitively sensitive information outside of what is strictly necessary for the execution of the relevant binding agreement by the parties.' Violations can occur even if the parties to the transaction do not compete in the same markets. In gun-jumping cases involving competitors, coordination of competitive activities or detailed information exchanges can also lead to a cartel violation, subjecting the parties to fines from 0.1 to 20 per cent of a company's (group of companies' or conglomerate's) gross revenues generated in the 'sector of activity' affected by the infringement in the year prior to the initiation of the investigation.[1]

The maximum period to conduct the merger review is 330 calendar days from the day of filing, or the day CADE considers the filing to be complete (whichever is sooner). Many of the cases notified to the Brazilian antitrust authority, however, are reviewed under a fast-track proceeding, under CADE's Resolution No 02/2012, and cases are cleared, on average, in approximately 25 days. In complex cases, the law also allows the reporting commissioner to authorise the parties to close the transaction before receiving CADE's clearance, subject to conditions such as the limitations on the freedom of the acquirer to: liquidate assets, integrate activities, dismiss workers, close stores or plants, terminate brands or product lines and alter marketing plans.

In merger cases, the DG is allowed to clear simple transactions without the need to submit its decisions to CADE's Tribunal. However, the law contains a provision allowing CADE's Tribunal to re-examine any decision issued by the DG, either by the initiative of a commissioner or any third-party (the so-called 'avocation process'). In February 2013, for the first time CADE resorted to this provision to review a merger that had been cleared by the DG, ultimately upholding the DG's decision.

As of today, there is a limited body of case law issued under Brazil's new merger

1 On 28 August 2013, OGX Petróleo e Gás Participações (OGX) reached a settlement agreement with the Administrative Council for Economic Defence (CADE) to close its investigation regarding OGX's alleged violation of the premerger waiting period requirements of Brazil's new competition law. CADE concluded that OGX had taken steps to prematurely close the acquisition of Petróleo Brasileiro's (Petrobras) shareholding in a consortium formed to explore pre-salt oil and gas concessions in the city of Santos, and OGX agreed to pay BRL3m (approximately US$1.3m) in fines. This is the first instance that a gun-jumping case was decided by Brazil's antitrust agency.

control regime, and CADE is generally expected to take into account decisions issued under the previous law. In any case, it should be noted that the Anglo-American concept of binding judicial precedent, that is, *stare decisis*, is virtually nonexistent in Brazil, and CADE is under no obligation to follow past decisions in future cases. Under CADE's internal regulation, legal certainty is only achieved if CADE rules in the same direction at least ten times, after which they codify a given statement via the issuance of a binding statement. To date, CADE has issued nine binding statements, all under the previous competition law.

Mandatory filing criteria

Brazil's competition law requires that an international transaction be filed in Brazil if the following criteria are met: (i) each of at least two parties to the transaction meets the turnover threshold; (ii) the transaction amounts to 'an economic concentration', as defined by CADE's Resolution No 2/2012; and (iii) the transaction produces effects in Brazil, as defined by Article 2 of Brazil's competition law ('effects test'). The law also introduces a clawback provision that allows Brazil's antitrust agency to review transactions that fall outside the merger thresholds within one year of its closing. Consumer associations, clients, suppliers, and competitors may file complaints against a transaction before the agency, prompting CADE to act.

Turnover threshold

The competition law provides for minimum size thresholds, expressed in total revenues derived in Brazil by each of at least two parties to the transaction. Joint Resolution No 994/2012 of the Ministries of Finance and Justice established that one party must have Brazilian revenues in the last fiscal year of at least BRL750m and the other BRL$75m – both acquirer and seller, including the whole economic group, should be taken into account.

Pursuant to CADE's Resolution No 2/2012, the following entities shall be considered as part of the same 'economic group' for the purposes of calculating the group's revenues: (i) entities subject to common control; and (ii) all the companies in which any of the entities subject to common control holds, directly or indirectly, at least 20 per cent of the voting or total capital stock.

In private equity transactions, the turnover of the following entities shall be taken into account for the purposes of determining whether a filing is mandatory: (i) management company; (ii) funds under the same management company; (iii) limited partners that hold at least 20 per cent of at least one of the funds mentioned in item (ii); and (iv) the portfolio companies in which one of the funds mentioned in item (ii) holds at least 20 per cent of their voting or total capital stock.

Types of transactions subject to filing

Whereas the new provisions specifically refer to 'concentration acts', it defines those very broadly as when: (i) two or more companies merge; (ii) one company acquires sole or joint control of the stock or assets of another, or even a minority shareholding; (iii) an absorption of other companies takes place; or (iv) a JV, an association or a consortium is formed. The provisions do not apply to consortia that are formed in connection with public bids.[2]

CADE's Resolution No 2/2012 defined clear criteria to determine when an acquisition that does not involve change in control is subject to mandatory filing. They are as follows:

- if, as a result of the transaction, the acquirer becomes the largest individual shareholder of the target company;
- in cases that do not involve horizontally or vertically related companies, if a party acquires at least 20 per cent of the voting or total capital stock of the target company, or in cases where the party already holds 20 per cent of the voting or total capital stock of the target company, if the party acquires at least 20 per cent of the voting or total capital stock from the same seller;
- in cases involving horizontally or vertically related parties, an acquisition that results in the buyer having at least five per cent of the voting or total capital stock of the target company;
- in cases the party already holds at least five per cent of the voting or total capital stock of the target company, every time the shareholder acquires an additional stake of at least five per cent; and
- in cases involving the already controlling shareholder, when the controlling shareholder acquires at least an additional 20 per cent stake from the same seller.

The secondary legislation has not addressed whether associative contracts that refer to licensing, distribution, supply and other commercial arrangements that are not typical mergers fall under the mandatory filing thresholds. These situations will become clear only through new case law, as will be further discussed below.

Effects test

The so-called effects test is met whenever a given transaction is wholly or partially performed within Brazil or, if performed abroad, it is capable of producing effects within Brazil. This will be the case if the target to the transaction has a direct and/ or indirect presence within the country. Direct presence is achieved through a local subsidiary, distributor, sales representative, etc. Although indirect presence is

2 The reasoning for that is that the government authority in charge of the procurement will undertake the antitrust authorities' role to ensure that the bids will be competitive.

most commonly established through export sales into the country, we cannot rule out the possibility that CADE would consider third-party sales (eg, via a licensing agreement) as evidence of indirect presence in Brazil.

In a case reviewed under the new law, the DG cleared a transaction that was submitted for review simply because the buyer and seller fulfilled the Brazilian turnover threshold, despite the fact that the target had no activities in Brazil (the target was an international airport in Curaçao – see Case No 08012.002945/2012-81). In another case, adjudicated in March 2013, the DG concluded that the review was not mandatory given the absence of effects in Brazil as: (i) the target had no activities in Brazil; (ii) there were no horizontal or vertical relationships between the parties that could affect Brazil; and (iii) the geographic market was local in scope (see Case No 08700.001204/2013-13). It is worth mentioning that neither of the DG's decisions was reviewed by CADE's Tribunal.

Furthermore, given the limited case law under Brazil's new merger control regime, it is worth mentioning that under the old system, CADE took the approach that it had no jurisdiction over some international transactions given the absence of effects in Brazil (see Case Nos 08012.003246/2002-86, 08012.009254/2002-36, 08012.006025/2001-89, 08012.005749/2003-77, and 08012.005925/2003-71). The common feature of these transactions was that: (i) the target had no direct presence in Brazil; (ii) the target had low or no sales to Brazil in recent years; (iii) such sales were made on a sporadic basis; (iv) there were no horizontal or vertical relationships between the target and the buyer in the relevant market which affected Brazil.

Also, in a 2011 case (Case No 08012.003505/2011-60, adjudicated by CADE's Tribunal on 8 June 2011), Schneider Electric acquired control over Summit Energy Services, a company that had reported no sales in Brazil and no Brazilian clients. The parties argued that the notification was not mandatory since the transaction did not generate effects in Brazil. CADE, however, considered the notification mandatory based solely on the fact that the parties met the turnover threshold. Moreover, in Case No 08012.009358/2006-74, the then-investigative agency SDE stated that the filing was not mandatory because 'the transaction did not involve Brazilian companies and the product at issue is not sold in Brazil'. CADE's Tribunal dismissed SDE's opinion stating that: 'SDE's opinion is based on a partial assessment [of the effects test…] in order to assess whether an international transaction does not produce effects in Brazil […] it is not sufficient to establish whether the transaction involves Brazilian companies or exports into the country.' CADE stated that if the target's production capacity is within a relevant market that includes Brazil, a Brazilian filing is mandatory.

Review on the merits

Brazil's antitrust law does not contain language specifically setting forth the substantive standard to be employed in reviewing transactions, but the interpretation of the law by CADE allows us to conclude that the standard applied in Brazil contains both a dominant position and a lessening or restriction of competition tests. No merger guidelines have been issued by CADE to date, but it is expected that CADE will take into account the case law and regulations under the previous law, including SDE's and SEAE's Horizontal Merger Guidelines.[3]

The above-mentioned merger guidelines adopt traditional merger analysis and describe five steps in the review process:

- *Step 1: Defining the relevant product and geographic markets*: The methodology used for defining the relevant product and geographic markets is mostly based on substitution by consumers in response to hypothetical changes in price. The guidelines incorporate the 'SSNIP test', which aim to identify the smallest market within which a hypothetical monopolist could impose a small and significant non-transitory increase in price (usually taken as a price increase of between five and ten per cent for at least 12 months). Supply side substitutability is also sometimes considered at this stage.
- *Step 2: Determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power*: The law presumes market power to exist if the parties jointly hold a share of at least 20 per cent of the market. The guidelines describe threshold levels of market concentration that raise concerns about the possible exercise of market power in either of two ways: (i) by a single firm unilaterally, when that firm has a market share of at least 20 per cent; or (ii) through coordination of firms in a market in which the four-firm concentration ratio is at least 75 per cent and the resulting firm has a market share of at least ten per cent. If the market concentration exceeds either of those levels, CADE proceeds to step three. The guidelines do not explicitly adopt the Herfindahl-Hirschman Index (HHI) as a measure of concentration but CADE usually uses it, following the US or even the EC standards.
- *Step 3: Assessing the probability that market power will be exercised post-merger*: CADE will consider market conditions relating to the likely exercise of market power, taking into account both unilateral and coordinated effects. These conditions include the

3 Prior to Law No 12,529/11, there were three competition agencies in Brazil: the Secretariat of Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defence (CADE). The SDE was the chief investigative body in matters related to anti-competitive practices, and issued non-binding opinions in connection with merger cases. The SEAE also issued non-binding opinions related to merger cases and issued opinions in connection with anti-competitive investigations. The CADE was structured solely as an administrative tribunal, composed of six commissioners and a President, which made final rulings in connection with both merger reviews and anti-competitive practices.

opportunity for increased imports, conditions of entry and other factors that may affect rivalry, for example, scope of competition between the merging parties and customer switching patterns, as well as prior similar mergers and countervailing market power of buyers or suppliers. Vertical issues are increasingly being raised during the review. If CADE concludes there is a likelihood of market power exercise following the completion of transaction, CADE proceeds to Step 4.

- *Step 4: Examining the efficiencies generated by the transaction*: The authorities will consider whether cognisable efficiencies resulting from the merger are likely to reduce or reverse adverse effects. It is incumbent upon the merging firms to substantiate efficiency claims so that CADE can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved, how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific;
- *Step 5: Evaluating the net effect of the transaction on economic welfare*: Historically, all the times CADE reached Step 5, the transaction was either blocker or subject to substantial remedies.

The law allows CADE to take whatever measures deemed necessary to ensure that the transaction would not impact competition – there is a preference for adopting structural rather than behavioural remedies. If CADE finds a transaction to be harmful to competition, it may block it or accept remedies, particularly divestitures of production facilities, stores, distribution networks or brands. Under the new law, parties can negotiate undertakings with CADE to remedy perceived competition issues. Parties can offer undertakings from the day of filing up to 30 days following the challenge of the transaction before the Tribunal by the DG.

Rules on the review of JVs

As discussed above, Brazil's competition law includes in the types of transactions subject to review the formation of 'a JV, an association or a consortium'. Under Brazil's new and previous competition law, there is no clear distinction between full function and non-full function JVs as regards the duty to submit them to CADE. Nonetheless, full function JVs are generally viewed by CADE as economic concentrations and, as such, they are subject to mandatory notification if the applicable thresholds (turnover threshold and effects test) are met.

A non-full function JV may be exempted from notification if: (i) it does not amount to an economic concentration; and (ii) it can be viewed as a cooperation among competitors that does not limit competition. This is usually the case of JVs with a rather limited scope that leave their participants independent to act in the market as regards key market-related issues (ie, price, output, business plan, investments, etc) and has no non-compete clauses. As further discussed, under

CADE's new competition law, the DG has already reviewed a number of JVs and whether they fall under the mandatory review thresholds or not.

Regarding the review on the merits, over the years, JVs subject to merger review have been reviewed like typical merger cases, that is, through the traditional five-step review process discussed above: (i) definition of relevant market; (ii) determination of the parties' market share; (iii) assessment of the probability of the parties exercising market power after forming the JV; (iv) evaluation of the efficiencies generated by the transaction; and (v) evaluation of the net effect on welfare. The main concern of the authority is whether the JV will increase the risk of collusion between the parent companies to the detriment of competition.

CADE's Resolution No 02/2012 states that the association of two or more companies to form a newly joint-controlled company, which would provide products and/or services that are not horizontally or vertically related to the products and/or services offered by the parent companies, is eligible for the fast-track review.

CADE's case law

PETROBRAS AND MPEC CONSORTIUM

In October 2012, CADE adjudicated a merger case involving a partnership between Petrobras and MPEC Consortium,[4] where the parties had created a JV to offer environmental and risk management services to important consumers of oil products. While the substantive review was straightforward since the case did not raise any potential antitrust concerns, it was the first where CADE began to shed light on the types of JVs and associative contracts that are subject to mandatory filing.

The parties argued that the transaction was not subject to merger review, since it would not result in the formation of any structural link between the parties or in concentration in the market. CADE's legal services, followed by the DG, concluded otherwise and highlighted that although the parties would remain structurally and economically independent, they would jointly develop an economic activity and that could lead to the elimination or reduction of competition in the affected markets. Moreover, the transaction agreement included an exclusivity clause preventing the companies from individually providing environmental and risk management services outside the partnership.

CADE then found that the transaction would result in a minor horizontal overlap in view of Petrobras' and MPEC's small market shares in the segment of environmental and risk management services. The transaction did not result in vertical integration since Petrobras' subsidiary BR did not require minimum conditions to supply oil products that would make hiring the JV's management

4 Merger Case No 08700.008736/2012-92.

service imperative or even tie the products' purchase with the acquisition of the management services.

Bosch, ZF and Knorr-Bremse

Another important case adjudicated by CADE in 2013 involved a greenfield project through a join venture entered into by Bosch, ZF and Knorr-Bremse[5] for the provision of services to car maintenance and support shops in Europe. The DG dismissed the case based on the 'effects test' provided for in the antitrust law. Although the parties to the JV met the statutory turnover thresholds, the JV was not deemed to be reportable in Brazil because: (i) it would have no activities in the country or generate any revenue in Brazil; (ii) there were no horizontal or vertical relationships between the parties that could affect Brazil; and (iii) the geographic market was local in scope.

Vidigal Prado/Yasuda/Marítima

This transaction involved the consolidation of Yasuda's control in the JV *Marítima Seguros*, by acquiring approximately 33 per cent of stock held by the Vidigal Prado Family.[6] In this case, for the first time CADE assessed how to calculate the group's turnover in cases involving JVs (please refer to the 'Turnover threshold' section above for the rules to calculate the group's turnover for purposes of defining the need for a merger filing).

The parties argued that the acquisition was not reportable since the buyer, the seller and the target individually considered would not meet the turnover thresholds and that CADE should not include the target's turnover in the economic group's turnover of both the buyer and the seller as this would result in double counting. CADE took a different approach and concluded that since both buyer and seller held over 20 per cent of stock of the target, it was part of both economic groups and, therefore, its turnover should be considered for both buyer and seller.

Itaú Unibanco and BMG

In yet another case adjudicated by CADE under the new law, the Brazilian antitrust authority assessed whether any competitive effect would derive from a JV in the consigned credit market. Itaú Unibanco and BMG[7] formed a JV to offer consigned credit through banking correspondents in all of the Brazilian territory. CADE found that the parties overlapped in the market for consigned credit, but the

5 Merger Case No 08700.001204/2013-13.
6 Merger Case No 08700.001525/2013-18.
7 Merger Case No 08700.006962/2012-39.

structure of that particular market prevented the transaction from causing any harm to competition.

Other recent non-merger cases also deemed reportable by CADE[8]

In recent cases involving licensing agreements by Monsanto,[9] CADE's DG took the view that a non-exclusive licensing agreement that: (i) did not contain non-compete clauses; (ii) did not provide for transfer of assets; and (iii) did not create corporate relationships (ie, shareholdings) did not constitute an economic concentration and would not require antitrust approval in Brazil.

CADE's Tribunal, however, advocated the cases and ruled that: (i) from a procedural perspective, the criteria to establish whether licensing agreements meet the thresholds are complex and should be further discussed by CADE's commissioners with the purpose of promoting consistency regarding its precedents; and (ii) on substance, the *Monsanto* transactions were subject to antitrust review in Brazil. Moreover, during the adjudication of the *Monsanto* cases, CADE's President stated that:

> '[...] the definition of a licensing agreement as an economic concentration is not related exclusively to the presence of cooperation or collaboration [...] it includes more detailed considerations of the independence between the parties and possible effects that contractual clauses have on the possibility of one party to influence another on relevant contractual decisions and the way financial risk is shared'.

There is still one *Monsanto* case pending analysis by CADE's Tribunal.[10] When reviewing this agreement, the DG had concluded that there would have been no need for filing in Brazil, but later the Tribunal stated that possible anti-competitive effects may arise from non-exclusive licensing agreement for technology transfer and also advocated the case.

Information exchange and risk of collusion

Finally, CADE has not yet dealt under the new competition law with the risk of

8 Other cases involving JVs that were adjudicated by CADE under the new law include: (i) Merger Case No 08700.001014/2013-98 (*Avolon/Wells Fargo*); (ii) Merger Case No 08700.001262/2013-39 (*BMG/Sony/ATV*); (iii) Merger Case No 08700.009182/2012-41 (*DSM/Cargill*); (iv) Merger Case No 08700.009182/2012-41 (*Bosch/HGDE*).

9 Merger Cases No 08700.006706/2012-08; 08700.003937/2012-01; 08700.003898/2012-34; and 08700.006336/2013-23.

10 Merger Case No 08700.004957/2013-72.

the exchange of competitively sensitive information or collusion in the context of JVs, but it did so in two very interesting cases under the previous law.

In 2008, CADE cleared the formation of a JV between Air Liquide and White Martins through which the companies would supply atmospheric gases and other products to a third party, Companhia Siderurgica do Atlantico (CSA). For CADE, the JV structure proposed by the parties facilitated collusion between them in the market for industrial gases. The fact that the parties were the leaders in the market in which they operated only increased the likelihood of a tacit or formal agreement between them. The case was cleared in 2007 with the execution of a consent decree valid for ten years, where the parties agreed to prevent risks associated with the exchange of information in the management of the JV by: (i) one of the parties hiring an independent manager to participate in the decision-making process with the other party, in charge of directly running the JV; (ii) any excess capacity would be traded by the parties in a totally independent way; and (iii) CADE should receive notice of all meetings of the relevant management committees.

In 2000, CADE blocked a transaction related to the formation of 'Bolsa Brasil Álcool',[11] an association of 181 ethanol companies that aimed to cooperate under an exclusivity agreement. According to the parties, the deregulation of the sector was causing prices below the average production costs, thus, the association was created so that ethanol producers could exchange information in order to facilitate joint selling for foreign markets. For CADE, 'Bolsa Brasil Álcool' facilitated collusion between ethanol producers. Besides, there were other aid alternatives for the sector. Brazilian authorities, then blocked the transaction in 2000 and assessed whether it should be investigated as a cartel, which in the end it did not.

11 Merger Case No 08012.004117/1999-67.

Mexico[12]

The Mexican competition law was enacted in 1992 in the context of the negotiations of the North American Free Trade Agreement (NAFTA) and took effect in July 1993.[13,14] It was subject to a comprehensive amendment in July 2006 and later to a sweeping reform, starting in 2011. The amendments introduced relevant changes to the pre-merger review system and to anti-competitive conduct enforcement in Mexico.

Since 1992, competition is a federal matter and the legal framework includes specific provisions in the Mexican Constitution, the Mexican competition law and its regulations. The *Comisión Federal de Competencia* (Federal Competition Commission FCC) is an independent agency associated to the Ministry of Economy that, until recently, was the sole agency responsible for enforcing Mexico's competition law. The FCC is composed of five commissioners, including one chairperson, who are elected for non-coincident terms, so as to ensure autonomy to the agency and avoid simultaneous replacement of all or almost all the commissioners at a single point in time. The five commissioners make up the decision-making authority of the FCC and decide issues by majority vote. The FCC has jurisdiction over all transactions and conducts that occur in Mexico or have effects in the Mexican territory.

The constitutional reform and the merger review framework

The Constitutional Reform passed by Congress in 2013 created the *Comisión Federal de Competencia Económica* (CFCE or the 'Commission'), which will take over the activities previously performed by the FCC. The CFCE's tribunal will have the number of commissioners modified from five to seven. The commissioners will be elected through a committee with the approval of the President and the Senate to serve a nine-year term.

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12 For more information, please see the 'Compendio normativo en materia de competencia económica' created by the CFCE and available at: www.cfc.gob.mx/images/stories/Leyes/compendionormativo/2013/Compendio_CFCE_nov_2013.pdf.

13 'Mexico's competition policy was introduced as part of a decade-long reform initiative, begun in the mid-1980s, to end central government control and protection of domestic economic activity and to develop instead a market-based economy. The government ended most domestic price controls and reduced entry constraints. To open the economy to foreign trade and investment, Mexico eliminated most compulsory import licenses, abolished official import prices, reduced tariffs, and adhered to the GATT.
Further, in 1994, Mexico entered the North American Free Trade Agreement (NAFTA), followed subsequently by free trade agreements with the European Union and a litany of Latin American countries, so that today virtually all of Mexico's foreign trade is covered by such accords. Trade with the United States and Canada tripled after the implementation of NAFTA, and in the period from the beginning of the liberalisation process in 1984 until 2002, annual imports increased by more than 1000 per cent, while exports increased by 555 per cent. Import liberalisation, as anticipated, beneficially stimulated domestic competition in Mexico's tradable goods sectors.' Taken from the OECD's 2004 Peer Review Report. Available at www.oecd.org/competition/mexico-competition.htm.

14 *Ley Federal De Compentencia Económica* (Mexico's Federal Law of Economic Competition), English version of original 1992 version of the law is available at: www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb_ncl_mexico_en.pdf.

Also, as a consequence of the Constitutional Reform, the Federal Telecommunications Institute (the 'Institute') was created, which will be responsible for the investigation and sanctioning of breaches to the competition law in the telecommunications sector.[15] The Institute will also have the power to adopt measures to promote free competition in the telecommunications sector. According to the Constitutional Reform, the Institute will have seven commissioners elected by a committee with the approval of the President and the Senate to serve a nine-year term.

Moreover, both the CFCE and the Institute will have additional tools to modify market structures with high levels of concentration. The mechanisms include regulating access to essential inputs, ordering the divestiture of assets, rights or shares in order to eliminate anti-competitive effects.

'Concentrations',[16] according to the Mexican competition law, refers to mergers, acquisitions, and any similar act that combines corporations, associations, partnerships, shares of stock, assets or trusts between competitors, suppliers, customers or other economic agents in a single transaction or series of related transactions. A concentration will be subject to a pre-merger filing if it meets the thresholds mentioned below. Whenever a concentration notification is required, the Mexican antitrust authority has ten business days from the date of the filing to issue an order preventing the parties from closing the transaction until clearance. If such an order is not issued, the parties may close the transaction at their own risk, since the authority will still be able to challenge the transaction or impose conditions following the closing of the transaction.

A concentration is reportable when: (i) it has a value equal to or greater than 18 million times the current general minimum daily wage applicable in Mexico (approximately US$95,252,414); (ii) it results in the accumulation of 35 per cent or more of the assets or equity stock of an economic agent whose assets or annual sales in Mexico have a value equal to or greater than 18 million times the general minimum daily wage (approximately US$95,252,414); and (iii) it results in the accumulation of assets or equity stock in Mexico equal to or more than 8.4 million times the current general minimum daily wage (US$44,451,126) and the participation in the transaction of two or more economic agents whose assets or annual sales volume, either jointly or separately, have a value greater than 48 million times the current general minimum daily wage (approximately US$254,006,439).

Once the notification has been submitted, the Mexican antitrust authority has 35 working days after the filing or the last submission of additional information to issue a decision.

15 The telecommunications sector in Mexico is highly concentrated. Telmex, a company owned by Carlos Slim, has 80 per cent of the wire line's market. Telcel, also owned by Carlos Slim, has around 70 per cent of the mobile phone market. The television market is concentrated in two companies: Televisa and TV Azteca.

16 Art 16 of the Mexican competition law.

Under the law, the following cases are eligible for fast-track procedure: (i) when there is no overlap or vertical integration and the market structure is not modified; (ii) when the acquirer has no control over the acquiring party and the transaction does not result in additional power to influence the management, strategy or operation of the company; and (iii) when the acquirer already has the control of a company and only increases its stake.

Sanctions for breaching the Mexican competition law or engaging in prohibited concentrations are as follows: (i) up to five per cent of the party's annual income if the concentration is implemented without reporting it to the CFCE whenever the notification is mandatory; (ii) up to eight per cent of the party's annual income if it engages in prohibited mergers or implements mergers in violation of a previous order of the Commission; and (iii) up to ten per cent of the party's income if it breaches any preventive measures or any conditions imposed by the Commission. Sanctions are doubled in case of recidivism.

Remedies that can be imposed by the Commission in merger cases include: (i) abstention from a specific conduct; (ii) divestiture of assets, rights, shares or interests; (iii) modification of the terms of the agreement; and (iv) measures to strengthen competition in the affected market.

JVs in Mexico

JVs are reportable as a concentration under the category of 'associations/ partnerships' provided for in the Mexican competition law. JVs in Mexico are subject to the same two-prong test as concentrative JVs in Brazil, which will establish whether they should be reviewed by CFCE: (i) if the parties meet the turnover threshold; and (ii) if the agreement was executed in Mexico or if it is expected to have effects in the Mexican market. Should the answer to both requirements be positive, the parties will need approval from CFCE for the formation of the JV.

Whenever the JV involves non-competitors, there is a presumption that the association will not harm competition. On the other hand, depending on the type of collaboration among competitors, the CFCE may block it and possibly investigate the parties for collusion.

With respect to the substantial aspect of CFCE's analysis, over the years JVs have been reviewed like typical merger cases, that is, through the traditional five-step review process also adopted in Brazil. This is as follows: (i) definition of relevant market; (ii) determination of the parties' market share; (iii) assessment of the probability of the parties exercising market power after forming the JV; (iv) efficiencies; and (v) the net effect on welfare.

The Commission's efforts seem to be focused on preserving the parties as

competitors in the different markets in which they conduct activities, by restricting the collaboration only to the relevant market of the JV and limiting the exchange of information to the minimum extent possible to achieve the JV's objectives.

Chile

Chile created its competition framework in 1959 with the enactment of Law No 13,305. The statute was a result of policy recommendations made by experts that intended to address macroeconomic stability issues. In 1963, the National Economic Prosecutor ('*Fiscalía Nacional Económica*' – FNE) was created to conduct investigations related to anti-competitive offences. The Competition Act (Decree Law No 211) was enacted in 1973 and created the Competition Commission and central and regional Consultative Commissions. At that time, competition policy aimed to promote and protect economic freedom and was not concerned with consumer welfare. In 2003, Law No 19,911, the new Competition Act, created the Tribunal de Defensa de la Libre Competencia (TDLC), replacing the Competition Commission and the Consultative Commissions.

Chile's legal framework and institutions in charge of antitrust enforcement are unique compared to other Latin American countries. The TDLC, for example, is a court subject to the direct review of Chile's Supreme Court of Justice. The Competition Act, in turn, is simple and general. According to the Chilean statute, any deed, act or agreement, including a contract that 'prevents, restricts or hinders free competition' or that is aimed at doing so is subject to the relevant sanctions prescribed in the law. The Competition Act provides few examples of conducts considered illegal, such as abuse of dominant position and predatory pricing. Case law has shed light on the scope of the provisions.

JVs in Chile

The Competition Act does not provide for a specific merger control regime and the Chilean competition agencies may review transactions under the general framework provided for by Article 1 of the Competition Act if they are deemed to 'substantially lessen competition' or 'create or maintain a dominant position'.[17] JVs can therefore be reviewed ex officio or following a request of a third-party, just as any other transaction, depending on the market structures and the specific terms of the agreement.

The parties may also consult the FNE through its voluntary merger review procedure, which is not binding to the parties or to the TDLC. The parties may

17 Pre-notification to the competition institutions is required only for transactions involving television and radio. See Law No 19,733/2001, Art 38.

only resort to FNE's voluntary review before the completion of the transaction. In practice, parties to complex transactions regularly file so as to prevent the transaction from being challenged by the FNE, even after its completion, if the agency considers that it could harm competition.

The 2012 Guide for the Analysis of Merger Transactions[18] (the 'Guide') issued by FNE, which replace the 2006 guidelines, is a non-binding document that establishes the criteria adopted by the agency to assess competitive effects in the market by JVs and other transactions. The Guide sets forth the following safe-harbours for transactions in general: (i) if the HHI[19] after the merger is under 1,500; (ii) if the HHI is above 1,500 but under 2,500 and the HHI variation is under 200; and (iii) if HHI is above 2,500 and the variation is under 100. The FNE may, however, review a transaction that does not meet the thresholds when: (i) one of the parties involved in the merger is a potential competitor, or a participant that has recently entered the market with a small market share that does not necessarily reflect its potential participation in a reasonably foreseeable future; (ii) one of the merging parties is an important innovator or a specially vigorous and independent competitor, in a sense that is not reflected by the market shares; or (iii) there is current or past evidence of coordination.

The FNE's voluntary merger review may not last longer than 60 days, but that period can be extended through mutual agreement by the parties and the FNE.

Mergers may also be challenged, ex post, in an adversarial proceeding before the TDLC. In this case, the TDLC may issue an injunction prohibiting the parties from closing the transaction while the proceeding is pending. Chile's Competition Act does not specify the maximum duration of such proceeding.

When analysing a transaction, the TDLC considers: (i) the risk that, following the transaction, the merging parties will unilaterally abuse their market power; and (ii) the probability of coordination among competitors. With respect to efficiencies, the TDLC has stated that they must be verifiable, inherent to the transaction and must be likely to cause a net effect on economic welfare.

Mergers can be considered a violation of the Competition Act whenever they prevent, restrict or hinder free competition. Sanctions can include fines for the companies and executives involved in the agreement, orders to amend or terminate acts or contracts and even dissolution of companies.

Case law

18 See: www.fne.gob.cl/english/wp-content/uploads/2012/08/Guide-for-Analysis-of-Merger-Transaction.pdf.

19 The HHI is a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases; see www.justice.gov/atr/public/guidelines/hhi.html.

In November 2010, a JV between Nestlé and Soprole for the joint production of several dairy products was submitted to the Chilean competition authorities for consultation.[20] Nestlé and Soprole are the major companies in the selling of dairy products and together held almost 45 per cent of the market for liquid milk in Chile.

The companies alleged a series of efficiencies derived from the transaction, such as: (i) avoiding duplication in marketing investment, production lines, distribution forces and logistics; (ii) the possibility of reaching a critical mass of consumers; and (iii) the association would allow the companies to increase their plants, allowing them to broaden their product portfolio.

The Agriculture Minister, as well as dairy farmers, was against the JV due to the parties' high market shares.[21] The FNE also issued an opinion against the transaction, where it differentiated between reduction in fixed costs and reduction in variable costs, which could be passed on to consumers. Therefore, the only efficiencies capable of counterbalancing the potential anti-competitive harm derived from the JV would be those related to variable costs – marketing, manufacture and logistics. Moreover, it took the view that the alleged improvements in production processes were mostly due to the competition between the parties prior to the association, which would be reduced. For the FNE, the transaction would restrict competition and, as a result, increase prices for consumers. The companies withdrew their submission and decided not to proceed with the JV before the TDLC could adjudicate the case.

Conclusion

Although there are differences in the legal and institutional frameworks in place in Brazil, Mexico and Chile, still the three countries share some ground with respect to the review of JVs. None of the three competition statutes include specific rules on the topic (unlike what happens in the US, for example) and antitrust review is primarily focused on the substantive criteria and the possible effects derived from the transaction. While this is not necessarily a problem, the lack of specific rules applying to JVs creates uncertainty as to the limits to be considered when evaluating the need to report a transaction and whether it would be deemed to be anti-competitive or not.

The increasing varieties and use of competitor collaborations around the world, as well as the globalisation of the markets, require competition agencies, businesses and private practitioners to have clarity regarding their treatment under the

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20 For more information on important cases adjudicated by the Chilean antitrust authority, see www.oecd.org/regreform/sectors/47950954.pdf; and see: www.fne.gob.cl/jurisprudencia-en-libre-competencia.

21 See: http://santiagotimes.cl/court-denies-chiles-soprole-nestle-merger; and see http://santiagotimes.cl/nestle-and-soprole-scrap-merger-again-amid-mounting-monopoly-concerns.

antitrust laws. Moreover, ideally, competition agencies in different jurisdictions should review transactions that have an international element under similar substantive criteria.

The establishment of clear rules, though the publication of guidelines based on international recommended practices, would allow market players to anticipate the likelihood of facing challenges by enforcers in Brazil, Mexico and Chile. This would tend to deter collaborations that are expected to cause anti-competitive effects in the market and to encourage those that are beneficial to consumers. Likewise, it would allow Brazilian, Mexican and Chilean competition agencies to devote scarce human resources to the investigation of JVs that are effectively worth the time.

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