LATAM Merger Control:

The Big Picture

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Since 2011 most of the countries in the region have revised their merger control legislation and issued guidelines with the object of improving effectiveness and predictability. In 2012, Brazil drastically modified its merger regime by establishing a mandatory premerger notification system, increasing the filing thresholds and restructuring the merger review process. Since then, the Brazilian regulator has also issued guidelines on many topics (*e.g.,* gun jumping) and is expected to publish on merger remedies in 2018. In 2014, Mexico enacted a new federal law, introducing procedural changes to the Mexican merger review. In addition, in 2015, the Mexican regulator issued merger review guidelines, which were updated in 2017 to insert provisions on the analysis of ancillary restrictions. In 2017, Chile adopted significant changes by switching its previously voluntary merger control regime to a mandatory preclosing notification obligation. The same year, the Chilean regulator issued guidelines fixing notification thresholds and merger remedies, and published standardized notification forms. Between 2011 and 2013, Costa Rica reformed its previously voluntary merger control regime to become mandatory, and Ecuador and Paraguay enacted merger control legislation for the first time. In the case of Ecuador, the regulator is currently working on drafting merger analysis guidance.

Merger regimes

Most LATAM merger control regimes prohibit closing pending a regulatory review. Brazil, Chile, Colombia, Ecuador, El Salvador, Honduras, Mexico, Nicaragua and Uruguay all now have premerger notification obligations. Argentina and Costa Rica are exceptions to the rule as they permit a post-closing notification (although Argentina is amending the current antitrust law to include a premerger notification regime). In Panama and Venezuela notification is voluntary, but the regulator can investigate the transaction post-closing. Bolivia and Peru only require previous authorization for mergers in certain regulated industries, such as utilities and banking (Bolivia) and electricity (Peru).

LATAM merger regimes also cover horizontal, vertical and conglomerate transactions that result in the acquisition of control through capital, shares or decisive influence, except for Colombia, where conglomerate mergers are not subject to control. However, only a few regimes review the

acquisition of minority interest. These include Brazil when the minority interest is more than 5% for horizontal or vertical mergers or 20% for conglomerate mergers, Chile when the minority interest is more than 10% and the parties are present in the territory, and Panama if the acquirer gains the right to appoint any member of the board of directors.

Merger thresholds

LATAM legislatures have also established different thresholds, based on economic power indicators, for a transaction to be reportable. For example, Argentina requires the parties to meet a certain amount of turnover and the transaction or assets acquired to exceed a minimum value. Brazil and Chile only require the parties to reach a specific amount of turnover within the territory (although the Chilean regulator is also entitled to investigate transactions falling below the thresholds). Uruguay, Paraguay, Ecuador and Colombia combine a turnover or value of the assets threshold with the transaction resulting in the acquisition of a market share in the relevant market, while Peru has only established a market share threshold in the electricity market.

Time periods

Most of the regimes with a premerger notification, including Chile, Brazil, Mexico and Paraguay, employ a two-phase review process. In the first phase regulators decide whether to clear a merger as non-problematic or to conduct a more intensive investigation in a second phase. Generally, the length of the first phase is one month or 30 days. In a few countries, the first phase lasts for 45 days. Other jurisdictions also offer a fast track review for mergers that clearly present no problems (*e.g.,* in Mexico if the transaction qualifies for fast track review, the regulator must issue a decision within 15 business days).

Second phase periods range from one to four months. It should be noted that in some cases, agencies can use different mechanisms provided by law to extend the review period.

Other relevant matters

LATAM jurisdictions have also incorporated other changes of interest to practitioners. Most jurisdictions require filing fee, though the fees are not exorbitant (excepting Brazil with US$ 25,000 or Colombia and Chile, where no filing fees are required). *S*ome regulators offer informal guidance on potential transactions, which parties may take advantage in a non-binding basis. As previously mentioned, some regimes also envisage fines for gun jumping (*e.g.,* Brazil, Chile or Mexico). The latter has been a priority for these agencies in recent years (with CADE reviewing 11 merger filings that involved possible gun-jumping violations between 2013 and 2017).

Finally, since cross-border coordination in LATAM is becoming key to a successful merger control review, regulators are working together now more than ever. For instance, in December 2017, the leaders of the competition authorities from Argentina, Brazil, Chile, Mexico and Peru met to discuss, in the framework of the OCDE, new opportunities for cooperation. They also agreed to arrange regular conference calls during the first quarter of 2018 semester to conduct joint trainings.