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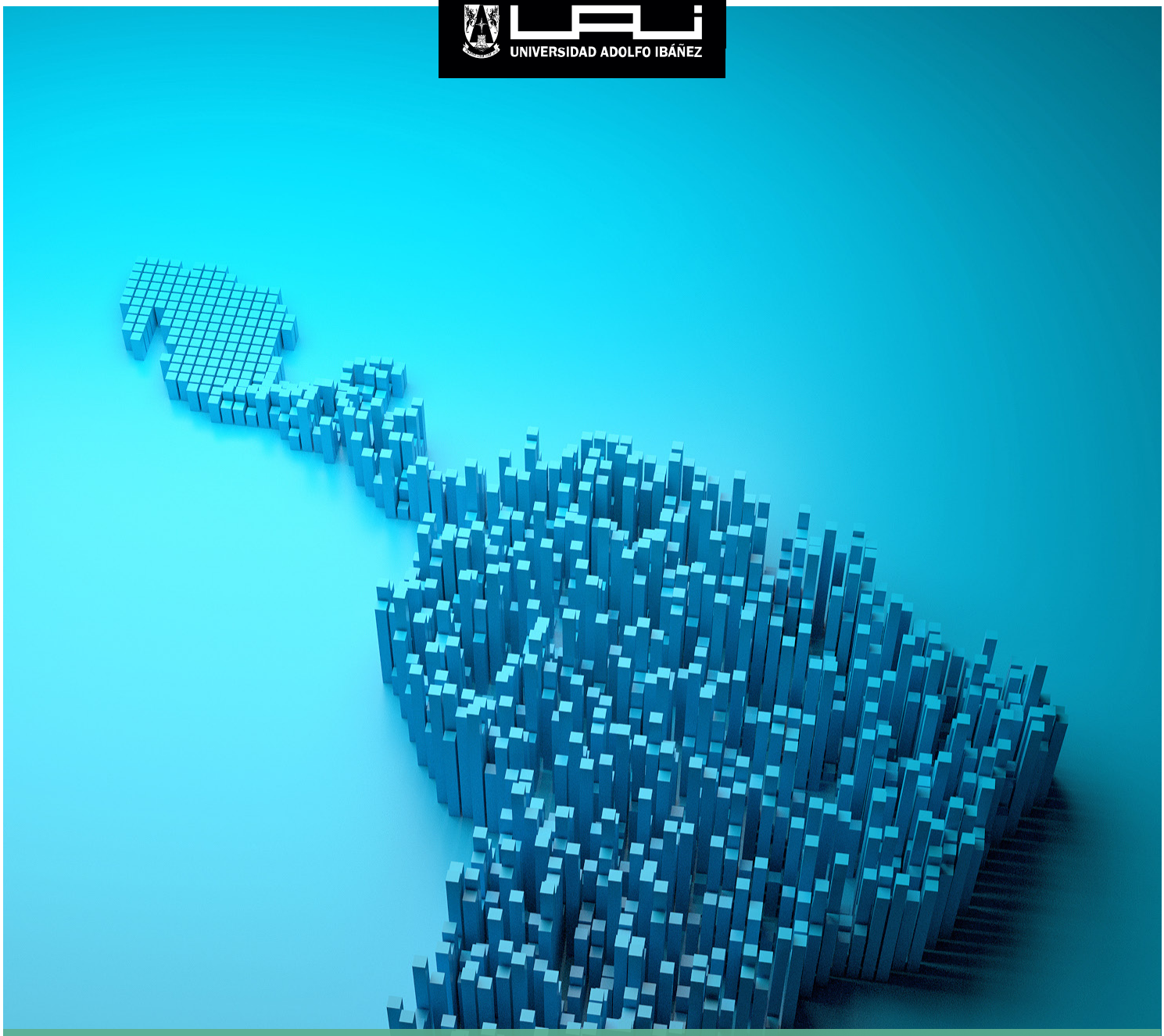

WHAT SHOULD A COMPETITION AGENCY DO IN A COUNTRY THAT HAS A MANDATORY MERGER CONTROL BUT LACKS FDI SCREENING?: THE CASE OF CHILE AND LATIN AMERICA

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What should a competition agency do in a country that has a mandatory merger control but lacks FDI screening?: The case of Chile and Latin America

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I. INTRODUCTION

1. Most of countries in Latin America have established in recent years mandatory controls of concentration operations (CCO) by their competition agencies. In general, these controls have operated correctly.[1]

2. Pre-merger review is an important and powerful mechanism for competition law enforcement, in addition to prohibitions against collusion and abuse of dominant position. However, CCO presents obvious challenges to agencies. The mechanism has to be done in an expeditious manner and many times the public information that exists in countries in transition (emerging economies) is meager. Furthermore, if the mechanism is misused, it can introduce non-competitive political factors and thus distort competition.

3. Young competition agencies have to learn how to use the CCO mechanism "on the job" through the cases they are addressing. In addition, they need to provide certainty to private parties in the way these new regulations will be applied, and thus give some predictability about which operations can be rejected or the remedial measures that are likely to be imposed.

4. For some time, developed countries have had Foreign Direct Investment (FDI) screening or control systems to address issues of national security alongside CCO. These mechanisms are varied and in recent times, developed countries have been perfecting and making these mechanisms more complex by adding other additional protections, such as critical facilities, data privacy, media pluralism and food security.[2]

5. This contribution addresses what a competition agency – particularly in emerging economies like Chile and throughout Latin America – should do when faced with the dilemma of reviewing a CCO with a national security issue involved.

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1 See OECD report (2022), Trends on competition in Latin America and the Caribbean 2022 at https://www.oecd.org/finance/tendencias-sobre-competencia-en-latinoamerica-y-el-caribe-2022-f19a5033-es.htm.

2 See OECD (2022), The Relationship Between FDI Screening and Merger Control Reviews, Competition Policy Roundtable Background Note ("*The number of jurisdictions that have established FDI review mechanisms, the scope of such mechanisms' application, and the concerns that their address have widened significantly over the past years. Ever more countries, essentially advanced economies, are now complementing, expanding, or strengthening review mechanisms in sectors considered sensitive with new, more comprehensive policies that seek to address the security risks occasionally associated with inward investment.*") and OECD (2020), Acquisition and ownership-related policies to safeguard essential security interests at https://www.oecd.org/investment/OECD-Acquisition-ownership-policies -security-May2020.pdf.

6. In the first part, the article describes the specific situation in Chile (Section II) and the tensions that the competition authority has had to confront in relation to merger operations that also involved public questioning on national security issues (section III). Then, the article shows that Chile is not an isolated case in Latin America (Section IV). Afterward, the document will try to specify the challenges that, in my opinion, FDI screening control entails in countries of the region (Section V), to end with some final reflections (Section VI).

II. CHILE AND ITS REGULATORY CONTEXT

7. Competition regulations in Chile date from 1959 but were mainly focused on collusion. Over time, the legal framework was perfected, and at the end of the seventies, provisions were added dealing with abuse of dominant position or monopolization.[3] Mandatory notification of mergers was only established in 2016 through a legal reform, more than 50 years after the creation of the competition agency (National Economic Prosecutor's Office or FNE).[4]

8. The legal reform was drafted by experts in competition law, following international standards and best practices, and the project was approved by Congress without undergoing substantial modifications.[5]

9. Merger control's regulations establish the substantial lessening of competition (SLC) test and omit any reference to a public interest test or exceptions to the SLC test.[6] Furthermore, the Chilean competition authorities have expressly rejected the argument of protection of national interests or "national champion" in specific cases of mergers.[7]

10. By coincidence, the same year the pre-merger review process was enacted in Chile (2016), the law that established the foreign investment law was repealed. This law allowed the investor to sign a contract with the State that assured stability with respect to taxes and currency remittance. On the side of the State, said contracts were signed by the Foreign Investment Committee, an organization that was dissolved following the change in the law.[8]

3 Bernedo, Patricio(2013), History of free competition in Chile 1959-2010, https://www.fne.gob.cl/wp-content/uploads/2013/11/Historia_libre_competencia.pdf .

4 In 2014, the OECD drafted a report on concentration operations in Chile and made recommendations for regulatory changes. That report helped convince the government of the need for legal change, as well as the Congress to approve the project presented by the government. See report at https://www.oecd.org/daf/competition/Chile%20merger%20control_ESP_nov14.pdf .

5 See the history of Law 20,945 of 2016 that improves the system for the defense of free competition at https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/5311/ .

6 See OECD (2022), The Relationship Between FDI Screening and Merger Control Reviews, Roundtable Background Note, where reference is made to the public interest test, a mechanism that would be absent in the Chilean control system ("(...) *several OECD jurisdictions open the possibility that threats to essential security interests arising from inward investments are In particular, this has been done through public interest tests or exceptions, which enabled competition authorities or an external body to consider essential security concerns within the framework of merger reviews, and possibly balance them against competition issues.*").

7 See the D&S case with Falabella, from the Tribunal de Defensa de la Libre Competencia (2018) ("(...) *for the Prosecutor's Office, the promotion of a "national champion" is an industrial policy issue, inconsistent with the objectives of competition policy Therefore, its consideration must be left out of the analysis that this Tribunal carries out with respect to the consulted operation.*").

8 Law 20,780, published in 2014, repealed DL 600 as of January 1, 2016, that is, the Foreign Investment Statute. See law at https://www.bcn.cl/leychile/navegar?idNorma=1067194&buscar=20780 . Currently, another mechanism is in force, which is called Chapter 14 and occurs before the Central Bank, however it is a registration mechanism (not an authorization one).

11. In another regulatory sphere, the Chilean press law required competition agencies to previously approve changes of ownership of concessions in social media (television and radio), considering their impact on the information market. This rule was later modified and currently establishes that the competition authority should analyze the operation on the grounds of its effects on competition.[9]

12. Moreover, Chile prohibits foreigners from owning land (real estate) on the borders with their neighbors unless the government grants an express exception by supreme decree[10]. There are also restrictions on foreigners in specific industries, such as maritime cabotage.[11]

13. Additionally, Chile was a pioneer country in the privatization of public companies in the eighties and many of these privatizations ended up in the hands of foreign capital (mainly from the U.S. and European countries).[12]

14. Another relevant factor is the enormous number of trade treaties signed by Chile with most of the world's countries, which contemplate the principle of non-discrimination, most-favored-nation clauses and the use of international dispute resolution mechanisms.[13]

15. Finally, it should be noted that the principle of non-discrimination between nationals and foreigners has a long history in Chile. In fact, the Chilean Civil Code of 1855 – which distanced itself from the French code – establishes that there will be no differences between Chileans and foreigners regarding the acquisition and enjoyment of civil rights.[14]

9 See Law 19.733 On Freedom of Opinion and Information and the Exercise of Journalism ("Article 38.- Any relevant fact or act related to the modification or change in the ownership of a means of social communication, must be reported to the National Economic Prosecutor's Office, within thirty days of execution. However, in the case of social communication media subject to the concession system granted by the State, the relevant fact or act must have, prior to its completion, a report from the National Economic Prosecutor referring to its effect on competition, which must issue it within thirty days of receipt of the information. In the event that the report is unfavorable, the National Economic Prosecutor must communicate it to the Tribunal for the purposes of the provisions of article 31 of decree with force of law No. 1, of 2005, of the Ministry of Economy, Development and Reconstruction. If the report is not evacuated within the aforementioned period, it will be understood that it does not warrant any objection from the Prosecutor's Office.") at https://www.bcn.cl/leychile/navegar?idNorma=186049.

10 OECD (2020), Acquisition-and ownership-related policies to safeguard essential security interests: Current and emerging trends, observed designs, and policy practice in 62 economies (2020), page 119.

11 See Law 18.454, that modifies Decree law 3.058 of 1978 and other legal statutes, at https://www.bcn.cl/leychile/navegar?idNorma=29858. See also note on maritime cabotage and competition, at https://www.estudiospublicos.cl/index.php/cep/article/view/2070. and https://www.estudiospublicos.cl/index.php/cep/article/view/2070

12 Currently in Chile there are few sectors where the State participates as a company through State Owned Enterprises (SOEs), such as ports, banking, mining, and post offices.

13 For more information in this regard, see Chilean Ministry of Foreign Affairs at https://www.subrei.gob.cl/ .

14 Article 57 of the Chilean Civil Code: "The law does not recognize differences between Chileans and foreigners in terms of the acquisition and enjoyment of the civil rights that this Code regulates." See https://corraltalciani.wordpress.com/2016/12/04/el-codigo-civil-y-los-inmigrantes/ .

III. CHILE: TENSION BETWEEN MERGER CONTROL AND NATIONAL SECURITY

16. In this legal and regulatory context, tensions have arisen between competition concerns and questions of national security. For instance, in 2018 a Chinese company expressed its interest in acquiring a minority stake in a Chilean firm that extracted lithium. Government officials and politicians expressed their concern about such an acquisition, considering the current and future importance of lithium in the world.[15]

17. Days before the end of the center-right government that had been in place at the time, a complaint was filed before the FNE to investigate this transaction. The political world and the media focused their attention on what the competition agency was going to do.

18. Despite the fact that the transaction involved a product for export, the FNE initiated an investigation and finally reached an out-of-court agreement with the acquiring company. This agreement was then approved by the Tribunal de Defensa de la Libre Competencia ("TDLC").[16] Thus, the deal to acquire a minority stake in the Chilean lithium producer was finally approved with conditions.[17]

19. Later, a Chinese state-owned company notified the FNE of its intent to acquire Chilquinta, an electricity distribution company. This operation also raised the attention of the political world and the media.[18] The FNE, however, carried out its investigation and ended up approving the transaction without making considerations of national interest or public security.

20. At the end of 2020 another similar notification was made by the same Chinese company as in the Chilquinta deal. The company being sold, namely "CGE" was also dedicated to the distribution of electricity in various regions of Chile. Tensions arose because if the operation were approved, the Chinese state company would have owned more than 50% of Chile's electricity distribution. In addition, Chinese companies had also acquired a stake in the power transmission company and had some investments in generation companies.[19]

15 The FNE began the investigation in 2018 after receiving complaints from Corfo, a State entity, and two well-known senators regarding the acquisition by Tianqui Lithium Corporation of 25.86% shares of Sociedad Química y Minera de Chile SA ("SQM"). The FNE Investigation ruled out significant overlaps between Tianqi and SQM in relation to the extraction of lithium hydroxide and lithium carbonate. Regarding refining, the FNE Investigation concluded that there would be different relevant markets for lithium carbonate and lithium hydroxide, therefore there would be overlap between the parties. The FNE analyzed the possibility that Tianqi could access strategic and sensitive information of SQM and a possible coordination between SQM, Tianqi and Albemarle Corporation (which entered into a joint venture with Tianqi). The FNE Investigation analyzed: (i) the monitoring capacity of the three actors; (ii) the factors that determine the internal stability of an eventual coordination; and (iii) the factors that facilitate the external stability of a possible agreement. The FNE decided to present commitments to mitigate the risks analyzed. See the decision of the Competition Court at https://centrocompetencia.com/jurisprudencia/fne-c-tianqi-lithium-por-participacion-minoritaria-2018/

16 The TDLC's decision was challenged by the controller entity of SQM (Pampa Calichera) through a constitutional action or "inapplicability", filed before the Chilean Constitutional Court. This action was dismissed by the Constitutional Court.

17 The FNE issued a report in relation to the minority acquisition of Tianqi in the Chilean lithium company (SQM), on August 24, 2018, where it is provided that: "As a general rule, [foreign jurisdictions] contemplate mechanisms for the consideration of elements of public interest in the analysis of concentration operations, at least for those markets that are considered sensitive or strategic for the country. However, these are powers that, in general, are enshrined with respect to authorities other than those empowered to exercise free competition controls. In these cases, the possibility of intervening in the development of transactions has been developed on the basis of powers explicitly granted by law to certain bodies, in order to safeguard the elements of predictability and objectivity of competition procedures." Then, the same report adds in a footnote (N°61) that both the OECD and the ICN do not recommend integrating the control of competition with the control of national interest, "while the analysis varies considerably, mixing with political aspects that they should not be relevant in a legal analysis framed in competition regulation", adding the link to the 2016 OECD background note (Public Interest Considerations in Merger Control). See FNE report at https://www.fne.gob.cl/wp-content/uploads/2018/09/Informe-Expediente-Rol-N-2493-18-FNE.pdf. The aforementioned 2016 OECD document establishes that "The foreign investment assessment, i.e. the assessment to examine proposals by foreign investors having regard to the national interest or national security, is rarely conducted by the competition authority." (p.13).

18 On February 27, 2020, the FNE purely and simply approved the merger operations involving the acquisition of Chilquinta Energía SA (dedicated to electricity distribution in the Valparaíso region) and Eletrans SA, by the Chinese holding State Grid International Development Limited. Chilquinta and Saesa were companies with US and Canadian capital, respectively. See at https://centrocompetencia.com/jurisprudencia/state-grid-chilquinta-eletrans-2020/ . Note from CeCo/UAI on the transaction at https://centrocompetencia.com/luces-de-la-fne-sobre-el-mercado-electrico-en-la-adquisicion-de-chilquinta/ .

19 See FNE resolution of March 31, 2021 at https://centrocompetencia.com/jurisprudencia/state-grid-cge-2021/ .

21. Some deputies of the Chilean Congress reacted and proposed a constitutional amendment aim to require companies owned by foreign states entering the Chilean market in products or services sensitive to national security, to be approved by a "qualified quorum law".[20]

22. The National Economic Prosecutor and a senior official from the Ministry of Foreign Affairs were summoned to Congress. Both stated that they found it interesting to establish a screening FDI mechanism, but with a law that would establish an expeditious proceeding and in line with the best international practices. Furthermore, the National Economic Prosecutor was emphatic in clarifying that the competition agency was not responsible for carrying out national security analysis in its merger control.
23. During that time, two influential senators published an opinion column in which they called for an *express law*, similar to the one existing in the United States, aimed to regulate this issue organically.[21] However, as of today, the project that sought to modify the Constitution has not advanced and no similar project has been presented before the Congress in this regard.

24. The FNE ultimately approved the sale of CGE without conditions and categorically reaffirmed that the merger control system was not suitable for analyzing matters of national security. The approving resolution reads that "the institutional design of the merger control regime in Chile (...) does not confer powers to rule on other considerations of national or public interest -such as geopolitical, defense or national security strategy considerations, etc.- different from the determination of whether or not an operation may be suitable to substantially reduce competition".[22]

25. Even more recently, questions of national security issues have arisen regarding the technology adopted for 5G in the telecommunications tenders carried out by the Chilean telecommunications authority and in the tender for the preparation of passports.[23]

26. It is not difficult to predict that new tensions will arise in the future as additional CCO involving sensitive national security issues are notified.

20 The bill, under Bulletin 13.934-07 of December 15, 2020, was presented by 10 deputies and consists of a single article. The article establishes the following: "*A qualified quorum law must authorize the investment of foreign states in corporations or companies, whatever their legal nature, purpose or function, that serve public utility services or whose stoppage causes serious damage to health, to the economy of the country, to the supply of the population or to national security.*" See https://www.camara.cl/verDOC.aspx?prmID=58593&prmTipo=FICHAPARLAMENTARIA&prmFICHATIPO=DIP&prmLOCAL=0.

21 See El Mercurio newspaper of November 27, 2020 at https://digital.elmercurio.com/2020/11/27/A/3I3SMFKT?fromSearch=1&q=Chile-China,+soluci%C3%B3n%20de%20Estado% 20Rodrigo%20Galilea%20Felipe%20Harboe&GotoArticle=JM3SMG39 . The column says that "(...) *the concentration resulting from said purchase is not the only problem. It also happens that the acquiring company is from the Chinese government. (...) Is it convenient for national interests for said operation to materialize? It certainly is not, since leaves Chile in a situation of potential fragility in the face of a very powerful economic State with enormous geopolitical influence. In addition, Chile could compromise its regulatory power in terms of setting electricity rates, since as it is a Chinese state-owned company, that country could -eventually- condition the purchase of national products to the setting of rates convenient to its interests.*"

22 See decision issued by the National Economic Prosecutor of March 31, 2021, in which it declares "*that this The Prosecutor's Office, like any State administration body, must submit its action to the Constitution and the rules issued in accordance with it, always acting within the scope of its competence, under penalty of annulment of its acts to the contrary. In the case of this Prosecutor's Office, the institutional design of the merger* control regime in Chile contained in Title IV of DL 211 does not confer powers to rule on other considerations of national or public interest -such as geopolitical strategy considerations, defense or national security, etc.- other than the determination of whether or not an operation may be suitable to substantially reduce competition. Because of this, neither the merit nor the plausibility of some of the concerns expressed in the Investigation by certain industry players regarding possible effects on national interest or security, in a broad sense, which in their opinion would entail the improvement of the investigation, were analyzed, since they exceed the scope of legal powers of this Prosecutor's Office. As with all the other concentration operations that this Prosecutor's Office has reviewed and is reviewing, its actions were framed solely and exclusively within the scope of its general mandate to promote and defend competition in the markets and, more specifically, in the provisions of the Title IV of DL 211, and only on that merit was it evaluated whether or not the Transaction had the aptitude to substantially reduce competition in the markets in which the Parties, and their related entities, are active in our country". (free translation from Spanish) See resolution at https://centrocompetencia.com/wp-content/uploads/2022/03/Resolucion-F255-2020.pdf .

23 See La Tercera (2021) at https://www.latercera.com/pulso/noticia/licitaciones-la-activa-presencia-china/TJ4UASO6ZBCAHCGG7RAQT4XSGI/ .

IV. LATIN AMERICA FACES THE SAME CHALLENGE

27. In general, according to the 2020 OECD report, in the region there are no organic regulations on FDI control.[24] There are, however, specific regulations that refer to military issues, foreign ventures in bordering areas and the participation of state-owned enterprises (SOEs) in critical businesses, such as telecommunications and transportation.

28. Argentina has regulations regarding the participation of foreign companies in the production of arms and ammunition. These companies must enter into a joint venture agreement with a public entity (the General Directorate of Military Manufacturing) and must be approved by the government. In addition, if a foreign entity wants to own rights to a border security zone, it requires prior government authorization. Moreover, the State maintains property (State Owned Enterprises) in companies in sensitive sectors, such as energy, telecommunications and transport.[25]

29. Brazil has controls for activities conducted by foreigners within a security zone along the borders with its neighboring countries. Such activities must be authorized by a state body in charge of national security. In addition, foreigners must obtain a permit to acquire property on the borders of the country.[26]

30. Colombia and Costa Rica have a ban similar to the Chilean one (i.e., a prohibition to acquire real state in border areas). In addition, they prohibit foreigners from having interests in private security enterprises.[27]

31. Mexico establishes a 49% limit for foreign entities that manufacture or trade arms and ammunition. In addition, prior approval is required in certain sectors (such as education, construction, train and boat services), through the National Foreign Investment Commission.[28]

32. Paraguay also has an authorization mechanism for land purchases in border areas, while the State owns enterprises (SOEs) in sensitive sectors, such as energy and telecommunications.[29]

33. Peru also imposes a ban on land in border areas, which admits exceptions by supreme decree. Moreover, it requires licenses in relation to weapons, and maintains ownership of companies in sensitive areas, such as energy, telecommunications, and transportation.[30]

34. Uruguay has a similar regulation to Paraguay.[31]

24 OECD (2020), Acquisition-and ownership-related policies to safeguard essential security interests: Current and emerging trends, observed designs, and policy practice in 62 economies.

25 Ibid, page 113.

26 Ibid, page 117.

27 Ibid, page 121.

28 Ibid, page 141.

29 Ibid, page 143.

30 Ibid, page 144.

31 Ibid, page 159.

Latin America controls chart (as of 2020)

	Merger control	Borders	arms	SOEs in critical sectors	Private security	Screening FDI
Argentina	✓	✓	✓	✓		☒
Brazil	✓	✓				☒
Chile	✓	✓				☒
Colombia	✓	✓			✓	☒
Costa Rica	✓	✓			✓	☒
Mexico	✓		✓			☒
Paraguay	✓	✓		✓		☒
Peru	✓	✓	✓	✓		☒

Source: OECD (2020), Acquisition-and ownership-related policies to safeguard essential security interests

V. FUTURE CHALLENGES

35. In the future, it is predictable that both merger control and FDI screening will acquire strategic importance. This process should intensify with the global reordering that is taking place (with the assumption of new world powers) and also due to the effects of the digital economy.

36. Since, many different FDI control mechanisms currently exist among developed countries, countries that do not have such controls have the opportunity to explore successful alternatives. The main parameters of FDI screening refer to the assets (industrial sector), the investor (his nationality) and the transaction itself (control or minority participation).[32] The key questions for achieving both an effective and efficient control of FDI screening are three: what to protect, who is in charge of that protection and basic rules of procedure and confidentiality.

37. Regarding the nexus between FDI screening and merger control, three different models can be found among the "OECD+5" countries.[33] On the one hand, there is a single authority model (Poland and Romania), where a single authority reviews both issues. Another model is dual, where "*competition and essential security reviews are conducted within the framework of a single procedure by distinct bodies*" (as in the UK before the legal reform of 2021)[34]. Finally, there is the parallel review model (US, Italy and France), "*in which competition and national security concerns are assessed by different bodies in separate proceedings under distinct rulesets*".[35]

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32 See OECD (2022), The Relationship Between FDI Screening and Merger Control Reviews, OECD Competition Policy Roundtable Background Note, page 17 ("*These criteria typically refer to characteristics of the asset under acquisition (eg, industry sector, physical location, sensitive technology), of the acquirer (eg, foreignness, specific nationality or residence of the acquirer, state-control of the acquirer), and of the transaction (eg, whether it leads to a controlling or other significant stake.*").

33 The "OECD+5" jurisdictions includes all the OECD' members, plus five accession candidates (Brazil, Bulgaria, Croatia, Peru and Romania).

34 See OECD (2022), The Relationship Between FDI Screening and Merger Control Reviews, OECD Competition Policy Roundtable Background Note, page 27.

35 Ibid, page 28.

38. Countries in transition to economic development may present special challenges regarding the control of FDI. They need investment, whether national or foreign, to keep growing, especially if they experience a concentrated economy and are dependent on the countries to which they export.[36] In addition, since they have less political and commercial influence, these countries have difficulties in understanding and deciding strategies on intelligence issues, having incentives to seek neutrality regarding global tensions. Finally, the level of confidence between public entities and the private world is not strong, and therefore creating a new organism with discretionary powers is difficult.

VI. FINAL REFLECTIONS

39. For the times ahead, it seems reasonable that each country in transition seriously evaluate whether or not it will have FDI control. Apparently, it seems reasonable to have an FDI screening mechanism, even if it is a small country with a developing economy.

40. In my opinion, this control should be as simple as possible in what is protected (initially restricted to specific matters of national security[37], avoiding lists of specific countries or nationalities and focusing on relevant participations), under a special body (which includes the country's highest economic authorities and also intelligence officials) and with basic procedural rules (namely, strict confidentiality standards and limited judicial remedies).

41. Both mechanisms should be autonomous, and care should be taken that FDI screening is an expedited procedure. In addition, the competition authority should inform the FDI authority of the notifications it receives, as is done in Austria.[38]

42. In the meantime, the competition authority should, in my opinion, make efforts to make explicit that the merger control mechanism is not suitable for controlling FDI, as the FNE of Chile did in the cases analyzed in Section III.

43. If the competition agency becomes involved in matters of national security in its merger control mechanism, it risks losing technical prestige, reducing the predictability of its decisions, and allowing other public policies other than competition to be included in its mechanism in the future.

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36 Ibid, page 12 ("*competition from potential foreign investors or from imports will naturally act as a disciplining factor for firms that would seek to exercise some form of market power. In contrast, restrictive investment (and trade) policies may enable incumbents to exercise market power to the detriment of consumers*").

37 Ibid, page 28 ("*Specific considerations can refer to a certain sector or industry, and are particularly common in the sectors of energy (eg, 'security of supply', 'stable provision of energy'), media ('plurality of the media'), finance ('prudential rules', 'stability of the financial system') and defense ('national security', 'national defense*')).

38 Ibid, page 32 ("*Given such shared concerns, FDI screening and merger control authorities could leverage each other's experience and information gathering to detect non-notified transactions. Austria has made a first move in this direction, by requiring, through a recent amendment, that whenever there is a merger notification, the federal competition authority will inform the competent ministry for FDI screening*").

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