UNIVERSIDAD ADOLFO IBÁÑEZ

MERGER CONTROL IN CHILE: CHALLENGES AND RESPONSES FROM AN EMERGING REGIME

Francisca Levin Visic

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Francisca Levin Visic

Francisca Levin is a lawyer at the Pontificia Universidad Católica de Chile, LL.M in Competition Law, King's College London and MSc in Regulation, London School of Economics. Competition Law Partner at Cuatrecasas and former Head of the Mergers Division of the National Economic Prosecutor's Office (*Fiscalía Nacional Económica*) (FNE) in Chile. She teaches postgraduate courses on antitrust at Universidad Adolfo Ibáñez and Pontificia Universidad Católica de Chile.

*Leonel Leal and Alexandre Picón[1] (Contributors)

1 For the preparation of this essay, the author counted on the contribution of Leonel Leal, lawyer and LL.M, mention in Economic Law at the University of Chile, Legal Coordinator and Pre-Notification Manager in the Mergers Division of the National Economic Prosecutor's Office (Fiscalía Nacional Económica) (FNE) and Alexandre Picón, lawyer and economist at Cuatrecasas (Madrid) and professor of postgraduate studies in Competition Law at Universidad Carlos III de Madrid, Universidad Complutense de Madrid and Instituto de Estudios Bursátiles.

FOREWORD

Mergers are part of the engine of the market economy. They are not only part of the legitimate exercise of economic freedom by companies and make foreign investment viable, but they can also increase productive efficiency (e.g., achieving economies of scale, obtaining synergies, or avoiding double marginalization) and allocative efficiency (i.e., that assets are placed in the hands of those who value them most).

However, mergers tend to increase market concentration to some degree. Significant increase in concentration may, in turn, increase the likelihood of competitors' coordination and/or generate opportunities for abuse of market power. Therefore, a competition authority in charge of administering a merger control system faces a twofold challenge: not to hinder trade and, at the same time, to detect and prevent those transactions that significantly reduce competition or to establish measures to correct risks of a certain entity. In meeting this challenge, it is the structure and functioning of our markets what it is largely at stake.

There is another problem: there is no crystal ball that allows the authority to predict the future and the exercise of evaluating concentrations is essentially prospective. Therefore, it must make use of a series of qualitative and quantitative economic analysis tools that, although supported by internationally agreed literature and practices (in the US and the EU), must be calibrated on a case-by-case basis and with a local perspective. Of course, these tools and criteria of analysis are not detailed in the law (which wisely only offers indeterminate legal concepts), so it is necessary to examine the decisional practice (that is, the set of relevant decisions of the authority) and it is the consistent application of this practice that injects predictability into this control system.

Within this framework, and after seven years since the entry into force of the current merger control system in Chile (implemented by Law No. 20,945 of 2016), CeCo UAI decides to critically review its functioning, seeking to balance an analytical vocation with a practical approach. We believe that the right person to take on this challenge is the former head of the Mergers Division of the National Economic Prosecutor's Office (and current partner of Cuatrecasas), **Francisca Levin V**. Francisca was not only kind enough to take on our assignment, but also the ability and skill to execute it in a virtuous way: nothing less than an easy-to-read digital book that addresses, in depth and support, the main questions –substantive and procedural– arising from the Chilean merger control system, in addition to describing said system.

We believe that in the pages of the book it is proven that our current system is already consolidated, and its evaluation is positive (beyond the natural areas for improvement that the author herself identifies in the book). This is particularly interesting if we consider that, as the author points out, the Chilean regime is not a copy of a foreign system, but at this point has developed to some extent its own

identity. Therefore, in the jargon that dominates the Chilean public policy debate at the time of writing these lines, fortunately we can affirm that our country's merger control system is a case of "successful permitting" (*permisología exitosa*): it allows for the intervention of the State, but not just any State: one that acts quickly and according to concrete evidence and manages to make the discussions to be focused on essentially technical issues, far from fiery political speeches.

Felipe Irarrázabal Ph. & Juan Pablo Iglesias M.

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Essay

Merger control in Chile: Challenges and responses from an emerging regime

Francisca Levin[1] (Author)

Leonel Leal and Alexandre Picón[2] (Contributors)

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[1] Francisca Levin is a lawyer at the Pontificia Universidad Católica de Chile, LL.M in Competition Law, King's College London and MSc in Regulation, London School of Economics. Competition Law Partner at Cuatrecasas and former Head of the Mergers Division of the National Economic Prosecutor's Office (*Fiscalía Nacional Económica*) (FNE) in Chile. She teaches postgraduate courses on antitrust at Universidad Adolfo Ibáñez and Pontificia Universidad Católica de Chile.

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I. Introduction

The incorporation of a preventive and mandatory merger control regime, as a public competition policy aimed at preventing concentrations that may have a negative impact on markets, inevitably entails a series of challenges not only for the authorities in charge of delineating its edges and implementing it in practice, but also for the users of the system.

Setting up a balanced system that allows for a sharp and rapid evaluation of transactions that are harmless to competition ——avoiding obstructing licit businesses—— and, in turn, carefully scrutinizing those mergers that could be anticompetitive (and intervening to modify them or to prevent their execution), requires a solid institutional design and a particular assignment of powers and roles. The field on which these institutions play is delimited through a process of continuous learning, not only of the agency in charge of implementing the system, but also of merging and third parties.

At the outset of any merger control system, there are many queries that arise for the regime's users, particularly regarding its operation and the applicable review standards. And there are also many questions that the same authorities in charge of the regime's implementation also deal with; in the face of a very concise competition law, characterized by the use of brief and undefined legal concepts, which will usually require to be interpreted to give content to notions that reflect criteria, decisions and legal traditions, that are usually foreign.

On this path, it is not enough for a jurisdiction to 'import' comparative best practices and set up a regime that closely mirrors foreign experiences. In order to avoid inappropriate legal transplants, a key element of any merger control system is to achieve a proper fit between foreign structures and principles ——which naturally inspire this type of system that is replicated, with nuances, in most jurisdictions globally——, with the institutions, local criteria and procedures of each country.

Because despite the natural symmetries in the substantive analysis of a concentration when similar economic parameters are applied at a global level ——which allows decisions from different systems to serve as a reference——, it should not be forgotten that the analysis of the effects of a concentration on competition is, above all, an eminently local exercise. What is sought is, as a general rule, to prevent a merger from damaging the competitive process in a market, generally national or regional, and that this may affect eminently local consumers.

For this reason, the agency needs to continuously nurture the regime it administers; illustrating and providing transparency through guides, guidelines and the development of jurisprudence that, over time, manages to be consistent with the domestic experience that is accumulated.

The soundness and consistency of the answers an emerging system is capable to provide to these questions will determine, in the end, the predictability of its results, having a significant impact on the level of legal certainty offered to businesses that are developed in the economy of a country. And it is with this certainty that a merger control regime, finally, achieves legitimacy.

This essay seeks to analyze some of the most relevant questions ——of a procedural, legal and/or economic nature—— that have been raised in Chile in the field of merger control since its inception, in June 2017, to date, and the solutions or answers that the competition law institutions ——the National Economic Prosecutor's Office (*Fiscalía Nacional Económica* or "**FNE**"), the Competition Tribunal (*Hon. Tribunal de Defensa de la Libre Competencia* or "**TDLC")** and the Chilean Supreme Court (*Corte Suprema* or "**Supreme Court**")—— have offered to address them.

Although this essay focuses preeminently on the Chilean system, it is evident that the vast majority of the questions do not necessarily obey to a local approach only. On the contrary, as shown in the following pages, the issues raised by the participants in the merger control regimes are convergent in the Latin American region and are being raised in other jurisdictions with which Chile resembles in terms of institutional design and standards of analysis, such as Peru, Mexico, Argentina, Colombia and Ecuador. Many of their criteria are also analyzed, in contrast to those developed in Chile.

And most of these jurisdictions, in turn, apply parameters of assessment and guidelines from foreign competition agencies —mainly Anglo-Saxon and/or European—. The analysis shows that Chile has been receptive to the global diffusion of comparative merger control policies, using criteria from different jurisdictions to design the system at its outset and to provide it with content on substantive and procedural aspects. However, seven years after its establishment, the Chilean regime has acquired its own identity, consistent with the local legal and economic context. A phenomenon that is also replicated, to a greater or lesser extent, in other jurisdictions in the region.

II. Merger control in Chile

a. Background

Chile has had a system of preventive and mandatory control of concentrations since June 2017, from the entry into force of Law No. 20,945[3], of 2016, which amended Decree Law No. 211 ("**DL 211**") in various aspects, such as the introduction of the power to carry out market studies, or the sanction *per se* and criminalization of the most serious collusion cases.

Prior to this legal reform, there was no regulation in Chile that explicitly addressed the evaluation of mergers. The institutional framework in force at the time had subsumed its analysis under the procedures and standards applied (and designed) for other types of conducts. In practice, at the time there was a *de facto*, semi-voluntary merger control regime, in which the parties had no legal obligation to file prior to executing the transaction to any competition authority.

In this context, if economic agents wanted to obtain certainty that their transaction did not raise anticompetitive effects, and therefore would not be challenged by any authority, they could submit them to the TDLC and initiate a public consultation procedure ——which could also be promoted either by the FNE or even by third parties unrelated to the transaction in question——.

As a general rule, this procedure could be of a non-contentious nature[4] and was usually promoted before the transaction was implemented, but also after closing[5]. Likewise, a transaction already executed could be reviewed under a contentious process when it raised anti-competitive effects[6]. Although the FNE investigated some mergers that came to its knowledge or that were voluntarily reported by the parties, only the TDLC could impose binding remedies or seek to prevent the completion of the transaction, in the event that it raised competition concerns.

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[3] Law No. 20.945, which improves the system for the defense of free competition ("*Ley N°20.945, que perfecciona el sistema de defensa de la libre competencia*"), available at: https://www.bcn.cl/leychile/navegar?idNorma=1094093 (last accessed 3 September 2024).

[4] The advisory procedure was based on the provisions of ——at that time—— number 2 of Article 18 of DL 211, which granted the TDLC the power to *"[c]onsult at the request of whoever has a legitimate interest, or of the National Economic Prosecutor, non-contentious matters that may infringe the provisions of this law on facts, acts or contracts existing or to be entered into, for which purpose, it may set the conditions that must be met in such facts, acts or contracts*" (free translation).

[5] One of the first cases in which a public consultation procedure was promoted (a few days) after the transaction was completed was the acquisition of a series of supermarkets owned by Supermercados del Sur S.A. by SMU S.A. TDLC, Decision No. 43/2012.

[6] The first time the FNE filed an injunction against a completed transaction on the grounds that the transaction prevented, restricted, or hindered free competition, or tended to produce such effects, was against the transaction entered into by the cinema chains Cine Hoyts and Cinemundo, which culminated in a settlement agreement with divestment measures of certain movie theaters. TDLC, Rol C N°240-12.

Following the publication of the results of the Evaluation of the Merger Control Regime in Chile[7] carried out by the Organization for Economic Co-operation and Development ("**OECD")** in 2014 ("**OECD Report**"), it was deemed necessary to migrate to an *ex-ante* merger control regime that would legally contemplate the obligation to notify certain transactions to the FNE for clearance prior to their execution.

That recommendation stated that the main objective of merger control policy was to draw the line between pro- and anti-competitive concentrations, and to specifically identify those transactions more likely to have negative effects. The OECD Report allows us to affirm that if concentrations do not imply an infringement of competition as such – as they are common mechanisms that allow companies to grow their businesses, expand geographically, reach more consumers, diversify their portfolio, generate synergies and achieve efficiencies or economies of scale, among others[8]–. So, why the procedures and legal standards used in Chile for their evaluation and mitigation were the ones originally designed to prosecute and sanction outright anticompetitive conduct?

The OECD Report emphasized that the regime in force in Chile at the time lacked the three key elements for an effective merger control system: transparency, legal certainty and predictability. The main reasons for this deficiency were the lack of regulatory design and legal powers, the absence of distribution of powers between the FNE and TDLC, and the lack of clear jurisdictional criteria and standards of review[9].

The OECD's main recommendations aimed to redesign the Chilean merger control regime and to establish a mandatory notification regime. It was suggested to precisely determine the scope of action of the system, expressly defining what is understood as concentration and establishing notification mechanisms based on thresholds. Likewise, it was proposed to establish a procedure for the analysis of mergers that would be fast and transparent, with a precise allocation of the review powers that should correspond to the FNE and/or to the TDLC, based on substantive and consistent standards to evaluate the impact of transactions on competition, together with the incorporation of enforcement and sanctioning tools that would make the merger control rules effective[10].

When accepting these recommendations, the Message from the Government that initiated the processing of Law No. 20,945 indicated:

> [i]n order to provide our antitrust system with a merger control regime that provides guarantees to all the players involved, that resolves in a transparent and predictable manner the cases that come to its attention and that provide legal certainty to those who intend to carry out relevant business projects, with this

[7] OECD (2014), "Evaluation of the Merger Control Regime in Chile", available at: https://doi.org/10.1787/8590ad30-es.
[8] Ibid. p. 56.
[9] Ibid., p. 7.
[10] Ibid., p. 4.

> initiative we take on board the recommendations made by the OECD, proposing that Chile adopts the best standards and practices in this area[11].

The legislative process culminated in the current merger control system in Chile. A hybrid or mixed notification system was designed around the FNE, mandating that transactions with effects in Chile must be notified provided that certain requirements are met: that certain sales thresholds are reached and exceeded in Chile, and that the transaction legally qualifies as a concentration.

The regime is hybrid because, for those transactions that do not trigger a notification obligation, the law establishes voluntary notification regime[12]. This, provided that they constitute concentrations from a substantive point of view, since other types of transactions cannot be notified under the merger control regime. Likewise, and inspired by the experience of countries such as Canada, Mexico and Brazil, a period of one year from the completion of a non-notifiable transaction was incorporated to allow the FNE to review it ex-post[13].

From a regulatory theory perspective, there was a design of a regulatory subsystem based on the pre-existing institutional framework ——based on the trilogy of administrative agency (FNE), court specialized in competition matters (TDLC) and general judiciary (Supreme Court)——, but under an assignment of responsibilities and roles different from the one these same bodies have in other areas of the Chilean competition regime[14].

Thus, under the new merger control regime there was a somehow departure from the traditional logic of a 'bifurcated agency' model, in which the FNE was the investigating body, which had to resort to the judicial body in search of the decision and fine, as the case may be (this logic applied to all the areas of work attributed to the FNE until that date[15]). Under the new regime, decision-making powers (which in other areas of the Chilean competition regime are exclusively assigned to the TDLC or the Supreme Court as a judicial review body) were deconcentrated and adjudicatory powers were assigned to the FNE (placing the merger review powers, in its investigation and decision-making aspects, essentially in the administrative agency) limiting the role of the TDLC (and, narrowly, of the Supreme Court) to substantive judicial review in very specific cases.

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11 History of Law No. 20,945, p. 9.

12 Article 48, eighth para. of DL 211.

13 It was considered that this power places the Chilean system on a better footing than the regimes of the United States or the European Union, which lack such power. History of Law No. 20.945, p. 10.

14 Jordana J., Sancho D. (2004), *Regulatory designs, institutional constellations, and the study of the regulatory state*, in: Jordana J, Levi-Faur D (eds.), *Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, Edward Elgar, United Kingdom, pp. 296- 319.

15 Trebilcock, M. J. and Iacobucci, E. M. (2010), "Designing Competition Law Institutions: Values, Structure, and Mandate", *Loyola University of Chicago Law Journal* 41, n°455, p. 459.

Likewise, the new system better circumscribed the intervention of third parties external to the transaction, allowing their participation in the evaluation of the competitive impact carried out by the FNE[16], but impeding them to notify a concentration or trigger its judicial review.

b. The Chilean merger control regime: structure and procedure

(i) The merger control regime and its functional structure

Mandatory notification

From the 2016 legal reform, the merger control regime in Chile is included in articles 46 *et seq.* (Title IV) of the DL 211. This section regulates both the requirements that must be verified for a concentration to be notifiable, and the procedure before the FNE to carry out such notification.

For a transaction to give rise to a notification obligation to the FNE, two cumulative requirements must be met. First, the fact, act or agreement, or set of them, must **legally qualify** as a concentration. In other words, a fact, act or agreement must have the effect that two or more previously independent economic agents, belonging to different business groups, cease their independence in any area of their activities, through one of the legal mechanisms foreseen in the DL 211: a merger, an acquisition of decisive influence, an association to form an independent economic agent (or *joint venture*) or the acquisition of control over assets.

This classification does not follow a formalistic approach, being irrelevant the legal form adopted by the transaction or the instrument in which it is recorded. In this regard, the 2012 version of the FNE's Guidelines for the Analysis of Horizontal Concentrations mentioned that legal qualification is based on economic concepts, specifically, on the change of incentives that occurs when two economic entities that previously acted independently, through some legal, contractual or factual phenomenon, align their incentives to jointly maximize their benefits[17].

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[16] The Presidential Advisory Commission for the Defense of Free Competition, which evaluated the competition regulations and proposed amendments that were later included in the legal reform to DL 211 of 2016, stated in this regard that: "*[...] the transactions notified and cleared by the FNE in the first stage should not be subject to appeal by any party before the TDLC. Under the above scheme, the participation of third parties with a legitimate interest in the transaction should be reflected in the submission of background information to the FNE during the period of analysis of the transaction*" (free translation). Report of the Presidential Advisory Commission for the Defense of Free Competition, 2012, pp. 26 and 27. In the same sense, presentation of the then Minister of Economy, Development and Tourism Luis Felipe Céspedes before the Economy Commission of the Chamber of Deputies, contained in the Report of the Economy Commission of 24 September 2015. In particular: "*[i]n any case, third parties other than the economic agents that are party to the transaction may not make notifications, nor carry out strategic actions aimed at paralyzing a concentration, without prejudice to their right to provide background information to the investigation carried out by the FNE*" (free translation).

[17] FNE (2012), Horizontal Merger Guidelines (*Guía de Operaciones de Concentración Horizontales*), footnote 2.

It can be argued that this notion remains in force, since it is precisely this change in economic incentives, which has a legal substrate in some *de facto* or contractual way, that the regulation seeks to capture under the notion of cessation of independence. Despite subsequent amendments to the law, such an approach is in place, and is consistent with that of agencies such as the *Competition and Markets Authority* ("**CMA**") of the United Kingdom[18] in the matter.

Second, the concentration must have **effects in Chile**[19]. In other words, there must be a geographical link between the transaction and Chile; and it must have some impact on markets and competition in the country. The most obvious element that illustrates the existence of a geographical nexus, which gives the FNE jurisdiction to review the transaction, is that the economic agents that plan to concentrate have reached a certain business volume in Chile, measured in sales[20].

The regulation sets out two cumulative sales thresholds for the transaction to be captured by the mandatory notification regime. A joint threshold, consisting in the sum of the sales in Chile of the economic agents that plan to concentrate on the year prior to the execution of the transaction; and an individual threshold, under which at least two of the economic agents planning to concentrate must have reached, individually, a certain level of sales during the year prior to the execution of the transaction[21].

The law establishes that the sales thresholds that trigger the obligation to notify must be set by resolution issued by the FNE. The current joint and individual thresholds in Chile, in force since 9 August 2019, are set respectively at 2,500,000 and 450,000 *Unidades de Fomento* (respectively around USD 190.61 million and USD 19.73 million)[22].

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[18] The concept of cessation of independence is inspired by the notion of '*cease to be distinct*' used in the UK regulations to define a merger. See CMA, "Guidance on the CMA's jurisdiction and procedure", Section 4.3: "*A merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes of the Act: (a) first, either: (i) two or more enterprises (broadly speaking, business activities of any kind) must* ***cease to be distinct****; or (ii) there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises* ***ceasing to be distinct*** *[...]*"

[19] Article 48 clause 1° of DL 211 and FNE (2017), Competition Guide (*Guía de Competencia*), pp. 4-5 and para. 111.

[20] FNE (2017), Competition Guide, para. 111.

[21] Regulated in articles 47 and 48 of DL 211.

[22] They were set by Exempt Decision No. 157 of 15 March 2019 of the FNE, which adapts and sets the thresholds of letters a) and b) of Article 48 of Title IV of DL 211. The *Unidad de Fomento* in Chile is a unit of account used in Chile, which is readjusted according to inflation. As of the date of this work, one *Unidad de Fomento* is equivalent to CLP$37,950.62.

It is interesting that, at the outset of the regime, the FNE established significantly lower sales thresholds than the current ones[23]. These thresholds were quickly raised[24] following a report prepared by FNE's Merger Division, which identified the need to increase them in view of the experience gained and the changes in the country's economic conditions, particularly in terms of economic growth[25-26].

Specifically, that report reflected that during the initial stages of the new regime an excessive number of concentrations were notified, many of them with no negative effects on competition whatsoever. In essence, the threshold set to capture mergers that formally merited review by the authority was too low and ended up encompassing many transactions that did not require *ex ante* review. In fact, the main justification for raising the thresholds was that all the transactions assessed, which had posed risks to competition, would also have been caught if higher thresholds were in place[27]. In addition, the report valued the fact that the Chilean regime was hybrid, with the possibility of evaluating concentrations that do not exceeded the thresholds until one year after its implementation[28].

Notification thresholds established on the basis of national turnover are an objective, quantifiable and manageable mechanism. It is an element present in companies' accounts and, in general, no additional calculations or analysis are required for its determination[29]. Its use allows both the merging parties and the agency to distinguish with relative ease those transactions that must be *ex ante* reviewed from those for which there is no such obligation (and which could be voluntarily notified or simply not reported to the FNE due to their lower impact on the market). However, these thresholds require certain rules for the geographical distribution of sales, so as to avoid capturing global turnover that are not related to the size of the parties in the country[30].

Although from a public policy perspective there are other options for notification thresholds, measured in terms of market shares (as is the case in Spain or the United Kingdom),

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23 By means of Exempt Decision No. 667 of 24 November 2016, the joint sales threshold was set at 1,800,000 *Unidades de Fomento* and the individual sales threshold at 290,000 *Unidades de Fomento*.

24 FNE, Exempt Decision No. 157 of 25 March 2019, which adjusts and sets the thresholds of Letters A and B of Decree Law No. 211 of 1973, which sets standards for the defense of free competition (*Resolución Exenta Nº157 de 25 de marzo de 2019, que Adecúa y Fija los Umbrales de las Letras A y B del Decreto Ley N°211 de 1973, que Fija Normas Para la Defensa de la Libre Competencia*), available at: https://www.fne.gob.cl/wp-content/uploads/2019/03/Resoluci%C3%B3n-exenta-157.pdf (last accessed 3 September 2024).

25 Ibid.

26 FNE, Merger Notification Threshold Adjustment Report (*Informe de Ajuste de Umbrales de Notificación de Operaciones de Concentración*), available at: https://www.fne.gob.cl/wp-content/uploads/2019/03/Informe-de-ajuste-de-umbrales.pdf (last accessed 3 September 2024).

27 Ibid., para. 7.

28 Ibid., para. 13.

29 FNE (2019), Practical Guidelines to the Application of Notification Thresholds for Mergers in Chile (*Guía Práctica para la Aplicación de Umbrales de Notificación de Operaciones de Concentración en Chile*), para. 7 et seq. In the same sense, FNE, Closing Report, Complaint about the acquisition of assets of Unilever Chile Limitada and Unilever Chile SCC Limitada by Empresas Carozzi S.A. Rol FNE F241-2020 ("***Bresler/Carozzi***"), para. 29.

30 FNE (2019), Practical Guidelines to the Application of Notification Thresholds for Mergers in Chile, para. 22 *et seq*.

transaction value, value of assets or other subjective thresholds (which are used in Mexico or Peru[31]), they are not exempt from certain enforcement challenges since they depend on a substantive analysis for their application ——such as the definition of a relevant market which serves as basis to calculate market shares——. This explains why many OECD member countries have moved from substantive criteria (such as market share) to formal or objective criteria (such as turnover) for the purposes of establishing the criteria for mandatory notification of their transactions, in search of more objective filters[32].

However, the jurisdiction of the FNE with respect to transactions that do not have effects in Chile deserves some attention. Foreign economic agents involved in a transaction may reach or exceed the respective turnover thresholds in Chile (objectively triggering mandatory notification) because they have sales generated by their activities in Chile, even though the transaction does not affect competition in any market in Chile ——because it does not impact any local market, Chilean assets or consumers, but only foreign markets——.

Indeed, the obligation to notify a transaction to the FNE does not only arise when the economic agents involved in the transaction equal or exceed the sales thresholds in Chile, but the transaction must produce effects in Chile. The DL 211 is clear in stating that transactions that produce effects in Chile and cumulatively comply with the established individual and joint turnover thresholds must be notified to the FNE[33].

In most cases, a concentration among entities that have sales in Chile will impact one or more local markets. But there are very particular situations in which, despite the transaction is entered between economic agents with activities in Chile, it does not directly impact any local market, assets or consumers in Chile and, therefore, has no effect on the country[34]. With respect to this type of transactions ——the so-called *foreign-to-foreign transactions*—— can it then be held that the transaction has no geographical nexus, and challenge the geographical jurisdiction of the FNE to evaluate said transaction, despite the fact that the turnover thresholds were reached?

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31 In the case of Mexico, in addition to sales, the reporting thresholds are based on the value of the transaction attributed to assets or companies based in Mexico or the value of sales or assets in Mexico, whereas in Peru the thresholds include a value of assets, along with a value of sales in Peru.

32 OECD (2014), OECD Report, p. 89. However, many jurisdictions such as Spain, UK or Portugal still maintain thresholds based on market shares. This has allowed these jurisdictions to capture certain relevant transactions, such as *Facebook/Whatsapp* (Case M.7217 - *Facebook/Whatsapp*) or *Apple/Shazam* (Case M.8788 - *Apple/Shazam*), which due to the industry and the nascent nature of the acquired operators did not meet the notification thresholds based on sales or asset value. This allowed these transactions to be resubmitted and assessed by the European Commission. See Delgado Ruiz-Gallardón, I. (2019), "Notification thresholds: comparative analysis between Spain and the European Union and the challenges of the digital era", *Competition Yearbook, ICO Foundation*, No. 1, 2019, pp. 205-232 (Delgado Ruiz-Gallardón, I. (2019), “Umbrales de notificación: análisis comparativo entre España y la Unión Europea y los retos de la era digital”), available at: https://anuariocompetencia.fundacionico.es/files/2019/2019.pdf (last accessed 7 September 2024).

33 Article 48 DL 211, para. 1°.

34 Such as the acquisition of an asset abroad between two economic agents with sales in Chile, or the execution of a *joint venture* between economic agents operating in Chile to develop a project with exclusive effects outside Chile.

From a public policy perspective, merger control regimes aim to capture transactions that could negatively impact local markets and consumers. It would not make sense to cover transactions without effects at the domestic level; capturing such transactions would only generate a merger control system that is too all-encompassing –which the FNE precisely tried to limit by raising the level of sales thresholds in 2019– and would divert resources to analyze transactions that are not related to the promotion and defense of competition in the markets.

On the other hand, the DL 211 established objective and quantifiable parameters to determine the mandatory nature of a notification to the FNE —the existence of a certain turnover in Chile— since it is not possible to leave to the merging parties' discretion the determination of whether their transaction has effects in Chile and whether it impacts assets, markets and local competition. Rather, this is due to a substantive and less quantifiable analysis such as the existence or not of sales in Chile.

Although when the respective turnover thresholds are reached or exceeded, *foreign-to-foreign* transactions are generally notified to the FNE —since the sales thresholds are the objective element that triggers the jurisdiction of the agency for review, although they can access waivers not to provide certain information[35]— it is interesting that, at the beginning of the regime, the FNE analyzed and cleared transactions that have been notified to it, but declaring that:

> The Transaction does not produce effects in Chile [...] there is no circumstance in the case at hand that would demonstrate the existence of a geographical link with the country [...] the transaction only entails a change in the nature of the control of an economic agent that does not carry out economic activities in Chile, either directly or indirectly, for which reason this Division recommends clearing the notified transaction, with no remedies[36] (free translation).

As a mechanism to capture *ex ante* transactions that have no effects in Chile and that may not be notifiable to the FNE, in 2021 the possibility of giving a declaration of mere certainty was incorporated within the framework of the pre-notification stage that can be triggered by the parties to the concentration before the FNE prior to a possible notification. Within the framework of this procedure, and on the basis of the information provided to the FNE for this purpose, it is possible for the parties to obtain a written statement from the FNE on the

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[35] See FNE, "ICN Merger Notification and Procedures Template," *Merger Working Group*, February 25, 2021, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/09/MWGTemplate2021Chile.pdf (last accessed 2 September 2024).

[36] FNE, Clearance Report, Acquisition of joint control of CIT by Bolloré Africa Logistics and APM Terminals, Rol FNE F167-2018, paras. 4 and 6. This criterion contrasts with that of other authorities that lack a local nexus criterion. For example, at the European Union level (and in many European jurisdictions), transactions that lack any nexus with European markets are reviewed (e.g., Case M. 11210 - *Acciona Concesiones / Cobra / Endeavour / JV*, in which the creation of a *joint venture* with joint control to develop an energy project in Australia was analyzed).

mandatory nature of the notification of a transaction to the FNE.[37] It is under this procedure that the FNE could theoretically conclude that a concentration, despite reaching the sales thresholds, does not have effects in Chile and that, therefore, it does not comply with the requirements established in the law for its notification to be mandatory.

The formalization of the pre-notification stage and its regulation by means of guide (*instructivo*) contemplating the possibility of giving a declaration of mere certainty, constituted at the time an effort by the FNE to provide greater legal certainty to the parties to streamline the procedures and avoid the costs associated to the notification of concentrations that are harmless to the Chilean market. It is equivalent to the mechanism used in many comparative jurisdictions, such as most countries in the European Union, where the investigating team can be consulted at the pre-notification stage whether a transaction qualifies as a concentration and/or whether the notification thresholds provided for in the respective merger control regulations are met. Likewise, in certain national regimes, such as Spain, there are formal mechanisms for prior consultation, which also make it possible to obtain a formal pronouncement from the decision-making body of the competition authority with *erga omnes* effects[38].

Voluntary notification and *ex-post investigation*

Finally, if the turnover thresholds are not reached or exceeded, the law contemplates two ways for the FNE to evaluate the impact of a transaction on competition.

First, the possibility for the merging parties to notify to the FNE a transaction on a voluntary basis ——provided that it legally qualifies as a concentration, and it is still pending implementation——. Second, the possibility for the FNE to investigate a transaction that has already been implemented but that has not been voluntarily notified, up to one year since its completion[39].

In short, in a general way, a hybrid system such as the one that exists in Chile seeks to generate a manageable system that allows capturing those transactions that are entered into between the largest companies ——those with the highest turnover—— and that presumably could generate greater concerns for competition. But obviously this is not always the case. There are concentrations between companies with higher sales that may be harmless to competition, as well as acquisitions of small companies or nascent

[37] In the framework of such voluntary procedure, prior to an eventual notification, the merging parties may consult the FNE whether or not a transaction can be legally qualified as a concentration and request the FNE to issue a written pronouncement, based on the described transaction and the accompanying documents. FNE, Pre-notification Instruction (*Instructivo de Prenotificaciones*), para. 25.

[38] Article 55.2 of Spanish Law 15/2007, on the Defense of Competition ("Ley 15/2007, de 3 de julio, de Defensa de la Competencia"), provides that "*prior to the filing of the notification, the National Competition Commission may be consulted on: a) whether a given transaction is a concentration as provided in Article 7, b) whether a given concentration exceeds the minimum thresholds for mandatory notification provided in Article 8*", (free translation).

[39] Article 48, paras. 8 and 9 of DL 211.

competitors, whose competitive constraint may be relevant, or mergers between small companies, but in highly concentrated markets, which can raise negative effects on competition.

Therefore, in view of the establishment of sales-based notification thresholds in Chile, which are relatively high for the size of companies and businesses present in the country, a hybrid system seeks ——through voluntary notification—— that the merging parties can carry out a self-assessment of their transaction to evaluate whether it would be necessary to seek certainty before the authority that their transaction will not raise concerns. The duty to carry out a self-assessment is reinforced by giving the FNE the power to analyze *ex officio* and eventually challenge concentrations that may raise competition concerns, despite their sales in Chile are below the thresholds and thus they do not trigger the notification obligation[40].

The principle behind it is that a planned concentration may substantially reduce competition or, if it has already materialized, may constitute an act that prevents, restricts or hinders competition, regardless of whether or not it exceeds the notification thresholds, which only aims at filtering those transactions that must be brought to the attention of the authority, but do not necessarily represent the competition concerns associated to the transaction.

However, in this respect the rule is obscure, and the self-evaluation made by the parties is not subject to clear criteria, since the law does not contemplate in which scenarios it would be plausible to voluntarily notify a transaction to the FNE. In other words, there is no legal criterion that illustrates which transactions that do not meet the merger thresholds in Chile can be implemented without notification to the authority and without the risk of being investigated by the FNE within a year from completion.

The legislative technique of leaving the decision to voluntarily notify to the self-assessment by the parties that intend to merge is deemed adequate, since the law could hardly contemplate a closed catalog of situations in which it would be convenient to notify voluntarily without risking leaving out some scenarios due to lack of foreseeability[41]. In this case, while the law contemplates the principle that should trigger the need to seek certainty from the parties —that a transaction may be apt to substantially reduce competition or when there are doubts as to whether there is a duty to notify the transaction[42]— it was decided not to set a specific rule.

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40 OECD, OECD Report, p. 80

41 This regime coexists with mitigation measures imposed prior to the introduction of the preventive control system, which imposed the obligation to notify all acquisitions in the supermarket market. After a non-contentious process before the TDLC and the CS, in which the passive subjects of the measures sought to lift them, such measures persist, and certain actors must notify all their concentrations to the FNE regardless of the sales thresholds. Complaint filed by the FNE before the Supreme Court in "Consulta de SMU S.A. y CorpGroup Holding Inversiones Ltda. sobre el alzamiento, modificación y/o revocación de las condiciones tercera y sexta impuestas por la Resolución N°43, Rol NC N°501-2021", para. 80-83.

42 Criteria in articles 54, 57 and 3 bis letter a), DL 211.

During these years of the regime, individuals have repeatedly notified transactions voluntarily to the FNE when their transaction raised doubts as to whether it could imply a substantial lessening of competition. An emblematic case was *Clínicas de Iquique*[43], a concentration between the only two private health service providers in Iquique, which was notified voluntarily and then prohibited by the FNE on the grounds that it may substantially lessen competition. However, most transactions that have been notified voluntarily, have been thereafter subject to unconditional clearances.

It can be argued that, during these years, the FNE has made a reasonable use of the power to investigate *ex post* implemented transactions ——with a ratio of one to two annual transactions investigated—— which have been initiated either *ex officio* or by complaints from third parties[44]. Both in the choice of the transactions to be investigated, and in the competition action in which the investigation has concluded, the FNE has shed light on when it is likely to exercise its power and thus when a transaction that is not notified either obligatorily or voluntarily may be exposed to an investigation.

In *Bresler/Carozzi*, the FNE investigated Carozzi's acquisition of Unilever's ice cream business, which operated the Bresler and Melevi brands. In that investigation, the FNE assessed not only whether there was possibly a *gun jumping* conduct—— for not having notified a transaction when it should have done so because the respective turnover thresholds were reached——, but also analyzed the effects of said transaction on the market ——since the investigation lasted almost three years, which provided a relevant timeframe to analyze its effects——**.**

In that case, the FNE held that, although there was no *gun jumping* (because the parties were below the sales thresholds, albeit by a small margin), and the transaction did not raise anticompetitive effects, it is relevant and efficient to voluntarily notify it to the FNE when there is a 'borderline scenario' regarding the notification thresholds, and when one or both parties that plan to concentrate hold a relevant position in the respective markets in which they operate (as the parties to said transaction indeed held, in the ice cream market).

In such cases, *i.e.*, when the parties are by a narrow margin below the respective turnover threshold (which could likely be due to an accounting error or some inaccuracy in the calculation of the threshold) and/or hold a relevant position in the respective market, the FNE considers it appropriate to make a voluntary notification of the transaction, in order to avoid "[...] *a possible ex post scrutiny of the concentration in light of Article 48, paragraph nine of DL 211, and the uncertainty and transaction costs that, certainly, this entails both for the Parties themselves, and also for the FNE*"[45] (free translation).

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[43] FNE, Acquisition of control of Clínica Iquique S.A. by Redinterclínica S.A., Rol F178-2019 ("***Clínicas de Iquique***"). However, the parties notified the transaction disputing that it was a merger to monopoly.

[44] However, during the year 2024, the FNE has increased the number of investigations initiated for this reason.

[45] Ibid., para. 52.

In addition, the FNE has indicated as a criterion for analyzing whether to voluntarily notify a transaction to the FNE the fact that the transaction may affect remedies in force. This is not only limited to cases in which one or both parties have been part of a previous merger control procedure and have offered behavioral remedies which are still in force, but also with respect to any measure that either party have been subject to in other instances (*i.e.*, remedies imposed by the TDLC in contentious or non-contentious matters)[46]".

(ii) Main regulations and guidelines

Title IV of DL 211 regulates the stages, phases and deadlines of the FNE's review on the impact of a concentration on competition; the powers of the agency in the context of the procedure; the duties and rights that the notifying parties may invoke during the proceedings; and the role of third parties interested in the concentration.

The regulations also establish ——in article 3° bis of DL 211—— various procedural infringements. According to the OECD, the Chilean regime previously lacked adequate mechanisms to sanction infringements related to mergers, which required a reform to make the system effective and efficient[47]. Thus, among other aspects, in cases of failure to notify, implementing a notified concentration before receiving authorization from the FNE, implementing a transaction that has been prohibited, or notifying providing false information, were introduced as infringements[48]. Penalties equivalent to those contemplated for other anticompetitive conduct are applicable to such infringements[49].

Additionally, Decree No. 41 of 2021 of the Ministry of Economy, which approves the Regulation on the notification of a concentration (*Reglamento sobre la notificación de una operación de concentración*; hereinafter, the "**Regulation**"), establishes in detail what background information is necessary to notify a concentration to the FNE[50]; who must notify

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46 FNE, Pre-Notification Instruction, Annex I, section 16.

47 OECD (2014), OECD Report, section 6, pp. 102-103.

48 Article 3 bis of DL 211, "*The measures of article 26, as well as those preventive, corrective or prohibitive measures that may be necessary, may also be applied to those who: a) Violate the duty of notification established in article 48. b) Infringe the duty to do not implement a concentration notified to the FNE and which is suspended pursuant to the provisions of article 49. c) Fail to comply with the measures with which a concentration has been cleared, pursuant to the provisions of articles 31 bis, 54 or 57, as the case may be. d) Implement a concentration contrary to the provisions of the decision or judgment that has prohibited such transaction, pursuant to the provisions of Articles 31 bis or 57, as the case may be. e) Notifying a concentration, pursuant to Title IV, by providing false information*" (free translation).

49 Contemplated in article 26, DL 211.

50 For those notifications made after November 2, 2021. The Regulation previously in force was established in Supreme Decree No. 33 of 2017 of the Ministry of Economy, Development and Tourism ("Decreto Supremo N°33 de 2017 del Ministerio de Economía, Fomento y Turismo"). Among the reasons for its modification, the citations of the new Regulation state: *"That, through public consultation initiated on 25 March 2019, the FNE detected aspects that can be improved of said regulation, gathering the opinion and grounded appreciations of current and potential notifiers, lawyers, economists, advisors and the general public* [....*That, based on said public consultation, the main problems of the current regulation were identified as the excessive volume of information required to notify a concentration before the National Economic Prosecutor's Office, the lack of a substantial difference between the ordinary and the simplified notification mechanism, and the need to simplify the language to provide greater clarity to the notifying parties*" (free translation).

and attach their information (the 'entities that take part in the transaction, including not only those who sign the act or contract but also the target entity and their business groups).

The Regulation establishes two main mechanisms for notifying, the residual or ordinary, and the simplified one, which requires fewer documents and applies to concentrations that are presumably of lesser entity and impact. A variant of the simplified mechanism was introduced in 2021, when a new version of the Regulation was issued in order to alleviate the requirements for notification and to implement a special simplified notification mechanism for concentrations that do not result in overlaps between the parties' activities in the market, with substantially lower reporting requirements.

In addition to the provisions of DL 211 and the Regulation, the FNE has sought to provide guidance on the interpretation and application of these rules through different guidelines and soft law instruments. As most of these documents indicate, the purpose is to give greater transparency and legal certainty to those who seek to notify a concentration, and to limit the discretion that the Regulation confers on the FNE.

To date, the FNE's guidelines on merger control are the following:

(i) 2022 Guidelines for the Analysis of Horizontal Mergers[51] (*Guía de Operaciones de Concentración Horizontales* or "**Horizontal Merger Guidelines**") ——which replaced the previous version of 2012—— which set out the analytical framework under which the FNE assesses, in a horizontal dimension, whether a concentration can substantially reduce competition;
(ii) Practical Guidelines to the Application of Notification Thresholds for Concentrations[52] (*Guía Práctica para la Aplicación de Umbrales de Notificación de Operaciones de Concentración en Chile*), which seeks to guide the way in which the sales of economic agents that plan to concentrate should be calculated;
(iii) a Competition Guide[53] (*Guía de Competencia*), which seeks to provide guidance to the notifying parties on whether a transaction qualifies as a concentration;
(iv) a Remedies Guide[54] (*Guía de Remedios*), which is intended to guide the notifying parties regarding the FNE's assessment of the mitigation measures they offer, and the general principles applicable to such measures that it may consider in its decisions; and

[51] FNE (2022), Horizontal Merger Guidelines, available at: https://www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-castellano.pdf.
[52] FNE (2017), Practical Guidelines to the Application of Notification Thresholds for Concentrations in Chile (*Guía Práctica para la Aplicación de Umbrales de Notificación de Operaciones de Concentración en Chile*), available at: https://www.fne.gob.cl/wp-content/uploads/2019/08/Guia_Umbrales-08.2019.pdf.
[53] FNE (2017), Competition Guide, available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-competencia.pdf.
[54] FNE (2017), Remedies Guide (*Guía de Remedios*), available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-remedios-.pdf.

(v) an Instruction on Pre-Notifications of Concentrations (*Instructivo sobre Pre-Notificaciones de Operaciones de Concentración* or "**Pre-Notification Instruction**")[55] and its Annex with questions and answers[56], which seek to provide clarity on the way in which this voluntary instance is developed prior to notification, providing guidelines to the parties on what they can obtain in it, and the way in which FNE will manage this stage and respond to the parties' queries.

As in comparative jurisdictions, these guidelines and instructions have allowed the FNE to develop clearer criteria regarding its interpretation and application of the merger control regulations, contributing to provide legal certainty and predictability to the system. Such clarity in the applicable rules is intended to mitigate possible disincentives to investment that may arise from the very existence of a merger control regime[57].

In addition, the criteria set out in other FNE guidelines issued on matters other than merger control are fully applicable. For example, the 2011 Guidelines on Trade Associations and Free Competition (*Guía de Asociaciones Gremiales y Libre Competencia*) contain relevant and useful guidelines to set the boundaries regarding contacts between competitors in the interim period between the evaluation of a concentration, its notification and even the clearance decision by the FNE[58].

However, the FNE guidelines do not cover all the relevant issues that are generally subject to evaluation in a concentration. For example, at the level of substantive analysis, there is no guidance on the criteria under which the FNE analyzes non-horizontal or conglomerate concentrations. Whenever these types of concentrations must be evaluated, in the absence of specific guidelines, it is common in practice for the FNE to resort to guidelines, *soft law* or comparative jurisprudence (mainly Anglo-Saxon and European), to assist in the application of interpretative criteria and standards in the prospective risk analysis.

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[55] FNE (2021) Pre-notification Instruction, available at: https://www.fne.gob.cl/wp-content/uploads/2021/05/20210416.-Instructivo-Pre-Notificacion-rev-CI-30.04.pdf.

[56] FNE (2023), Pre-notification Instruction, Annex 1, available at: https://www.fne.gob.cl/wp-content/uploads/2023/08/Anexo-instructivo-pre-notificaciones.-Preguntas-frecuentes-16-08-2023.pdf

[57] The FNE has stated that "*[....although the Special Procedure of Title IV is designed on the basis of the intervention of the State through the FNE in certain transactions whose completion is suspended in time, while a final resolution of authorization is pending, it also seeks that this state intervention does not have an unnecessary impact on the development of lawful economic activities in our country, which is achieved by providing legal certainty to users about the deadlines involved for the efficient development of business and safeguarding the exercise of the fundamental rights of the various economic agents that are subject to the procedure*" (free translation). FNE, Decision of May 28, 2021 rejecting the administrative appeal for reconsideration, Rol F255-2021, recital 31°. This resolution rejects the appeal for reconsideration filed by the Organization of Consumers and Users of Chile, Consumers Association (ODECU) (*Organización de Consumidores y Usuarios de Chile, Asociación de Consumidores*) against the Decision of the FNE of 31 March 2021, by which the acquisition of control by State Grid International Development Limited in NII Agencia en Compañía General de Electricidad S.A. and others was cleared unconditionally, available at: https://www.fne.gob.cl/wp-content/uploads/2021/05/inic_F255_2020.pdf.

[58] FNE (2011), Guidelines to Trade Associations and Free Competition (*Guía Asociaciones Gremiales y Libre Competencia*), Promotional Material Nº2, available at: https://www.fne.gob.cl/wp-content/uploads/2017/10/guia_-asociaciones_-gremiales.pdf (last accessed 3 September 2024).

It is interesting that in recent Latin American merger control regimes –such as Chile, Peru and Ecuador, among others– it can be observed a generalized practice to fill the gaps in criteria for assessment with guidelines and jurisprudence consistently applied in the jurisdictions that have served as a reference and inspiration for the domestic regime[59].

The question that arises is how to apply a concise competition regulation, lacking decades of jurisprudential development that sets the limits and gives meaning and interpretation to these rules?

Resorting to comparative criteria has been the public policy option of various jurisdictions in Latin America, since it gives them sufficient flexibility to fill the gaps usually left by brief competition rules, importing standards traditionally accepted and applied at the comparative level. It cannot be denied that this option may suffer from a certain lack of legitimacy ——since it allows a sort of discretionary selection ('*cherry picking*') of criteria and standards without a democratic process of legal creation or judicial interpretation——.

However, this deficiency has been (to some extent) mitigated by the gradual incorporation of international criteria into local *soft law* instruments, such as guidelines and instructions, most of which are subject to a prior public consultation process by the agencies. This makes it possible to hear and incorporate the views and comments of all stakeholders and especially, in the case of the merger control regime, of its main users[60].

This process has enabled to incorporate foreign standards by turning them into local guidelines that, although not binding, have allowed the global diffusion of foreign competition policies, in a process of local learning of comparative best practices that has ended up establishing foreign competition criteria at the domestic level[61]. It is usual for specialized courts such as the TDLC not only to directly quote and refer to foreign jurisprudence and comparative guidelines, but also to incorporate in its own decisions and judgments the standards of analysis of the FNE's soft law instruments[62].

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59 Levin, F. (2023), "Merger Control in Chile: Echoes from the EU", in: *Journal of European Competition Law & Practice* 14, Nº1, Oxford University Press, available at: https://doi.org/10.1093/jeclap/lpad002 (last accessed 3 September 2024).

60 In Chile, most of the guidelines issued by the FNE have been submitted for public consultation, not only on mergers, but also on antitrust fines or compliance programs, among others. The same occurs in other jurisdictions such as Peru (INDECOPI, Guidelines for the qualification and analysis of concentrations, or *Lineamientos para la calificación y análisis de las operaciones de concentración empresarial*) or Mexico (COFECE, Guidelines for the notification of concentrations, or *Guía para la notificación de concentraciones*).

61 Dobbin, F., Simmons, B. and Garret, G. (2007), "The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?", in: *Annual Review of Sociology* 33, pp. 449-472.

62 For example, in Decision No. 81/2024, the TDLC cites the FNE's Horizontal Concentrations Guide for the purpose of analyzing the market structure of Isapres. In fact, the Decision states that "*the FNE may issue on its own initiative guides or guidelines on various matters in accordance with the law, as well as instructions to be followed (article 39, letter s), D.L. N° 211), which, although not binding for the analysis of the Court, provide predictability to the exercise of its powers of investigation and prosecution of conduct*" (recital 126°), (free translation). Likewise, in Judgment 166/2018, the TDLC relies on the 2012 Concentrations Guide and the Remedies Guide.

(iii) Merger control procedure

The merger control procedure is divided into two stages or phases during which the FNE can assess the impact of a transaction on competition (either in Phase I or Phase II). The possibility of contacting the FNE before notifying is also contemplated (at the soft law level in the Pre-notification Instruction)

Pre-notification

The pre-notification phase is a voluntary, informal, collaborative and confidential stage, which allows notifying parties to consult the FNE on specific issues or doubts, both substantive and procedural, regarding a possible notification[63]. Its existence is not contemplated in DL 211, but the Pre-notification Instruction formalizes a practice developed since the beginning of the regime with the purpose of facilitating the act of notifying a transaction to the FNE but establishing response deadlines for the agency.

Once the consultation is received, the FNE will schedule a meeting, videoconference or call with the consulting parties, within a maximum period of five administrative working days, to discuss the consultations formulated in the request, which could be extended depending on the case and complexity of the consultation[64]. Within the framework of this stage, the FNE may also evaluate certain specific doubts contained in the notification form, and for this purpose it is also subject to the deadlines established in said Instruction.

Likewise, within the framework of this procedure, the FNE may be requested to issue a declaration of mere certainty with respect to the legal classification of a concentration. In Chile, this declaration allows the parties to obtain certainty, under confidentiality, regarding the obligation to notify a transaction to the agency that may be doubtful, while it allows the FNE not to allocate resources to investigate transactions that do not legally qualify as a concentration and were not notifiable to the FNE before entering into the framework of the notification procedure[65].

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63 FNE, Pre-notification Instruction, p. 1.

64 If the consultation is accompanied by a draft notification, the term is extended to between five to ten administrative working days. This period may be extended to a maximum of 15 working days if necessary for an adequate analysis of the consultation. If the notifying parties do not submit the information requested by the FNE to resolve the consultation, or if they do not take any action during a period of 30 administrative business days, the pre-notification will be considered abandoned. See FNE, Pre-notification Instruction, pp. 5 and 6.

65 See, for example: FNE, resolution of 28 August 2020 in Rol FNE F242-2020, which states that "*the projected transaction would not constitute a concentration in the terms set forth in article 47, letter b) of DL 211*"; resolution of January 15, 2021, which indicates that "*not being clear the legal qualification of the Transaction, in accordance with the provisions of article 50, final para. of DL 211, it is necessary to consider the Notification as not filed*" (free translation). Subsequent to the issuance of the Pre-notification Instruction in 2021, the decision on whether or not a transaction can be legally qualified as a concentration pursuant to article 47 of DL 211 is, as well as the entire pre-notification procedure, confidential.

This regime contrasts with that of other jurisdictions, such as the European Commission ——and most national jurisdictions in Europe——, where the pre-notification phase is not subject to deadlines and has the fundamental objective of allowing the competition authority to carry out an initial analysis of the transaction and request information to complete the notification form without being subject to legal deadlines[66]. It also allows the agency to prepare itself more appropriately, organizing and distributing resources according to the expected intensity of work. This has meant that in these jurisdictions pre-notification has become, in some way, an essential stage or step prior to the notification of the transaction, allowing, in turn, to reduce the authorization periods in those cases resolved purely and simply in phase I.

The Notification

If a concentration complies with the requirements established in Title IV of DL 211, the parties must notify the FNE prior to its implementation. In order to so, the parties must send the FNE the notification form, as well as "*the background information that allows for a preliminary assessment of the possible risks that the notified transaction may pose to free competition*"[67] (free translation).

Specifically with respect to the notification mechanism, the DL 211 and the Regulation contemplate the possibility for notifying parties to avail themselves of the simplified notification mechanism. This is the case in certain scenarios in which it can generally be considered, *a priori*, that a concentration would raise fewer competition concerns[68].

However, and even if it is appropriate to use a simplified mechanism, the FNE can always request, within the Phase I period, that the notification is submitted under the ordinary form, when this is necessary for an adequate investigation of the possible risks to competition arising from the concentration. The Regulation states that this could occur in certain cases, such as when it is difficult to define relevant markets, it is not possible to properly determine the market shares of the economic operators participating in the transaction, or one of them is a potential competitor or a holder of important intellectual or industrial property rights, or, the markets involved have high barriers to entry, a high degree of concentration, or the transaction entails risks or coordination.

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66 European Commission (2004), "Best Practices on the EC merger control proceedings", available at: https://tinyurl.com/ECMergerBestPractices (last accessed 2 September 2024).

67 Article 3 of the Regulation. The same Regulation lists the minimum information that must be submitted.

68 Article 4 of the Regulation. It mainly comprises the following grounds: (i) that there is no horizontal or vertical overlap between the parties; (ii) that the transaction refers exclusively to the acquisition of individual control over an economic agent in which the acquirer already had joint control; (iii) certain cases in which the shares of the economic agents that do have overlap in the relevant markets are particularly low (below 20% in the same market or below 30% in vertically related markets); (iv) certain cases in which these thresholds are exceeded but the combined market share of all the entities involved in the transaction in the same relevant market is less than 50% and the increase (or delta) of the Herfindahl-Hirschman index resulting from the concentration in the same relevant market is less than 150.

In short, the spectrum of scenarios proposed by the Regulation ——and whose classification could only be made by the FNE in the course of the investigation in Phase I—— is so broad that the use of the simplified mechanism is essentially reversible by the FNE. This can be explained, at least in part, by the existence of transactions notified under the simplified mechanism that have entailed competition concerns, representing difficulties for the agency to carry out more in-depth investigations with less information from the parties. However, although the breadth of criteria could generate some uncertainty in the notifying parties, in practice the FNE has used the reversibility of the mechanism on very exceptional occasions.

When preparing their notification, the parties may always request the FNE, prior to or at the time of notification, to be waived from submitting information that is not necessary, or relevant to the analysis of the transaction, or that is not reasonably available to them, either totally or partially. This possibility of asking to be waiver to submit certain information is widely used by users of the regime, and it is what allows the scope of the Regulation to be limited to the transaction and context of the specific parties. However, this request is generally made alongside the notification, so the discussion on what information is or is not relevant to the analysis and is available to the parties arises once the notification procedure has begun, within the limited decision deadlines and under the system. Therefore, except for very obvious information, it may be difficult for the FNE to elucidate what information it will require in its substantive analysis and what will not be relevant.

Most likely, when the system becomes more mature, (and as is done in other relevant jurisdictions such as the European Union) there will be a tendency to discuss the relevance of the information to be accompanied and its availability in the pre-notification instance, which offers greater flexibility and deadlines to determine the information that is really required by the FNE and is available by the parties to assess the concentration.

Likewise, although the Regulation establish as a general rule that the information provided by the parties must be in Spanish unless there is specific authorization from the FNE to provide it in a different language, it also establishes the possibility of providing in English, without authorization from the FNE, information related to the contracts and documents related to the transaction and its effects in Chile, including minutes of the shareholders' meeting and the board of directors, as well as internal or external reports or presentations, prepared or commissioned to evaluate the transaction, business plans, commercial programs, studies or reports on the relevant market, the conditions of competition or competitors or the powers of attorney of the company's representatives, among others[69].

[69] Article 8 of the Regulation establishes that the information to be submitted to the FNE "*must be submitted in Spanish, except when there is a special authorization from the National Economic Prosecutor ("Fiscal Nacional Económico") or in the case of the information required in article 3, para. 1 letter f), para. 4 letter g) and para. 8, article 6, para. 1 letter e) and para. 8, and article 7, para. 1 and para. 4, all of these regulations, which may be submitted in English without the need for such prior authorization. Notwithstanding the foregoing, the National Economic Prosecutor may always require the notifying parties to attach documents in their original language, which must be accompanied by the respective simple translation"* (free translation).

Since 2021, a simplified notification mechanism has also been contemplated ——called simplified 'without overlaps'——, in those cases where there is no horizontal or vertical overlap between the activities of the parties[70]. In this scenario, the amount of information that is required is substantially lower, since, as a general rule, such transactions should not generate a relevant impact on the markets. As is evident, for the admissibility of such a mechanism, it is necessary to accompany background information that justifies its origin[71]. Transactions that do not fall within these cases must benefit from the residual mechanism of ordinary notification.

Once the concentration has been notified, a period of evaluation is opened for the FNE to ensure that all the background information that must be accompanied to the notification has indeed been submitted. The FNE has a period of ten business days to determine whether or not the notification is complete. If the FNE decides that the notification is incomplete, it will inform the notifying parties of the missing information so that, within a period of ten days, they can correct the errors or omissions.

The law does not provide for appeals against the FNE's decision to declare the notification incomplete (a decision that opens a period of up to ten days to correct the notification and another equivalent period for the FNE to re-evaluate the new information submitted). If the errors are not corrected in a timely manner, the notification will be deemed not filed[72]. If the errors or omissions detected are corrected within the deadline, it will be considered as a new notification[73].

The completion period poses challenges for both the notifying parties and the FNE, since the Regulation is set out in such broad terms that it is not difficult for a notification to have a missing document or to be considered incomplete, with the consequent delay in the start of the FNE's investigation periods. On the other hand, for the FNE, if a pre-notification instance does not precede the filing, the notification will usually be the first notice that the FNE may have about a concentration. Given the natural asymmetries of information with the parties, and the short decision deadlines in Phase I, the initial role of the agency will focus essentially on verifying full compliance with the list of information contemplated in the Regulation and accepting waivers from accompanying information in a very limited way.

The Investigation

The FNE will declares the starting of the investigation only once the notification is complete. Through a resolution, the FNE will order the initiation of the Phase I investigation and the “clock” will begin to run against the agency. This phase lasts 30 business days, but it can be suspended by agreement between the parties and the FNE for up to 30 additional days.

[70] Article 4 n°1 of the Regulation.
[71] Article 7 of the Regulation.
[72] Article 50, para. 4, of DL 211
[73] Ibid.

Likewise, the FNE can suspend the investigation period for up to 10 business days each time the notifying parties offer remedies.

Once the Phase I period has elapsed, the evaluation of the effects of the transaction on competition carried out by the FNE may end by three possible decisions: (i) authorize the concentration unconditionally, in the event that it is convinced that it is not suitable to substantially reduce competition; (ii) authorize the concentration subject to remedies or mitigation measures, if it is convinced that, subject to such measures, the transaction is not capable of substantially reducing competition; or (iii) extend the investigation to Phase II when it considers that the notified concentration, if authorized unconditionally or subject to remedies offered by the notifying party as the case may be, could substantially reduce competition.

The extension to Phase II is justified by a well-founded decision that contains the factual, legal and economic elements of why the transaction, if implemented, could substantially reduce competition, and why it is necessary to carry out an in-depth investigation of the effects on the markets involved and to gather more information to confirm or rule out such possible competition concerns, in the light of the counterweights wielded by the parties.

In the event any of these decisions is not adopted within the deadline, the transaction will be deemed cleared, since the law establishes a positive silence regime[74]. However, to date, there is no case in which the FNE has not adopted a decision within the deadline and positive silence has not been applied[75].

Phase II of the investigation lasts up to 90 working days, although it may be suspended by mutual agreement between the parties and the FNE for up to 60 additional days. The FNE may suspend this period for up to 15 days each time the notifying parties offer mitigation measures. This phase is generally characterized by a more specific delimitation of the FNE's theory of harm, a greater exercise of research powers and qualitative evaluation of the background that supports it, and an in-depth economic analysis and development of quantitative elements. Third parties usually participate more actively and submit more background information during this phase. Likewise, a dialogue and negotiation is generally generated between the parties and the FNE on the mitigation measures offered to mitigate the identified risks.

In short, an investigation under the ex-ante merger control regime operates, and must operate, under a logic of collaboration and dialogue between the parties and the FNE. This is because such investigations originate from a voluntary act of two or more parties that plan

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74 Article 54, second para., of DL 211.

75 This is consistent with the fact that, from an administrative law perspective, the Decisions issued by the FNE in the context of merger control are administrative acts that must be motivated and governed by the principles outlined in Law No. 19,880, which establishes the bases of administrative procedures governing the acts of the State administration bodies ("*Ley N°19.880, que establece bases de los procedimientos administrativos que rigen los actos de los órganos de la administración del Estado*"), Articles 4 and following.

to concentrate, which must cooperate with the agency as primary sources of the information on which it will base the evaluation of the impact of the transaction on competition.

It is interesting that the TDLC has shed light on the due cooperation that the FNE must maintain with respect to the notifying parties under the new regime. The *Ideal/Nutrabien* case reflects that the FNE must adopt an attitude of dialogue and cooperation with the notifying parties during the procedure, and that this duty is manifested especially in the negotiation of mitigation measures and the guidance and feedback that the FNE must provide to the parties in order to identify the measures that are most consistent with the identified risks[76].

This consistent with the rights of the notifying parties, recognized by law, such as the right to be informed about the course of the investigation and the risks arising from the concentration prior to any decision adopted by the FNE in this regard, the right to be heard, the right to express their opinion both with respect to the notified transaction, as well as to the background information provided by third parties, the investigation and the information of the investigation and the analysis of the transaction that is provided, and of suggesting investigative measures to the FNE[77].

Phase II can culminate in three possible decisions: (i) the unconditional clearance of the concentration; (ii) the clearance of the transaction subject to compliance with remedies if the FNE is convinced that, subject to such measures, the transaction is not capable of substantially reducing competition, or; (iii) the prohibition of the concentration, on the grounds that it is capable of substantially reducing competition.

Clearly, the investigation swifts it's collaborative approach of the parties via-a-vis the FNE when, based on its technical analysis, the FNE concludes that the transaction is capable of substantially reducing competition, so there is no other possible remedy than the prohibition of the concentration, despite the remedies offered by the parties. In this case, what is relevant is, according to the TDLC:

> That in the event the FNE considers that the mitigation measures are not adequate and proportionate to reduce the risks of the transaction, it should record this in the file expressing its objections prior to the final resolution [...][78] (free translation).

In such cases, parties have at their disposal the possibility of challenging the FNE's prohibition decision. Only the notifying parties can file a special review appeal before the

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[76] TDLC, Judgment in the Rol RRE N°1-2018, characterized " Appeal of Special Review of Ideal S.A. and another against the Decision of the FNE of 10 May 2018" ("***Ideal/Nutrabien***"), recitals 138 to 140 (*Recurso de Revisión Especial de Ideal S.A. y otro en contra de la Resolución de la FNE de 10 de mayo de 2018*). In the same sense, Message History of Law No. 20,945 (*Mensaje Historia de la Ley No.20.945*), para. 11.

[77] Article 53, DL 211.

[78] Ibid.

TDLC, within 10 working days from the date the prohibition decision is notified. Being the last step of the administrative procedure is the decision prohibiting the transaction, the filing of the appeal triggers a contentious proceeding before the TDLC, with a dispute between the parties and the agency over the result of the analysis of the transaction.

In turn, a complaint appeal (*recurso de reclamación*) against the judgment of the TDLC conditioning the clearance of the transaction to a different set of remedies than the last proposed by the parties to the FNE may be raised before the Supreme Court ——although to date has not been exercised——. In practice, through this appeal, the Supreme Court has also substantively analyzed a concentration and reversed a judgment of the TDLC prohibiting a transaction[79].

The law does not provide for any special appeal with respect to concentrations that are authorized either unconditionally or subject to remedies[80].

c. The regime in figures

From June 2017, when the merger control regime began operating in Chile, until 30 June 2024, a total of 285 concentrations were notified to the FNE. This implies an average of almost 41 transactions notified per year.

From the available information, a decrease in the number of transactions notified in 2019 and 2020 can be observed, attributable to the upward adjustment in the notification threshold amounts made in 2019[81] and the effect of the COVID-19 pandemic. Notwithstanding this, there is a new increase in transactions towards 2021, and a decrease in 2022, 2023 and the first half of 2024.

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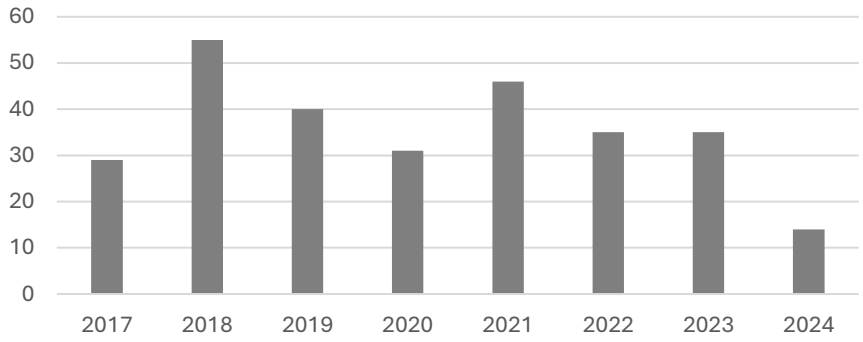
79 Supreme Court, Rol N°91.429-2022.

80 These issues are addressed in more detail in Chapter 3, section (iv) with respect to the edges of judicial review in merger.

81 Exemption Decision N°157 of 25 March 2019 of the National Economic Prosecutor's Office, which sets the thresholds of Article 48 letters a) and b) of Title IV of Decree Law N°211 of 1927, which sets rules for the defense of free competition (*Decreto Ley N°211 de 1927, que Fija Normas para la Defensa de la Libre Competencia*). The thresholds in question, which were raised to UF 2,500,000 and UF 450,000 respectively, entered into force on 9 August 2019.

Figure 1. Number of concentrations notified to the FNE (June 2017 to June 2024)



Source: Prepared by the authors based on public information available FNE's website, available at https://www.fne.gob.cl/fusiones/estadisticas/.

Of the 285 transactions, the FNE has only prohibited four[82]. Two of them were appealed under the appeal for special review[83] (*recurso de revision especial*) to the TDLC. One of these prohibition decisions was reversed by the TDLC, in a majority vote, and was finally authorized subject to the mitigation measures the parties offered to the FNE[84]. The TDLC confirmed the other prohibition decision adopted by the FNE[85], but it was subsequently appealed to the Supreme Court by means a complaint appeal (*recurso de reclamación*). The Supreme Court upheld the appeal and cleared the merger subject to mitigation measures[86].

With regard to the decisions of the FNE, between June 2017 and June 2024 it ruled on 246 concentrations. Of these, as shown in the table below, 230 were cleared unconditionally form (88.5%), 26 subject to mitigation measures (10%) and four were prohibited (1.5%).[87]

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82 These are: Notification of Merger Transaction Ideal S.A. - Nutrabien S.A. (F90-2017); Merger Transaction between Banco Santander - Chile and Sociedad de Recaudación y Pagos de Servicios Limitada (F101-2017); *Clinics of Iquique*; Acquisition of control in Colmena Salud S.A. by Nexus Chile SpA (F271-2021).

83 Article 57 final para. of DL 211.

84 TDLC, *Ideal/Nutrabien*.

85 TDLC, Judgment N°182/2022 in the Rol RRE N°2-2022, as follows: "Special Review Appeal of Nexus Chile SpA and another against the FNE's resolution of 3 February 2022" ("***Nexus/Colmena***")).

86 Supreme Court, Judgment of 27 March 2023 in the Rol N°91.429-2022. Notwithstanding the foregoing, this merger was never perfected.

87 For more details on the type of measures imposed between 2017 and 2022, see CeCo UAI (2022), "How long do the investigations of the National Economic Prosecutor's Office in Mergers take?" (*¿Cuánto tardan las investigaciones de la Fiscalía Nacional Económica en materia de Fusiones?*), CeCo Investigations, pp. 6 et seq., available at: https://centrocompetencia.com/wp-content/uploads/2022/07/CeCo-UAI-2022-Cuanto-tardan-las-investigaciones-de-la-FNE-en-Fusiones.pdf(last accessed 16 August 2024).

Table 1. Decisions of the FNE (June 2017 to June 2024)

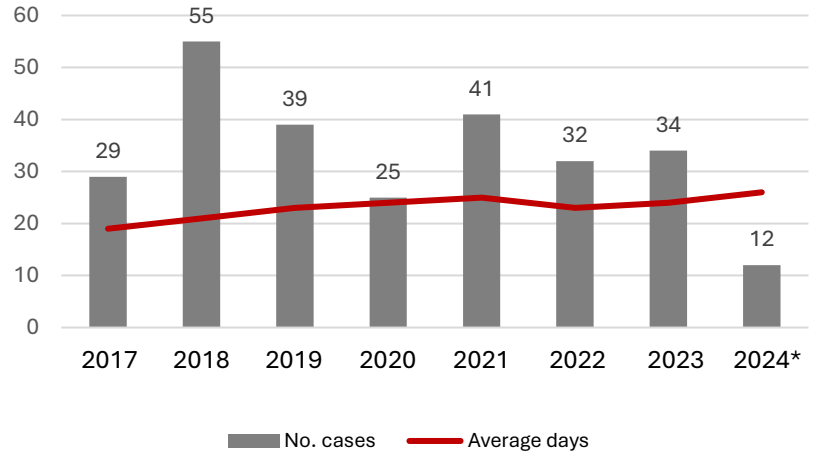
Year	No measures	With measurements	Prohibition	Total
2017	20	7	2	29
2018	52	4	0	56
2019	35	2	1	38
2020	22	2	0	24
2021	33	1	0	34
2022	30	2	1	33
2023	26	6	0	32
2024	12	2	0	14
Total	230	26	4	260

Source: Prepared by the authors based on public information available on FNE's website, available at: https://www.fne.gob.cl/fusiones/estadisticas/.

Regarding the duration of FNE merger investigations, they last an average of 27.7 days for concentrations authorized with no remedies form in Phase I, 151 days for those cleared subject to remedies (either in Phase I or Phase II), and 175 days for those prohibited.

As for the review time, Phase I concentrations involve an average of 23 administrative working days for the whole period, discounting concentrations suspended by mutual agreement or due to mitigation measures. The evolution of merger review time is shown in Graph 2 below:

Figure 2. Number of days of investigation and number of cases known to FNE



Source: Authors' elaboration with data published in FNE's website, available at: www.fne.gob.cl/fusiones/buscador

The number of Phase I and Phase II investigations conducted by the FNE in the period of analysis reached its maximum in 2018. The annual average of notified merger investigations is 38[88].

With regard to the complexity of the FNE's merger investigations, of the total of 285 transactions notified, only 19 of them were extended to Phase II (6.7%) as of 30 June 2024[89]. This shows that the vast majority of the transactions submitted to the FNE, in coherence with most jurisdictions globally, are authorized unconditionally form in Phase I, either without raising concerns or subject to remedies.

Given that the remedies are offered by the notifying parties to the FNE, the role of the merging parties plays a fundamental part in the decision to extend the investigation to Phase II. If the parties offer remedies during Phase I in view of the concerns identified by the FNE, it is possible to reduce the review time and simplify the procedure and analysis that would be carried out[90]. However, there are multiple cases where the FNE has highlighted the concerns that the transaction would entail in Phase I, extending the investigation to Phase II and then clearing the transaction unconditionally, ruling out all concerns after a more in-depth analysis[91].

In relation to its evolution over time, the graph below shows that the FNE has remained constant in terms of the duration of the investigations that result in uncodnitional clearances, ranging between 23 and 31 days on average, per year.

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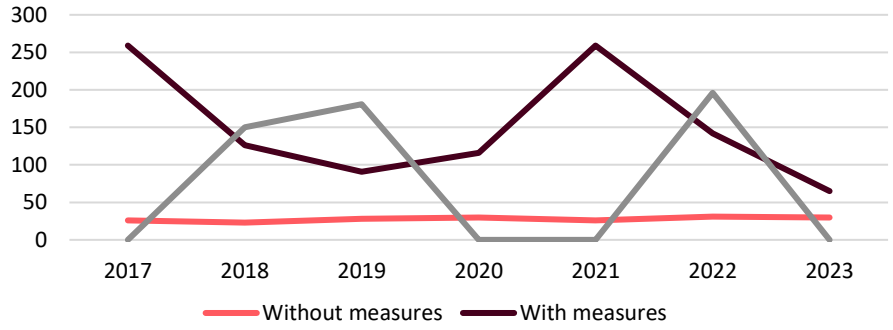
88 Excluding years 2017 (only considers from June onwards) and 2024 (only Excluding years 2017 (only considers from June onwards) and 2024 (only counts until 31 June).

89 The data has been calculated based on information published in CeCo Chile (30 August 2023), "Clearance of mergers in Phase 2: What is the purpose of extending the investigation?" (*Aprobación de fusiones en Fase 2: ¿Cuál es el fin de extender la investigación?*), available at: https://centrocompetencia.com/aprobacion-fusiones-fase2-cual-fin-extender-investigacion/ (last accessed 17 September 2024). The estimation has been updated as of 30 June 2024 through a review of the rulings issued since that time.

90 According to the statistics published by FNE, the duration of transactions cleared in Phase I subject to mitigation measures is substantially shorter than those cleared in Phase II (with or without measures). See: https://www.fne.gob.cl/fusiones/estadisticas/.

91 For example, FNE, Clearance Report, Acquisition of Cornershop by Uber Technologies, Inc. Role FNE F217-2019 ("***Uber*/*Cornershop***") or Clearance Report, Acquisition of control in SAAM Ports S.A. and SAAM Logistics S.A. by Hapag-Lloyd AG., Role FNE F332-2022.

Figure 3. Average duration of investigations according to result (days)



Source: Prepared by the authors based on public information available on FNE's website, available at https://www.fne.gob.cl/fusiones/estadisticas/.

This background shows that, although the review time of concentrations cleared unconditionally has remained constant over time, something different has occurred with the transactions authorized subject to remedies, where review times seem to have been reducing since 2017 ——with the exception of 2021 due to two concentrations authorized in Phase II after long-lasting investigations[92]——.

The trend also reflects that, with the aforementioned exceptions, the investigations that have ended in prohibition decisions have traditionally been the longest. Table 2 below shows the duration of these procedures, with an average duration of more than 250 days or 8 months from the time the FNE orders to start the investigation.

[92] Indeed, although there was a strong increase in the processing times of these in 2021, it is true that this average was affected by two Phase II investigations that were cleared after successive submissions of mitigation measures. These are the cases *EssilorLuxottica/GrandVision* (Acquisition of control in GrandVision N.V. (Rotter & Krauss) by EssilorLuxottica S.A., Rol FNE F220-2019, cleared on 9 April 2021), which lasted 95 calendar days from notification to initiation of the investigation, and 420 calendar days from initiation of the investigation to its clearance, and *Oxxo/OK Market* (Acquisition of control in OK Market S.A. by Cadena Comercial Andina SpA and Comercial Big John Limitada, Rol FNE F250-2020, cleared on 26 November 2021 ("***Oxxo/OKM***"), which lasted 41 days from the notification to the initiation of the investigation, and 344 days from the beginning of the investigation until its authrorized.

Table 2. Duration of prohibition decisions by the FNE		
Case	**Duration (from the beginning of the investigation)**	**Duration (from notification)**
Ideal S.A./ Nutrabien S.A. (F90-2017)	244	286
Banco Santander – Chile/Sociedad de Cobro y Pagos de Servicios Limitada (F101-2017)	196	266
Clínica Iquique S.A./Redinterclínica S.A. (Rol F178-2019)	296	311
Nexus Chile SpA / Colmena Salud S.A. (F271-2021)	283	297
Stocking	254,75	290

Source: Prepared by the authors based on public information available on the FNE's website, available at https://www.fne.gob.cl/

III. Main issues evaluated in the Chilean merger control regime

a. Introduction

Although there are many questions or doubts that naturally arise for agencies and economic agents faced with a nascent merger control regime, this section presents those that have raised the most relevant legal and/or competition policy problems during the seven years the regime has been in force in Chile.

Due to their relevance within any system that aspires to preventively evaluate concentrations, these questions have also been raised in different jurisdictions of the region ——mainly Peru, Mexico, Colombia, Argentina and Ecuador—— so the solutions and answers devised by these competition regimes are also presented, including their coincidences and/or contrasts with the Chilean regime.

Likewise, the criteria applied comparatively, both at the level of agency decisions and jurisprudence, in jurisdictions that have served as a reference for competition regimes in Latin America ——mainly the European Union, the United States, the United Kingdom and Spain—— are outlined. As shown, these guidelines are continuously imported and incorporated into local regimes, resulting in an interesting example of global diffusion of competition policies.

b. Questions related to substantive analysis

(i) What does it mean to notify a concentration by providing false information?

Introduction

The establishment of an *ex-ante* merger control regime, subject to limited review and decision deadlines by the competition agency ——and under the sanction of positive administrative silence[93]——, naturally has as a counterpart the duty for the parties, who activate the procedure and notify a transaction, to provide correct, truthful and complete information. This relationship between speed (in the agency's decision) and information duties (provided by the interested parties) has been understood as a pillar of the system since its origins, both in Chile[94] and in other jurisdictions[95].

If the agency must evaluate the impact of a concentration on competition within a maximum period of 30 days (at least in Phase I), it is logical that the speed of analysis and decision should have as a counterpart the delivery by the parties that trigger the procedure of documents that are complete and truthful. Although the FNE has various investigative tools ——essentially the same it has to investigate anticompetitive conduct, except for those specific to cases of collusion[96]——, the notifying parties are the primary sources of the information on the transaction and the market involved, which will serve as a basis for the investigation of the effects of the concentration (because this information will be contrasted with that collected from the market) and the subsequent evaluation and decision by the FNE.

In light of the above, at the global level the authorities have sought to enforce the procedural rules that seek to make the merger control regime effective. In recent years, it is particularly

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93 In Chile, article 54, para. 2 of DL 211. This is also viewed in other jurisdictions, such as Peru, Ecuador, the European Union, Spain, etc. Indeed, in the case of Ecuador, there is a precedent of an transaction that was authorized by positive administrative silence. See SCE, resolution of 27 July 2023 in file No. SCE-CRPI-5-2023.En

94 "*Control procedures should ensure that concentrations are analysed in an effective, efficient, predictable and timely manner at all stages of the analysis process". OECD (2014), OECD Report, pp. 102 et seq. In this regard, in the Decision rejecting the appeal of replacement filed by the Consumers and Users Organization of Chile, Consumer Association (ODECU) against the Decision of the National Economic Prosecutor of March 31, 2021, by which the acquisition of control by State Grid International Development Limited in NII Agencia en Compañía General de Electricidad S.A. and others (Rol FNE F255-2020) was cleared unconditionally form, it was indicated that "...] the procedure introduced involves a specific analysis that must be effective, fast and predictable, transparent in its criteria and collaborative between the notifying parties and the FNE. The fact that the law provides for suspension of the notified transaction pending its review and decision by the Prosecutor's Office is the basis, in return for the speed required in the procedure and explains the institutional design of the system of appeals under the Special Procedure of Title IV, analysed in this resolution*".

95 For example, the Peruvian system of control of corporate mergers, established in 2021 by Law No. 31.112, provides for a system of responsibilities (article 21.2), penalties and infringements for the delivery of false or adulterated information (article 31), the notifying party being responsible for providing the necessary and enough information for the control of the transaction in question.

96 Such as requesting information from individuals or state bodies, or calling for testimony, among others. Article 52 of DL 211 describes the investigative powers specifically applicable to the merger control regime.

illustrative that the penalties imposed for the provision of false information in the context of merger review have multiplied among agencies across the world[97].

The standard in Chile

In Chile, to date the FNE has issued two injunctions for delivering false information within the framework of a notification[98]. In 2024, the TDLC issued the first judgment on the matter, fining an economic agent for such conduct[99].

In fact, Article 3 bis of DL 211 states that the sanctions provided for in Article 26 of DL 211 may be applied to those who "*notify a concentration, in accordance with Title IV, by providing false information*" (free translation).

Considering the principle of collaboration that characterizes the ex-ante merger control regime, in light of the urgency the legislator imposes on the FNE to adopt a decision on the notified transactions, it is essential to have certainty regarding the veracity of the information provided. Indeed, the requirement to provide a certificate signed by the representatives of the notifying parties that certifies the truthfulness of the information submitted, foreseen in the Regulation, serves as evidence of the above[100].

What implies providing false information in the context of a merger notification has been subject of debate and interpretation by the TDLC.

First, it is relevant to attend to its semantic meaning. The Royal Academy of the Spanish Language defines "*false*" indicating in its second meaning that it is "*uncertain and contrary to the truth*".[101] This falsehood has been understood by the FNE as the absence of accuracy in the facts, and the occurrence of this requirement has been justified by stating that:

> [...] the statements of the Respondent were not consistent with the facts, corresponding in both cases to a false statement, inconsistent with the real and reliable information that was available to it[102] (free translation).

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97 At the European Union level, in March 2024, the European Commission sent a statement of objections to Kingspan accusing it of providing false information in the context of the transaction with Trimo. In 2021 and 2017, respectively, the Commission fined Sigma Aldrich and Facebook with significant fines for providing false information in the context of transactions involving Merck and Whatsapp. The National Commission for Markets and Competition in Spain (*Comisión Nacional de los Mercados y de la Competencia*, "CNMC") is also particularly active in this area. In May 2024, it sanctioned Rheinmetall AG with 13 million euros for providing misleading information in its merger with Expal Systems, and in 2023 it initiated a sanctioning case against MásMóvil for similar conduct in the purchase of Ahí+.

98 FNE, Requisition against Cadena Comercial Andina SpA (Rol C No. 465-2022) and The Walt Disney Company (Rol C No. 404-2020)

99 TDLC, Judgment N°190/2024.

100 Article 3, para. 10, Regulation.

101 https://dle.rae.es/falso (last accessed 2 September 2024)

102 FNE, injunction of 27 December 2022 against Cadena Comercial Andina SpA, which resulted in the TDLC Rol C No. 475-2022, para. 56 [emphasis added].

The scope of the word "*false*" used by the law ——and which is the basis of the infringement—— has been elucidated by the TDLC, for whom the conduct of delivering false information in the context of a notification, which is punishable by law, is configured by delivering information that is *'contrary to the truth, erroneous, incorrect or inaccurate'*[103]. According to the TDLC, the concept incorporates adulterated or modified information, but that is not necessary for the information to be considered false in light of the legal standard[104].

In general, the approach of the FNE and the TDLC is consistent with that expressed by other foreign authorities that serve as a reference in these cases, since they contemplate similar parameters in their regulations[105]. However, strictly speaking, the legal terms and concepts differ. While at the local level the law uses the notion of 'false' information, most comparative jurisdictions a concept refer to information that is 'misleading' ——under the term '*misleading information'*—— as explained *below*.

The comparative standard in relation to Chile

The European Commission has in the past imposed significant fines on various entities for providing incorrect or misleading information (as formally qualified under European Union law). Specifically, the European Commission has maintained that incorrect or misleading information "*is to be understood as meaning information that deviates from what is, to the best of the knowledge and belief of the undertakings supplying the information to the Commission, true, correct and complete*"[106].

According to the Commission's long-standing decisional practice, incorrect or misleading information consists of information that is inaccurate[107] in the sense that it does not reflect reality. For example, the Commission identified as incorrect a party's response that "[...] *did not give the Commission a true picture as regards the specific aspects of the conditions of competition on the [markets involved]*"[108].

The *Merck/Sigma-Aldrich* case is illustrative insofar as the Commission provided extensive reasoning consistent with the jurisprudence of the Courts of the European Union to justify

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[103] TDLC, Judgment N°190/2024, para. 43° [emphasis added].
[104] Ibid., para. 80° y 81°.
[105] Article 3° bis, letter e), DL 211, which states that "the measures of Article 26, as well as any necessary preventive, corrective or prohibitive measures may also be applied to those who: (...) e) notify a concentration in accordance with Title IV by providing false information", (free translation). Similar provisions are included in other regulations. For example, Article 14 of the EU Merger Regulation provides for sanctions against companies that "provide incorrect or misleading information" in a notification document or in response to a request from the European Commission. In Peru, article 27.3 of Law N°31112, which establishes prior control of corporate mergers, considers the provision of "incomplete, incorrect, adulterated, misleading or false information" as a very serious infringement.
[106] See, for example, European Commission, Cases M.8228 - *Facebook/ Whatsapp* (Art. 14(1) proc.), para. 78 and M.8181 - *Merck / Sigma-Aldrich* (Art. 14(1) proc.), paras. 192 *et seq*.
[107] European Commission, Case M.1610 – *Deutsche Post/Trans-O-Flex (Art.14 proc.),* para. 120.
[108] European Commission, Case M.3255 – *Tetra Laval/Sidel*, para. 94 (translated). See also para. 74.

that the information provided during the notification procedure did not allow the Commission to make a complete assessment of the anti-competitive effects of the transaction. In particular, during the process of discussing a divestment remedy, the Commission was informed of an innovation project that was closely linked to the divestment activity. That project had not been previously informed to the Commission, either voluntarily or in response to specific requests for information made by the agency.

In the light of this, the Commission found indications that the provision of incorrect or misleading information by Sigma-Adrich was intended to avoid including that project in the business to be divested. The Commission concluded that companies should behave like diligent operators and provide a full analysis of the facts, including all available information[109].

Although the Commission acknowledges that "misleading information" has not been defined in case law in the context of merger control proceedings, the Commission's decision-making practice ——and other uses of the terms "incorrect" and "misleading" information in European Union law—— would suggest that misleading information is information that is incorrect and/or so incomplete as to reasonably suggest to the Commission that a situation is other than what it really is[110].

With regard to the effects of this conduct, the European Commission has stated that "*[w]here a statement is thus false or so incomplete that the reply taken in its entirety is likely to mislead the Commission about the true facts, it constitutes incorrect information ...*"[111]. Indeed, incorrect and/or incomplete information may render a declaration misleading, taking into account the circumstances and the general context of the merger control system (in particular the need for speed and the tight deadlines to which the authority is subject) because, upon reviewing it, the Commission would understand that the situation is different from what it actually is[112]. This, considering that the Commission must be provided with all the information necessary to analyze the compatibility of the concentration in question[113].

However, there is an element of substantive criterion in which there is a certain contrast between the position of the authorities in Chile and the decisions of the European Commission. On the one hand, in Europe –while the Commission enjoys a certain degree

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[109] European Commission, Case M. 8181 – *Merck / Sigma-Aldrich (Art. 14(1) proc.),* para. 193.
[110] Ibid., para. 194.
[111] European Commission, Case IV/29.895 – *Telos*, para 21.
[112] European Commission, Case M.1610 – *Deutsche Post/Trans-O-Flex* (Art.14 proc.), para. 128: "*by failing to provide the information necessary for the assessment of [a merger], the account provided by the [acquirer] distorted the facts... such an omission may result in a misleading representation of the facts. If it were not incomplete and misleading, an account of the acquisition should have contained the... information" [translation]. See also M.2624 - BP/Erdölchemie, para. 29, "the failure to mention the limitation of Asahi's activities... and the fact that it has a cotransaction agreement with BP... should be considered as at least misleading, since it gives the impression that Asahi is active without geographical restrictions and completely independent from BP*" (free translation).
[113] Judgment of the General Court of the European Union of 4 February 2009, Case T-145/06, *Omya*, para. 28.

of discretion in this regard– it is understood that errors must be "material" in the sense that they "*could have a significant impact on its assessment of whether the concentration at issue is compatible with the common market* "[114].

On the other hand, in Chile, the regulation does not require that the provision of information is decisive, or that in any way affects the substantive analysis of the FNE's assessment of the impact of the transaction on competition, or that it is decisive in the FNE's decision to clear or not the transaction. In fact, recent case law of the TDLC has indicated that this infringement is based on a specific duty of conduct, so that there is an infringement in the mandatory rule that requires the notification to be accompanied by information that allows a preliminary assessment of the possible risks of a transaction, simply, by not providing all the available information[115].

As to how the conduct is configured, in Chile the Regulation requires that the notification of the transaction is accompanied by the information that allows for a preliminary assessment of the possible concerns of the notified transaction on competitionThe DL 211 requires that the notification is accompanied by the information that allows a preliminary assessment of the possible concerns of a transaction[116].

The TDLC considers that the rule punishing the delivery of false information is infringed "[...] *by not carrying out the action ordered by the law, that is, by not delivering all the information* [...][117] *and in the moment that it requires*"[118] (free translation), and that the declaration of veracity and completeness of the information that the representatives of the notifying parties subscribe and submit alongside the notification is an example of this.

That is, what the TDLC qualifies as erroneous and thus falls within the hypothesis of delivery of false information punished by law is the divergence between what is stated in said statement and the reality[119] ——even if the information was delivered, but late, after the notification of the transaction, having specifically stated that all the information in its possession was delivered at the time of filing——.

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[114] Ibid., para. 31; European Commission, Case M.8181 – *Merck / Sigma-Aldrich (Art. 14(1) proc.)*, para. 195.

[115] TDLC, Judgment N°190/2024, recitals 84 to 93. In response to the allegation that the unaccompanied background to the notification was not relevant for the FNE's competition analysis, the TDLC held that "*the infringement is manifested in the failure to comply with the obligation to provide a background for preliminary assessment of the notification. The rule is infringed by failing to comply with its requirements and in the appropriate manner, which is the case here when a transaction is notified after having specifically stated that all information in its possession was given at the time of submission, which proved to be erroneous; and therefore, false"* (free translation).

[116] Article 48 fourth para., DL 211.

[117] TDLC, Judgment N°190/2024, para. 84°.

[118] TDLC, Judgment N°190/2024, para. 93°.

[119] TDLC, Judgment N°190/2024, para. 84°.

On the other hand, there is consensus between the FNE[120] and the TDLC in considering that Article 3 bis, letter e), of the DL 211 is a rule of infringing fault (*culpa infraccional*). Academic literature explained this according to the following:

> since the legislator, or the public authority, as the case may be, is the one who establishes the duty of due care in the performance of the punishable activities, the principle of culpability of the Administrative Sanctioning Law can be assimilated to that of the notion of infringing fault, in which it is sufficient to prove the infringement or mere observance of the rule to establish fault[121] (free translation).

This criterion was ratified by the TDLC in Judgment No. 190/2024[122-123].

Consequently, providing false information in the context of a notification of a concentration consist in the submission of the notification and the background information required by the Regulation including, in any of the documents, information that is not consistent with the facts, and turns out to be contrary to the truth, incorrect, erroneous or inaccurate. This event will give rise to infringement fault (*culpa infraccional*), without it being necessary to prove intent or damage derived from it, and will be subject to the sanctions provided for in Article 26 of the DL 211.

At regional level, the precedents that have been identified are rather limited as regard to the criteria followed by other authorities. On the one hand, in Peru, a company was fined for providing inaccurate information under the old merger control regulations in the electricity sector. However, the fine was subsequently annulled by the Free Competition Commission (*Comisión de Libre Competencia*) of the National Institute for the Defense of Competition and the Protection of Intellectual Property (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*; hereinafter "**INDECOPI**")[124].

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[120] See: (i) FNE, Injunction of 9 September 2020 against The Walt Disney Company and others (Rol C No 404-2020); and (ii) FNE, Injunction of 27 December 2022 against Cadena Comercial Andina SpA (Rol C No 475-2022).

[121] Cordero, L. (2015), *Lecciones de Derecho Administrativo*, Santiago, Editorial La Ley, p. 504 [emphasis added].

[122] At the date of this document, a claim pending before Excma. Supreme Court under Rol N°11.714-2024.

[123] The judgment states that "*the infringement under consideration constitutes a protection against compliance with reporting or information obligations through formal notifications common to merger control procedures. For this reason, an intentionality of hindering or obstruction is not necessarily required as an element of the infractional type* [tipo infraccional]*, since what is protected is the act of notification as such, its integrity and self-sufficiency [...] in the case of a reporting obligation with content defined both legally and by regulation, the provision of false information, which is understood to be contrary to truth because of its incorrect or incorrect content, presumes guilt, as it is a breach of a duty of care*" (free translation). TDLC, Judgment No. 190/2024, recitals 43° and 44° [emphasis added].

[124] Specifically, under Law No. 26876, UIT Interconexión Eléctrica S.A. E.S.P. was fined 100 USD for providing inaccurate information on the Notification Form (Decision No. 011-2002-INDECOPI/CLC). However, this sanction was challenged (via reconsideration) and revoked by the Commission in Decision No. 002-2004-INDECOPI/CLC, as it found that the information provided, related to the transaction of electric transmission projects, was not inaccurate.

In Mexico, the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*; hereinafter "**COFECE**") fined the parties to a concentration for having submitted false information[125]. According to the information available, COFECE maintained that the false statements of the parties affected the functions of the agency, preventing it from adequately evaluating the possible risks of the transactions, which in turn compromised the system of protection of the competitive process and free competition and hindered the exercise of COFECE's powers[126].

Finally, for the purposes of defining the seriousness of the infringement, the European Commission has recognized that this type of conduct may give rise to a serious infringement of the regulations, since the conduct prevents the competition authority from accessing the information necessary to be able to analyze the concentration in question and may lead it to issue erroneous decisions because they are not based on truthful information. In this regard, and in line with what has been pointed out with regard to Chile, considering the reduced time limits to which the authority is subject to, being able to trust the reliability of the information provided is key to take a decision[127].

Some doubts that persist regarding the standard in Chile

The interpretation of the infringement of delivery of false information by the TDLC in its first decision leaves some questions that are central to the functioning of the merger control regime in Chile. The boundaries of the Regulation, the real burden on the notifying parties when notifying a concentration and how they can prevent possible infringements in this area are not yet clear.

Specifically regarding the documents questioned in the *FNE/Disney*[128] case —essentially internal documents of the notifying parties required by the Regulation[129] (i.e. studies, reports, analyses, surveys and any comparable documents produced in the last three years)—, the TDLC indicated:

> [...] that the aforementioned regulation is open in nature since it includes a broad term ("and any comparable document"), which makes it possible to comprise a

[125] COFECE, Decision of 25 January 2024 regarding the incident processed in the Expte. CNT-135-2022-I, Inmobiliaria A46, S.A. de C.V. and Avante 44, S.A. de C.V. At the present time, no public version of the decision issued is available. However, the stenographic version of the 3rd Ordinary Session of the Plenary (available at: https://www.cofece.mx/wp-content/uploads/2024/02/vep_20240125_3.pdf [last accessed 4 September 2024]) gives an account of the discussions held for the purpose of dictating the Decision.

[126] The gravity was medium in that the information did not lead to conclusions other than those referred to in the decision authorizing the transaction and it was the parties who brought the falsehood to the attention of the authorities when they discovered it.

[127] European Commission, Case M. 8181 – *Merck / Sigma-Aldrich (Art. 14(1) proc.)*, para. 475.

[128] TDLC, Judgment Nº190/2024.

[129] Article 3 para. 4 g) of the Regulation requires to be accompanied by: copies of studies, reports, analyses, surveys and any comparable document drawn up in the last three years analysing the relevant market concerned, conditions of competition, actual or potential competitors, consumer preferences, brand strength and potential growth or expansion to new products or geographic areas, among others.

> series of documents that do not exactly consist of studies, reports, analyses or surveys[130] (free translation).

From the breadth of the Court's interpretation of the notion of 'internal document' that the parties must submit when notifying a transaction, a series of practical questions arise: how can the notifying parties interpret a regulation formulated in such open terms and limit its legal exposure? Should the parties provide *all* documents in their possession? Therefore, does the Regulation include drafts of studies or reports, or exploratory analyses of intermediate collaborators that do not necessarily represent the will of those who hold decision-making positions in the company? How can the FNE become aware of information that has been omitted from the notification apart from in case of late delivery by the notifying parties within the framework of the procedure for analyzing the concentration?

These questions are likely to be clarified through the practice of the regime administered by the FNE, in particular in the context of pre-notification contacts or future jurisprudence[131]. As a guiding principle, there is no doubt that a clear sanctioning regime is necessary to guarantee the effectiveness of the system, which is altered when the parties to a concentration do not provide the FNE with complete or accurate information to carry out its analysis[132].

However, the legislative design adopted in Chile ——inspired by comparative jurisdictions—— to establish the duty of those who plan to merge to provide an extensive list of information to notify a merger, together with the enforcement of merger control procedural rules by the agency, undoubtedly poses challenges for both sides of the system[133].

For the FNE, the challenge is to demand compliance with the information duties established in the Regulation, in the light of the principle of proportionality,[134] since the rule ——set out in abstract and broad terms precisely for its application to all concentrations between economic agents (although with certain nuances according to the entity of the parties and the existence of overlaps between their activities)—— is an objective rule, but due to its

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130 TDLC, Judgment N°190/2024, para. 62°.

131 The FNE's injunction against Cadena Comercial Andina, SpA for providing false information in connection with the *Oxxo/OKM* transaction is pending as of the date of publication of this essay.

132 OCDE (2014), Report OCDE, p. 13.

133 In Peru, article 9 of the Supreme Decree N°039-2021-PCM, Regulation of the Law N°31112 identifies the requirements for the application for prior authorization of business concentrations, which includes a list of documents and information on the parties, the transaction and markets involved, which must be provided with notification. In the European Union, depending on whether a notification is standard or simplified (certain categories of transactions eligible under this scheme as provided for in the Communication from the Commission on the simplified processing of certain concentrations pursuant to the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings), the parties must provide a series of documents in the same sense as the Chilean and Peruvian system, as indicated in article 4 of the Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004 (for ordinary notifications).

134 Principle already enshrined in the merger control procedure, within the framework of the Guide to Remedies, paras. 13, 15, 17, 38 or 45.

structure and purpose it may allow (although limited) for a margin of discretion in its application to each specific case.

On the other hand, the challenge for the parties is to have the due diligence to activate the procedure by providing the FNE with the relevant information in a complete and truthful way, after a thorough internal evaluation of the available information. Likewise, to use the legal mechanisms in a timely manner to request, before or at the time of notification, not to provide what they reasonably lack, or what they consider unnecessary or irrelevant for the substantive analysis to be carried out by the FNE, and in this way, limit the mandatory nature of the information that must be submitted. Probably, with the maturity of the system, such a discussion would plausibly be anticipated to pre-notification contacts, and not confined to the completion stage (*etapa de completitud*) of the notification, which procedurally provides less flexibility to both the parties and the FNE[135].

[135] Article 9 of the Regulation provides for the possibility that the National Economic Prosecutor may exempt from the obligation to accompany certain documents required by this Regulation when: 1. they are not reasonably available, either in whole or in part; or 2. The information is not necessary, relevant or relevant for the analysis of the transaction. The National Economic Prosecutor shall consider the application to the extent that the reasons and/or circumstances for the application are well-founded and the information in respect of which exemption is requested is specified.

(ii) Which is the criteria to assess whether a concentration substantially lessens competition?

Importing a comparative standard

In those countries that have implemented merger control regimes, the standard generally applied to analyze the effects of a concentration on markets and competition is, in general, that of the substantial lessening of competition[136] (generally referred to as the SLC).

In Chile, the parliamentary discussion that preceded the incorporation of the mandatory merger control regime into competition regulations stated that:

> [...] the proposal contemplates a specific and differentiated substantive standard, which both the FNE and the Competition Court must apply when deciding on the transaction. This standard consists of the "substantial lessening of competition" and is the one applied by the most developed jurisdictions in the matter in the review of concentrations[137] (free translation).

Articles 54 and 57 of the DL 211, incorporated by the Law No. 20,945, introduced to Chile the standard of substantial reducing of competition in the light of which the impact of a concentration must be evaluated. While the law does not provide a precise definition, it is a widely applied legal standard in the United States and Europe.

Since it is a direct import of a foreign concept, in order to understand its application and limits it is necessary to understand how, and under what criteria, the comparative jurisdictions of reference ——at the agency level but also at the level of courts—— apply it in the respective merger control regimes.

As happened at the comparative level, in the face of concise competition laws that usually evade strict legal definitions, the jurisprudence has given meaning to the concept of substantial lessening (or reducing) of competition. And it is precisely in cases where a conflict has arisen ——when the parties, at odds with an administrative decision to prohibit a transaction, resort to judicial review—— that the boundaries of the concept have been interpreted within the framework of said jurisdictional decisions.

In Chile, on two occasions —*Ideal/Nutrabien* and *Nexus/Colmena*— a decision by the FNE to prohibit a transaction has been challenged. Both cases referred to concentrations in which the activities of the merging parties overlapped horizontally. In particular, in *Nexus/Colmena*, the TDLC provided certain guidelines in this regard, stating that:

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[136] As will be explained below, the standard in Europe is effective interference with effective competition (ECCS). However, in practice it is equivalent to the CSR standard followed in Chile.

[137] History of law Nº20,945 (*Historia de la Ley Nº20.945*), pp. 12, 56, 332.

> [...] the application of the substantial lessening of competition standard may consider modifications in the incentives of the parties that concentrate to generate unilateral risks such as increasing prices or decreasing the quality of their goods or services, or coordinated risks, thereby generating harm to the consumer [...][138] (free translation).

Likewise, ——adopting the criterion provided by the FNE——**,** the TDLC pointed out that this standard entails a reduction in "*the incentives of the parties that concentrate on rivalry, to the detriment of consumers*"[139] (free translation), which could materialize in various ways. As a common baseline, the TDLC required an affectation of competitive variables relevant to compete in the affected market, the elimination of competitive pressure on one or more companies or altering the nature of competition in such a way that companies, which did not coordinate their behavior, begin to coordinate or to facilitate or make coordination more stable or effective[140].

Along these lines, the FNE's Horizontal Merger Guidelines state that a concentration will have the ability to substantially lessen competition in a given market when, if implemented, it would strengthen or increase (or could potentially strengthen or increase) the capacity of the resulting entity to, by itself (generating unilateral risks) or in conjunction with others (generating coordinated risks), would significantly deteriorate the competitive conditions of the respective market compared to the situation in the absence of the transaction (*i.e.*, the counterfactual situation)[141].

In essence, the analysis carried out by a competition authority focuses on determining whether the particular transaction can generate the ability and incentives for the merged entity to increase its prices or affect other relevant variables in the competitive process that affected by the transaction, to the detriment of consumers[142].

It is illustrative to analyze the position of the TDLC in light of the interpretation of comparative competition agencies.

On the one hand, the CMA links the standard of substantial lessening of competition to the concept of rivalry, and how, in the event of a concentration, the incentives to compete can be reduced to the detriment of consumers[143].

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[138] TDLC, Judgment Nº182/2022, para. 6º

[139] Ibid.

[140] TDLC, Judgment Nº182/2022, 90º y ss.

[141] FNE, Horizontal Merger Guidelines, para. 5 y 39 and case law quoted.

[142] Ibid.

[143] CMA (2021), Merger Assessment Guidelines, para. 2.2 y 2.6. In particular, the CMA's Merger Assessment Guidelines state that "*The CMA views competition as a process of rivalry between firms seeking to win customers' business over time by offering them a better deal. Rivalry creates incentives for firms to cut price, increase output, improve quality, enhance efficiency, or introduce new and better products. This is because rivalry provides the opportunity for successful firms to take business away from competitors, and poses the*

In addition, the European Commission analyses its possible anti-competitive effects and relevant counterweights in order to determine "*whether the merger would significantly impede effective competition, in particular through the creation or the strengthening of a dominant position, and should therefore be declared incompatible with the common market*"[144].

Until 2004, the legal test applied in the European Union was based on the creation or reinforcement of a dominant position as a result of a merger[145-146], which was focused on the evaluation of the dominant position of the merged entity. The European Commission modified this standard because the system at that time failed to capture mergers that damaged competition without reaching a dominant position, leaving risky transactions without intervention (resulting in an *under enforcement*).

Interestingly, a similar discussion took place in Chile in the *Nexus/Colmena* case, where the parties argued that the transaction was unable to substantially lessen competition since the concentrated economic agents would not reach a threshold of dominance. The TDLC pointed out that the test of substantial lessening of competition is equivalent to that established in the *Clayton Act* of the United States[147], and that its effect may be to substantially lessen competition or to tend to create a monopoly. This standard differs from the dominance test, which contemplates the existence of a dominant position within a relevant market that is reinforced or generated as a result of the concentration.

The potential negative effects of a transaction can occur regardless of whether or not the merging parties reach a dominant position. In essence, necessarily linking the risks of a concentration to a threshold of dominance may imply incurring false positives ——intervening in concentrations that may be neutral or even positive for competition—— or false negatives ——not intervening in transactions that generate risks for competition——.

That is why the standard of substantial lessening of competition, from the outset, has evolved into a notion that goes beyond whether the parties reach a dominant position as a result of the merger, focusing rather on the effects of the loss of competition generated by a concentration between economic agents that directly competed with each other. This

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threat that firms will lose business to others if they do not compete successfully […] The CMA will consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. When levels of rivalry are reduced, firms' competitive incentives may be dulled, to the detriment of customers".

144 European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paras. 12 and 13.

145 Professors Whish y Bailey stated that "*the test in the EUMR was changed in 2004: the question now no be asked is whether the merger would 'significantly impede effective competition' ('SIEC'), in particular (but not exclusively) as a result of the creation or strengthening of a dominant position*". Whish, R. y Bailey, D. (2012), *Competition Law,* 7a. Ed., Oxford University Press, p. 823.

146 For a more detailed information, see OCDE (2005), "Substantive Criteria Used for the Assessment of Mergers", OECD Journal: Competition Law and Policy, vol. 6/3.

147 Clayton Act, 15 U.S.C. § 12-2, sec. 7 para. 1°. *Nexus/Colmena*, para. 5°.

criterion is the prevailing in Europe[148], in the United States[149] and is followed in Chile and in many of the jurisdictions that have been inspired by these regimes when establishing their own.

The standard and its boundaries

In light of the above, it is worth asking: How to apply and manage the legal standard under which concentrations are analyzed? If the majority of horizontal mergers reduce competition ——because they essentially eliminate competition or a competitor—— or if vertical mergers eliminate a related economic agent upstream or downstream, when is this reduction in competition substantial, so as to merit and justify the intervention of the merger control regime? And what does a loss of incentives to compete generated by a concentration mean and how is it evidenced?

Determining the factual situation against which to evaluate the impact of a concentration on competition ——which is intensified in new and dynamic markets—— usually poses challenges to competition agencies in terms of the standard of evidence required for its configuration[150].

In this regard, the CMA's statement that "*substantial*" in the context of a "*substantial lessening of competition*" does not necessarily mean something "*large*", "*considerable*" or "*significant*" in absolute terms but will depend on the facts and circumstances of each particular case[151], becomes relevant.

That is why neither in Chile, nor at a comparative level, are there fixed standards, concentration thresholds or economic tests that can predict, on their own, whether or not a transaction will substantially lessen competition. Rather, it is a case-by-case assessment ——that exceeds the merely quantitative analysis—— that requires a holistic evaluation of the background of the transaction, weighing the dynamic elements of the competition, and considering the countervailing arguments the parties may raise against the concerns, such as the efficiencies that can be passed on to consumers as a result of the concentration.

The lack of a single and structured criterion in the light of which evaluating when a transaction will result in a substantial lessening of competition ——what has been described

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[148] De La Mano, M. y Roller, L. (2006), "The Impact of the New Substantive Test in European Merger Control", European Competition Journal 2, n°1, pp. 9-28.

[149] Article 7 of Clayton Act prohibits concentrations which "*may have the effect of substantially reducing competition or tend to create a monopoly*" See also Radic, L., "Test SLC (merger)", *Global Dictionary of Competition Law, Concurrences*, Art. N°88920.

[150] See: OCDE (2019), "Merger control in dynamic markets", DAF/COMP/GF(2019)8, available at: https://one.oecd.org/document/DAF/COMP/GF(2019)8/en/pdf.

[151] CMA, Merger Assessment Guidelines, para. 2.9.

as a 'liquid test'[152]—— at first glance could generate legal uncertainty or lack of consistency, given the lack of clear limits in the legal test and the possibility that the substantive standard may vary depending on its application to a specific case.

But it is precisely the possibility that the same test can be applied in the light of the particularities of the case which allows the system to adjust to the different markets and industries in which a concentration has effects. It can be argued that it is a more liquid test, in contrast to fixed thresholds or more structured standards, which allow the same notion to be applicable to concentrations in markets as diverse as cement, retail or digital platforms.

However, it is precisely this analysis in the light of the specific context of the concentration and the specific market concerned which has allowed the FNE not only to prohibit concentrations (and the TDLC to confirm such decisions) in which the parties did not reach a dominant position in the markets involved ——as in the *Nexus/Colmena case*—— but rather to unconditionally clear transactions in which the merged entity reached relevant market shares, basing such clearance on a dynamic view and likelihood of entry, expansion and considering the imminent competitive constraints observed in a given market.

However, it is clear that a challenge that remains in the merger control regime, which is likely to materialize when it becomes more mature and reaches greater case-law development, is that the standard of substantial lessening of competition can tend towards a more structured test, providing greater clarity and predictability regarding its specific application to the different markets in which a concentration has effects, and what are the conditions that, in each case, are required for its configuration.

The standard and its evidence

Specifically, in the first case in which the FNE prohibited a concentration ——*Ideal/Nutrabien case*—— the parties lodged an appeal for special review and the TDLC (in a majority vote) reversed the FNE's decision. Among other arguments, the TDLC focused not only on the high market shares that the FNE argued would be achieved by the parties ——which under certain assumptions would be dominant in certain segments—— but also on the dynamic conditions of competition, the possibilities of challenging and exerting competitive discipline on the market. In particular, when authorizing the transaction ——although subject to compliance with a series of behavioral measures——, the TDLC considered as a relevant element the real possibility of new competitors or incumbents to rearrange their brands and/or reposition their products, projecting effective competitive pressure to the merged entity once the transaction was implemented[153].

[152] Ibañez Colomo P. The (Second) Modernisation of Article 102 TFEU: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review". Journal of European Competition Law & Practice, 2023, Vol. 14, No. 8.

[153] TDLC, Judgment N°166/2018, recital 107°.

On the other hand, it is interesting to consider the approach of the FNE in various recent concentrations where, echoing the limitations of the tools for defining the relevant market and the concentration analysis in markets involving differentiated goods outlined in the Horizontal Merger Guidelines[154], the FNE has authorized transactions in which the concentrated entity would hold a dominant position in the market, mainly in view of the dynamism of competition, low barriers to entry and the likelihood of expansion and/or rearrangement of competitors to challenge the merged parties post-transaction[155].

A relevant element of evidence for a competition agency when analyzing whether or not a concentration has the ability to substantially reduce competition and, therefore, must be subject to remedies or, failing that, prohibited, are the analytical tools to determine the existence of concerns that the merged entity may increase its prices or affect other competitive variables to the detriment of consumers[156].

Among the commonly used economic tests are indices based on price increases such as the '*Indicative Price Rise'* ("**IPR**"), [157]the '*Upward Pricing Pressure'* ("**UPP**")[158] and its variants, the '*Gross Upward Pricing Pressure Index'*[159] ("**GUPPI**"), and the '*Vertical Gross Upward Pricing Pressure Index'*[160] ("**vGUPPI**"). Although less used, there are also tools that seek to measure the feasibility of exercising an anticompetitive strategy by the concentrated entity, such as the closing of the market through the method of 'vertical arithmetic'[161].

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[154] FNE (2021), Horizontal Merger Guidelines, Section II.

[155] See, for example, FNE, Clearance report, Acquisition of control in Credit Card Operator Nexus S.A. by Minsait Payments Systems Chile S.A., Role FNE F297-2021 ("**Nexus/Minsait**"); Clearance Report, Partnership between subsidiaries of Liberty Latin America Ltd. And America Móvil, S.A.B. de C.V., Rol FNE F295-2021, in which the transactions were cleared in view of the dynamic nature of the market, the possibility of entry and expansion plans of third operators, among other elements.

[156] FNE (2021), Horizontal Merger Guidelines, para. 17.

[157] This method assumes that there is an asymmetry of firms and a constant demand elasticity, and estimates the percentage price increase resulting from a transaction based on customer diversion and gross margin percentage. Shapiro, C. (1996), "Mergers with Differentiated Products", *Antitrust* 10, https://pdfs.semanticscholar.org/0334/1cb7a9d50bbb2d6aa396106e0f9123cbe665.pdf.

[158] This method seeks to quantify the incentives for maximizing profits by the concentrated entity by minimizing the "cannibalization" effect (that is, the incentive to raise prices in the absence of customer disputes which existed between the parties prior to the concentration). Farrell, J. y Shapiro, C. (2010), "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition", *The B.E. Journal of Theoretical Economics* 10, n°1, artículo 9, https://faculty.haas.berkeley.edu/shapiro/alternative.pdf.

[159] This method is an evolution of the UPP and seeks to quantify the incentive to increase post-transaction prices in gross form (that is, without considering potential efficiencies). Salop, S.C. y Moresi, S. (2009), "Updating the Merger Guidelines: Comments", *Georgetown Law Journal.*

[160] This method is a vertical variant of the GUPPI and seeks to quantify incentives to raise prices both upstream and downstream. Moresi, S. y Salop, S.C. (2012), "Vguppi: Scoring Unilateral Pricing Incentives in Vertical Mergers", *Georgetown Business, Economics and Regulatory Law Research Paper No. 12-022*, disponible en: https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1167&context=fwps_papers (last accessed 5 September 2024).

[161] It seeks to quantify and compare the costs with the benefits of implementing a total input closure strategy by calculating the customer diversion from rivals that would be necessary for this to be a profitable strategy. See, for example, FNE, Clearance Report, Merger between Time Warner Inc. Y AT&T Inc., Rol FNE F-81-17, pp. 24-25.

The FNE's general practice ——even before the new regime—— has been to use the GUPPI (and its vertical variant) to assess the magnitude of the incentive to raise prices (or affect quality) resulting of a concentration.

The GUPPI provides a quantifiable measure of a company's incentive to increase prices after a concentration. To do this, it considers two factors: first, the acquiring company's margin (or profit) on the product it sells and, second, the proportion of diversion of its customers towards the target company. By analyzing how many sales are recovered (measured by the deviation ratio) and the profitability of recovered sales (measured by margin), the GUPPI provides a measure of the acquiring company's profits that would be lost as a result of a price increase but would be recaptured as a result of the merger[162].

From the configuration of the index it is evident that the possibility of obtaining reliable data on reasons for customer diversion is the central element to be able to use it as evidence to measure the potential effects of a transaction.

Thus, in most of the concentrations evaluated in Phase II, the FNE has prepared surveys of end consumers or resorted to public market information on consumer diversions, together with information on the profit margins of the merging parties, as an input to apply the test to the specific transaction.

Specifically, in the development of its consumer surveys, the FNE uses the CMA's guidelines on the matter as a reference for best practices[163]. It is interesting that, following these guidelines, before executing the respective survey, the FNE generally shares with the notifying parties the methodology and the corresponding questionnaire, in order to incorporate the reasonable technical observations that they make. The foregoing, without being obliged to do so ——since in the exercise of its investigative powers the FNE does not require the opinion of the economic agents that may be impacted by them——.

Although the parties to the transaction can always submit their own consumer survey to the FNE ——under the law they have the right to provide the FNE with the additional information they deem necessary——, in fact the parties tend to actively participate in the survey carried out by the FNE, and often choose not to submit a parallel survey. One reading of this is that, if there is agreement between the FNE and the parties to the transaction in terms of the structure and content of the survey, in the light of comparative criteria in the field of survey preparation, this would allow greater acceptance by the parties of the information obtained

[162] Xiao-Ru Wang, E. (2013), "Economic Tools for Evaluating Competitive Harm in Horizontal Merger", *Practical Law Antitrust*, available at: https://media.crai.com/sites/default/files/publications/Economic-Tools%20for-Evaluating-Competitive-Harm-in-Horizontal-Mergers.pdf (last accessed 5 September 2024).

[163] CMA (2018), "Good practice in the design and presentation of customer survey evidence in merger cases", available at: https://www.gov.uk/government/publications/mergers-consumer-survey-evidence-design-and-presentation/good-practice-in-the-design-and-presentation-of-customer-survey-evidence-in-merger-cases (last accessed 4 September 2024).

from it, regardless of whether the results are more or less favorable towards evidencing or ruling out the risks of the transaction.

In addition, as a parameter of robustness, a minimum amount of consumer responses has been required, in order to ensure the representativeness of the data collected through the survey and the conclusions drawn (mainly deviation reasons), which serve as input to the economic tests indicated above[164].

However, we cannot ignore that the aforementioned tools suffer from certain shortcomings inherent to the quantification and projection of future events in a market. All operate based on a series of assumptions of the market, of the parties and of their competitors, which are not necessarily or always a true reflection of the real market context. Specifically, they do not consider certain structural features ——for example, that a market has two or more sides, something common in digital markets—— nor dynamic factors such as the possibility of reaction by other firms to the potential price increase made by the dominant company, which could, in fact, increase the negative impact of the transactions (if competitors choose to also raise their prices) or reduce the incentives to raise prices (if, on the other hand, they reduce their prices, capturing a part of the customers of the merged firm).[165]

For example, none of these tests (the IPR, the UPP, the GUPPI and the vGUPPI) considers the reaction of competitors to the concentration or to its possible price increase. Likewise, the GUPPI and vGUPPI do not directly quantify the value of the expected price increase, as they are gross measures, while the IPR would allow for it. Vertical arithmetic, on the other hand, does not necessarily measure the incentives to carry out a foreclosure strategy in dynamic markets, for example, due to changes in products, nor does it manage to reflect the incentives to exercise a partial market foreclosure, or a foreclosure based on a variable other than price.

In short, although these tools are very relevant for the analysis of the impact of the transaction on competition, the truth is that none of them is considered a test that, in itself, is unequivocal evidence of the ability of an entity to substantially lessen competition, but rather an additional element of analysis.

These shortcomings have been taken into consideration by competition authorities at a global level. For example, the UK's CMA considered vertical arithmetic as a tool to be used primarily as a cross-check of its quantitative analysis[166], and expressly notes in its *Merger Assessment Guidelines* that it:

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[164] See also: (i) FNE, Clearance Report, Acquisition of Activision Blizzard, from Microsoft Corporation, Rol FNE F320-2022 ("***Activision Blizzard/Microsoft***"); and, (ii) FNE, Clearance Report of *Uber/Cornershop*.

[165] Pittman, R. (2017), Three Economist's Tools for Antitrust Analysis: A Non-Technical Introduction, disponible en: https://www.justice.gov/atr/page/file/925641/dl (last accessed 5 September 2024).

[166] CMA, Final Report en Intercontinental Exchange/Trayport, para.40, 8.133 y 11.11.

> [...] does not apply any thresholds to market share, number of remaining competitors or on any other measure to determine whether a loss of competition is substantial. The CMA will decide whether a loss of competition is substantial under the applicable legal standard[167].

For its part, in the United States, tools such as the GUPPI have been used as a filter to determine which markets must be involved in the investigation of a transaction. It is interesting that in that country there have been voices that have clamored for a safe harbor threshold in merger control, whereby it would be presumed that, under a certain threshold of incentives to raise prices (or GUPPI level), the unilateral effects of a concentration would be unlikely to harm competition[168].

However, this view has not been accepted, and the Federal Trade Commission ("**FTC**") has indicated in its decisions that it considers a 'safe harbor' threshold based on GUPPI inappropriate but has advocated the application of a legal standard ——more 'liquid' or less structured—— that considers facts and other sources of qualitative and quantitative information in the context of all available evidence[169].

The FTC's view in this regard is interesting, in that despite the natural search by a competition agency for substantive standards that are manageable and to provide legal certainty to the system ——which in a certain way would justify a more pragmatic or rigid approach to the analysis——, it considered inappropriate to base the regime on objective risk thresholds and opted to pursue a more holistic approach to determine the existence of a substantial lessening of competition.

In short, the view adopted at the comparative level ——and also in Chile—— is not to assign excessive value to one piece of evidence with respect to others or to overestimate the probative value of economic evidence over qualitative analysis to configure the risks to competition of a merger. Determining that a transaction is capable of substantially lessening competition requires weighing, as a whole, the different elements of evidence collected by the agency, whether qualitative or quantitative, and evaluating their coherence and consistency among themselves, and only on this basis can we conclude that the most likely scenario of occurrence is that the concentration has the ability to substantially reduce competition.

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[167] CMA (2021), Merger Assessment Guidelines, para 2.8.

[168] Statement of Commissioner Joshua D. Wright Dissenting in Part and Concurring in Part, 13 July 2015, Dollar Tree, Inc./Family Dollar Stores, Inc., FTC File No. 141-0207, p. 2.

[169] "*in any case where a GUPPI analysis is used, the Commission will consider particular factual circumstances and assess other sources of quantitative and qualitative information of evidence. As with other quantitative tests such as market shares and HHIs, we believe that GUPPs should be considered in the context of all other reasonably available evidence*", Statement of the Federal Trade Commission 13 July 2015, Dollar Tree, Inc./Family Dollar Stores, Inc., FTC File No. 141-0207, p. 4.

In Chile, both the FNE and the TDLC have recognized the complementary nature of economic tools and other type evidence in the assessment of mergers. For example, in *Ideal/Nutrabien*, the TDLC emphasized that although the index used by the FNE to measure the competitive proximity between the merging parties —such as the GUPPI or IPR— represented a useful tool to assess the unilateral risks arising from the concentration, economic literature recognizes different limitations inherent to them, and therefore they do not constitute proof that a proposed merger substantially lessens competition, but rather they are additional factors of analysis that must be taken into account[170-171].

In the last prohibition case by the FNE, *Nexus/Colmena*, the TDLC confirmed the prohibition decision and in its analysis delved into the criteria by virtue of which it can be concluded that the legal standard is met. Regarding the index of incentives to rise prices, the TDLC pointed out that together with the qualitative analysis of competitive proximity between the merging parties, they serve only as an *'indication of unilateral risks'* within the framework of the prospective analysis of a concentration. Specifically, the TDLC held that if the index show that there is an incentive to raise prices once the transaction is implemented, this only leads to the need to carry out a more in-depth analysis to determine whether the transaction has the ability to substantially lessen competition[172].

Structure of analysis of a substantial lessening of competition

If the results of economic tests, such as the GUPPI, are incapable of constituting single evidence that a concentration substantially lessens competition, and such conclusion must necessarily be reached by considering multiple other factors, under what parameters whether or not a transaction substantially lessens competition should be evaluated?

As a starting point, the standard commonly used by the authorities to analyze the effects of a concentration begins with the comparison between the competitive situation in the market after the concentration is implemented and the situation absent the merger (or

[170] TDLC, Judgment Nº166/2018, para 53°, en que el TDLC cita a Moresi, S. (2010), "The Use of Upward Price Pressure Indices in Merger Analysis", *The Antitrust Source*, p. 6; OCDE (2011), "Economic Evidence in Merger Analysis", *Series Roundtables on Competition Policy* N°126, p. 41; Keating, B. y Willig, R. D. (2015), "Unilateral effects", en: R. D. Blair y D. D. Sokol (eds.), *The Oxford Handbook of International Antitrust Economics*, vol.1, p. 466.

[171] Among the limitations of these index, the TDLC noted that they omit important sources of competitive pressure and dynamic elements of competition, such as the response of competitors from the notifying parties to a transaction, entry of new players into the market, or the repositioning of products by other suppliers. TDLC, Judgment Nº166/2018, para. 54°, cited: Shapiro, C. (2010), "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox In Forty Years", *Antitrust Law Journal*, vol. 77, p. 717.

[172] TDLC, Judgment N°182/2022, para. 89°.

counterfactual). The counterfactual that is usually, or by default, considered is the situation prior to the merger[173-174].

Generally, in order to determine whether or a transaction amounts to a substantial lessening of competition, competition agencies evaluate the market structure and the degree of concentration of the market; the likelihood that the transaction will generate negative effects on competition in light of the particular transaction and, in general, within a specific relevant market; the existence of factors that act as a counterweight to the possible effects; market entry conditions; and the potential efficiencies generated by the transaction.

The challenge of applying the standard of substantial lessening of competition in practice requires a case-by-case analysis, in which the aforementioned factors do not constitute a closed list that must or can be applied mechanically in each and every case. Rather, the analysis shall be based on an overall assessment of the foreseeable impact of the concentration in the light of the relevant factors and conditions in each individual case[175].

Like other comparative guidelines, the FNE's Horizontal Merger Guidelines provide that, as a general rule, a structural analysis of the affected market or markets must first be carried out. This means that the agency will have to determine the size of the respective relevant markets and the position occupied by each of the actors ——including the merged entities—— within it.

In general, market shares and the degree of market concentration provide a first filter for analysis, and preliminary indicia of the market structure and the competitive relevance of the parties to the concentration and their rivals[176].

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[173] FNE (2022), Horizontal Merger Guidelines, para. 6 "*The analysis of a concentration will seek to compare the levels of competition expected to exist from completion of the transaction with those without the merger. The latter is the counterfactual scenario"* (free translation). See also: (i) CMA (2021), Merger Assessment Guidelines, para. 3.1: "*Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'. The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether the merger gives rise to an SLC*" *La* y (ii) European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 9.

[174] Section III.b.(iv) contains a detailed analysis of this assessment.

[175] European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 13; FNE, Horizontal Merger Guidelines, sec. III, para. 27 et seq.

[176] FNE (2022), Horizontal Merger Guidelines, para. 30; European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 15.

Market definition allows to identify the main competitors of the undertakings concerned as suppliers of those products, as well as their corresponding customers[177].

To this end, the first stage of the substantive analysis of a transaction has traditionally been to define the relevant market as the area that encompasses the group of products or services and the geographical area that serve as an analytical framework for the competitive impact of the transaction.

Specifically, the delimitation of the market comprises both the product market and the geographic market. The product market comprises all the products that customers consider substitutable, taking into account their characteristics, prices and intended use, the conditions of competition and other factors related to demand and supply[178]. The geographic market, on the other hand, covers the geographical area in which the merged entities offer or demand the relevant products, in which the conditions of competition are sufficiently homogeneous and different from other areas[179].

However, in order to assess the effects of a transaction on competition, it is not always necessary to carry out an excessively in-depth or precise definition of the relevant market. The fundamental objective of this step is to establish a first filter, an analytical framework to assess whether, at the outset, the transaction may give rise to any risk to competition. However, when it is necessary to carry out an in-depth examination of the market and the effects of the transaction (generally in the framework of a Phase II investigation), the definition of the market is an essential step[180].

The importance of market definition as part of the competitive analysis was reflected in the *Ideal/Nutrabien* case. In that case, the TDLC criticized the FNE for having excluded sweet cookies from the relevant market for biscuits and *alfajores*. This, since according to information collected from consumers, there was sufficient competitive pressure from sweet cookies to be incorporated into the product market, which, in the opinion of the TDLC, affected both the structural analysis and the effects of the transaction[181].

In this exercise, the market shares of each player at the time the transaction will normally be considered first. However, if it is reasonable to expect changes in the market in the near

[177] European Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, para. 6. Available at: https://eur-lex.europa.eu/legal-content/Es/TXT/?uri=OJ%3AC_202401645.
[178] FNE (2022), Horizontal Merger Guidelines, para. 15 et seq.; European Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, para. 12.
[179] FNE (2022), Horizontal Merges Guidelines, para 22 et seq.; European Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, para. 12.
[180] FNE (2022), Horizontal Merger Guidelines, para. 12.
[181] TDLC, Judgment N°166/2018, para. 43.

future, possible exists or entries of operators, as well as possible imminent contractions or expansions, they may also be taken into account[182].

Likewise, when market characteristics so require, the FNE will be able to analyze historical market shares, as well as their evolution over time, which can be a useful element of analysis in rapidly changing markets or markets that are characterized by innovation[183]. In fact, the dynamism of the market can make high market shares contestable by other operators, which substantially reduces the risk that the transaction will have a significant impact on competition[184]. In short, market shares provide a first indicator of the effect of a concentration, although they are not generally sufficient to conclude that it is capable of substantially lessening competition[185].

On the other hand, through the Herfindahl Hirschman Index[186] ("**HHI**"), the agency will be able to determine whether the concentration gives rise to a concentrated market or not, based on different parameters given by said index which seek to measure the change (or *delta*) that the market concentration experiences as a result of a transaction.

The HHI is only useful to obtain a first approximation of the degree of concentration of the market and the impact that the transaction in question would have on it. In particular, this index would allow to establish sort of a 'rule out' rule to non-problematic transactions, since if the degree of market concentration ——measured by the value of the HHI—— or the change generated by the transaction on said degree of concentration ——measured by the value of the *delta* (δ) (*i.e.*, the difference between the post and pre-transaction HHI)—— are lower, it may be ruled out *a priori* that the transaction is capable of generating a substantial lessening of competition.

Along these lines, many competition agencies in the region use similar values of the HHI and *delta* as benchmarks[187], which is logical given the degree of development of their respective markets and the size of their economies[188]. On the other hand, other authorities

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[182] FNE (2022), Horizontal Merger Guidelines, para. 30; FNE, Clearance Report, Merger between Cementos Polpaico S.A. and Cementos Bicentenario S.A, Rol FNE F71-2016, pp. 18-19.

[183] FNE (2022), Horizontal Merger Guidelines, para. 31; European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 15.

[184] FNE, Clearance Report, Acquisition of control of Suez S.A. by Veolia Environnement S.A., Rol FNE F267-2021 ("***Veolia/Suez***"), Clearance Report, *Nexus/Minsait*.

[185] FNE (2022), Horizontal Merger Guidelines, para. 32 y et seq.

[186] The HHI index is obtained by summing up the market shares of the participating companies, squared, and provides an indicator of the degree of competition and concentration in a particular market.

[187] For example, both the FNE's Horizontal Merger Guidelines and INDECOPI's Guidelines for the Classification and Analysis of Mergers (*Lineamientos para la calificación y análisis de operaciones de concentración empresarial*) (2023) argue that horizontal concentrations with HHI values below 1500 or between 1500 and 2500 with a variation of HHI (δ) below 200, or below 2500 with an δ below 100 are less likely to create risks to competition.

[188] Small economies would generally tend to have more concentrated starting markets (Gal, M. (2009), *Competition Policy for Small Market Economies*, p. 14), which would not necessarily imply that the degree of

such as the European Commission have different thresholds[189], based on subjective assessments of the generally acceptable degree of concentration in the markets considered.

In fact, in jurisdictions such as Mexico, where, in addition to COFECE, the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*) has the authority to evaluate and supervise concentrations in the telecommunications and broadcasting sectors, both agencies use different HHI reference values[190]. It follows from this that the results of the HHI's analysis must be assessed in the light of the specific context, taking into account the circumstances that characterize the market affected by the transaction in question.

Given the inherent simplicity of the index, the HHI yields static values and does not take into account the complexities and particularities of the structures of each market. In view of its limitations ——excluding from the calculation the greater or lesser competitive proximity of the actors in a market or the degree of product and services differentiation, elements that affect the competitive dynamics——, in many cases the HHI only operates as an indication and offers a very limited and partial vision of the true impact of the improvement of a concentration in a specific market.

In short, it is clear that it is not possible to establish a presumption as to the existence or otherwise of risks to competition on the basis of the HHI alone[191].

As stated in the Horizontal Merger Guidelines, the FNE's practice since the current merger control regime enter into force has been to use the concentration index as a starting point in the analysis of risks of a concentration, usually complemented by the evaluation of the greater or lesser competitive proximity of the parties that are concentrated, the intensity of competition and the differentiation of its products or services, criteria that is not included within the scope of the index.

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competitive intensity would be lower, Other factors inherent to the transaction, such as entry conditions, need to be assessed.

189 For example, in the case of the European Union, the European Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings state that it is unlikely that the Commission will detect horizontal competition concerns when the value of the post-transaction HHI is less than 1000, or is between 1000 and 2000 with a δ of less than 250, or at a concentration giving an HHI of more than 2000 and a δ of less than 150

190 See IFT (2022), "Technical criterion for the calculation and application of a quantitative index to determine the degree of concentration in markets and services in the telecommunications and broadcasting sectors" (*Criterio técnico para el cálculo y aplicación de un índice cuantitativo a fin de determinar el grado de concentración en los mercados y servicios correspondientes a los sectores de telecomunicaciones y radiodifusión*), available at: https://www.ift.org.mx/sites/default/files/criterio_tecnico_2022.pdf (last accessed 13 August 2024); y COFECE (2015), "Technical criteria for the calculation and application of a quantitative index to measure market concentration" (*Criterios técnicos para el cálculo y aplicación de un índice cuantitativo para medir la concentración del mercado*), available at: https://www.cofece.mx/wp-content/uploads/2017/11/criterios_tecnicos_para_medir_concentracin_del_mercado.pdf (last accessed 13 August 2024).

191 European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 21.

However, if a transaction gives rise to a concentration exceeding the HHI thresholds provided for in the Horizontal Merger Guidelines, this does not mean that the transaction necessarily results in a substantial lessening of competition. Many times, the analysis of HHI and the concentration generated by a transaction does not allow to reach a conclusion about the competitive impact of a concentration. Especially in those cases where, as a result of the merger, the parties will concentrate a relevant part of the market, the FNE complements and deepens its analysis with appropriate qualitative and quantitative tools to determine whether it can generate anticompetitive effects, through a comparison of the post-transaction scenario and the counterfactual scenario[192].

On the other hand, the Horizontal Merger Guidelines account for a series of circumstances where, even if there is a small change in market concentration, the transaction could still generate a substantial lessening of competition[193].

From all of the above, it follows that the analysis of whether or not a transaction is suitable to substantially lessen competition goes beyond the increase in concentration that a market experiences with its materialization. In short, the potential risks of a competitive transaction that may result in the ability to substantially lessen competition may be unilateral –whether horizontal, vertical or conglomerate – or coordinated.

What the analysis seeks is simply to determine whether the materialization of the concentration, in terms of the FNE:

> may grant, reinforce or increase the capacity of the entity resulting from the concentration to, by itself (generating unilateral risks) or in conjunction with others

[192] FNE (2022), Horizontal Merger Guidelines, para. 37 y 38.

[193] For example, if one of the parties involved in the Transaction is a potential competitor, or a recent entrant, with a small market share that does not necessarily reflect the share it could reasonably achieve in the near future; where one of the parties involved in the Transaction is a major innovator or an especially vigorous and independent competitor (a *maverick* economic operator) in a way that does not reflect its market shares; where the concentrated parties are close competitors in markets with differentiated products; where there are relevant links between players in the respective market, whether structural (for example minority shareholdings) or contractual (for example, cotransaction, collaboration or supply agreements, financing agreements, etc.), which may reduce their independence and/or competitive autonomy; where the market presents a structure tending to coordination, there have been signs of coordination in the recent past; where there are significant consumer concerns about the effects of the Transaction, or similar apprehensions about the competitive dynamics of the respective market or industry; when in Similar Transactions in Chile or at a comparative level the existence of risks to competition has been concluded by the relevant authority; and/or when there is evidence or any other indication of possible competitive risks in connection with the Transaction. Ibid., para. 36.
Other comparative guidelines contain similar exceptions. For example, INDECOPI (2023), Guidelines for the Classification and Analysis of Mergers (Lineamientos para la calificación y análisis de operaciones de concentración empresarial), para. 2.3.1, p. 43; or European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 20.

(generating coordinated risks), significantly deteriorate the competitive conditions of the respective market compared to the counterfactual[194] (free translation).

In practice, the FNE's approach to unilateral risk analysis has been to focus on how competitively close are the parties that are concentrated both from a qualitative dimension, based on the analysis of internal documents, and quantitatively, resorting to the various applicable economic tests that were set out above.

On the other hand, in order to assess the coordinated risks resulting from the transaction, it is necessary to study the incentives for economic operators to compete on the merits in order to determine whether coordination may be more profitable than competing in the market[195]. Specifically, the analysis must make it possible to determine, at least indicatively, whether the transaction is likely to lead to coordination (such as price fixing or market sharing or even less direct understandings), as well as the ability to achieve and maintain such coordination in the light of the characteristics of the market[196] (concentration, product differentiation, transparency and presence of structural links between competitors, the frequency and opportunity of exchanging sensitive information, etc.).

In particular, the FNE's Horizontal Merger Guidelines structure the analysis of coordinated concerns based on three specific circumstances: (i) the capacity that the transaction would provide to achieve the terms of coordination; (ii) the internal sustainability of coordination; and, (iii) the external sustainability of coordination. The first is given by the possibility that economic agents in a market would have to reach a common understanding, explicit or tacit, based on criteria such as high concentration, low number of actors, few product differentiation, similarity of characteristics, the type of products, the stability of demand, the frequency of their contacts and/or structural links between them.

Sustainability, on the other hand, is given by profitability. If coordination is sufficiently profitable for economic agents, and it is possible to monitor and punish eventual deviations, coordination will be more likely. Such sustainability can be internal, if the concentration facilitates these factors or reduces the asymmetry between competitors, or external, if there is no external competitive pressure capable of disciplining and preventing coordination elements from being generated or if the transaction eliminates it.

In this regard, the FNE has prohibited two transactions considering that their implementation would generate coordinated risks. In the *Servipag/Santander* case, the FNE considered that the transaction linked the three most important banks in the country, in a business support company that was specifically related to a particular activity where they were particularly

[194] FNE (2022), Horizontal Merger Guidelines, para. 39.
[195] Ibid., para. 63.
[196] Ibid., para. 71 y ss. The analysis also includes the potential of punishment mechanisms to deter deviations from coordinated behaviour and the impact of fusion on these mechanisms (see para. 76 and footnote 105).

close competitors, generating a structural link in an economic agent in which they would have outsourced the cash management service[197].

Likewise, in *Nexus/Colmena*, in the private health insurance segment, the FNE considered that the transaction would increase the capacity to achieve coordination and make it more stable, based on elements such as the base price and the coverage of health plans. In certain segments, the transaction would have concentrated a relevant part of the supply in a few actors, increasing the symmetry between market shares, and increasing the degree of homogeneity, thereby increasing the possibility of concentration, and eliminating a player that would had generated greater disruption in terms of readjustment of base prices in health plans[198].

In the case of *full-function joint ventures*, it will also be necessary to assess the potential of the entity to create or strengthen structural links between parent companies, which can facilitate coordination or the exchange of sensitive information[199].

Countervailing analysis

In any assessment of substantial lessening of competition, there are two key elements that are analyzed and that could mitigate ——or even reverse—— the competition concerns that are raised.

The first is the assessment of the entry conditions and the evaluation of how certain dynamic elements of competition could affect the competitive scenario after a concentration has been implemented. This is because the entry of new competitors into the market can generate sufficient competitive pressure to counteract the risks[200-201].

The second element is the countervailing arguments, especially the efficiencies arising from a concentration, which can mitigate the risks associated with it. Productive efficiencies such as obtaining economies of scale, scope, density, synergies, elimination of duplications or double marginalization, specialization, rationalization of functions, etc., are considered by the FNE's Horizontal Merger Guidelines as possible counterweights to unilateral concerns[202].

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[197] FNE, Report of the prohibition of the concentration between Banco Santander – Chile y Sociedad de Recaudación y Pagos de Servicios Limitada. Rol FNE F101-2017, para. 239.
[198] FNE Report of the prohibition of the acquisition of control of Colmena Salud S.A. by Nexus Chile SpA, Rol FNE F271-2021, para. 406 et seq.
[199] Ibid., para. 63 est seq.
[200] Ibid., para. 118 et seq.
[201] Assessment of entry conditions is addressed in section III.b.(vi).
[202] Ibid., para. 23 et seq.

Dynamic efficiencies will be those that are the result of complementarities between the parties, or changes in the ability and/or incentives to develop new or better products[203]. These types of efficiencies deserve special attention in the context of dynamic markets or with digital components. They can have a relevant weight in the competitive evaluation of a transaction, since their impact could even exceed that of static efficiencies, under a long-term prospective analysis.

In fact, however, dynamic efficiencies are generally invoked to a much lesser extent as a counterweight to the risks of a merger than static efficiencies. This would not only be due to the fact that they are more difficult to prove and quantify, but also to the fact that the theories of harm constructed by competition agencies focus on evaluating the effects of a concentration, preeminently, on price or quality, against which efficiencies can be more easily incorporated to counteract the greater incentives to affect competition in economic tests that serve as a basis for predictions of competitive risks.

However, even though production efficiencies can play a more direct role in mitigating risks arising from a horizontal transaction, considering that innovation directly affects economic growth ——even beyond the price level——, the agencies' view moves from a rather static view of risks, to a dynamic one focused on the impact of the merger on the incentives to innovate, and in this context, the calculation of dynamic efficiencies has been acquiring greater relevance.

Traditionally, agency guidelines generally agree that for admitting both static and dynamic efficiencies they must meet three cummulative requirements: be verifiable ——demonstrable, through convincing evidence, both in their probability and magnitude——; inherent ——that they are a consequence of the concentration and that this is the least anticompetitive means to achieve them—— ; and transferable to consumers —— able to

[203] Ibid., para. 153. Among the potential efficiencies of a dynamic nature that can be identified, the OECD has analysed *knowledge spillover* (also known as *innovation spillover*), that is, the internalization of innovative knowledge transfer. According to the OECD, some of the doctrine has pointed out that these transfers are in fact an important motivation for companies to cooperate in R & D and thus to achieve dynamic efficiency gains related to the development of innovations. See OECD (2020), "Background note, Merger Control in Dynamic Markets", p. 29, available at: http://www.oecd.org/daf/competition/merger-control-in-dynamic-markets.htm (last accessed 2 September 2024). The doctrine has also recognized as dynamic efficiency possible the exit from the market of less efficient firms and high-value acquisitions that involve rewarding an entrepreneur for successful innovation. With respect to the latter aspect, the expectation of a profitable exit strategy may encourage new entrepreneurs to participate in venture capital and risky R&D projects that can lead to relevant new innovations (Henkel, J., T. Rønde and M. Wagner (2015), "And the Winner is - Acquired: Entrepreneurship as a Contest Yielding Radical Innovations", *Research Policy*, Vol. 44/2). In fact, it has been recognised that exit is essential for the smooth functioning of the business and entrepreneur ecosystem, It provides liquidity to the founders of innovative companies to develop new projects and encourages investment by venture capital firms. Vease Sokol, D. (2018), "Vertical Mergers and Entrepreneurial Exit," *Florida Law Review*, Vol. 70, pp. 1357-1378, available at: https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1442&context=flr. Ibid., para. 153 (last accessed 2 September 2024).

compensate for the greater market power, resulting in lower prices or improvements in the quality of the products offered[204].

In general, competition agencies consider that efficiencies is more plausible in vertical or conglomerate transactions than in horizontal mergers[205]. And even in non-horizontal mergers, the reality shows that efficiencies are rarely considered by competition agencies as a counterweight to the risks generated by a concentration.

Probably, the greatest challenge in terms of efficiencies is to be able to demonstrate that they are inherent to the transaction, and that they are not generated as a result of other factors unrelated to the transaction being analyzed, although the evaluation of the requirements depends on each specific case[206]. In the case of dynamic efficiencies, the testing difficulties are even higher[207].

The area protected by merger control

From the foregoing, it can be seen that competition institutions in Chile have been clear in stating that the standard of substantial lessening of competition is based on the evaluation of whether the transaction will result in a significant deterioration in the competitive conditions of the respective market compared to the situation without the transaction or counterfactual.

Although it is clear that the standard under which the impact on competition of a concentration is evaluated is intended to protect the competitive process, for the benefit of consumers, it is currently discussed that this welfare focuses only on limited competition variables ——such as prices, quality, variety or innovation——.

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[204] Ibid. In the same sense, FNE, Report of prohibition of the acquisition of control in Colmena Salud S.A. by Nexus Chile SpA, Rol FNE F271-2021, para. 526.

[205] Indeed, the European Commission's Guidelines for the Assessment of Non-Horizontal concentration (para. 13) argue that vertical and conglomerate concentrations offer substantial scope for efficiencies. One characteristic of vertical concentrations and certain conglomerate concentrations is that the activities and/or products of the companies involved are complementary to each other. Integration of complementary activities or products into a single firm may lead to significant efficiencies and be beneficial for competition.

[206] For example, in Nexus/Hive, the TDLC was not proven to be efficient in terms of economies of scale, being neither verifiable nor able to counter risks, noting that "*it has been ruled out that the estimation of economies of scale as a counterweight to anti-competitive risks, when done in an aggregate way -industry level-, can be considered in the analysis of mergers, In particular, it does not explain how the consumers affected by the merger will benefit* [...]" (free translation). TDLC, Judgment N°167/2022, recital 154°.

[207] This means that in many cases dynamic efficiencies are not even considered by the parties. A study carried out at European level in 2012 showed that of 42 Phase II decisions in the period 2004-2011, only 11 were supported as having dynamic efficiencies and only 2 had dynamic efficiencies. See Veugelers (2012), Innovation in EU merger control: walking the talk, *Bruegel Policy Contribution*, Nº2012/04, February 2012, available at: https://www.bruegel.org/sites/default/files/wp-content/uploads/imported/publications/pc_2012_04__FINAL.pdf (last accessed 2 September 2024). The study shows that, of these 11 cases, the European Commission accepted the existence of dynamic efficiencies in only 2 of them, referring to concentrations of a vertical nature.

And there are voices at comparative level that tend to challenge the traditional analysis holding into the competition policy debate that there would be a much wider range of interests that could be affected when two economic agents merge, and that would also deserve protection under the competition assessment.

That is why, from this perspective, it is worth asking which are the edges of the standard of substantial lessening of competition in terms of the purposes it is intended to protect.

In other words, it is questionable whether, when analyzing a merger, competition agencies, in addition to focusing on the traditional analysis of evaluating whether the concentration will affect the incentives to produce better products at lower prices or the incentives to innovate, should also evaluate other interests that, in principle, have remained absent from the traditional competition analysis.

Preventing environmental damage; protecting the privacy of personal data; avoiding affecting labor markets or gender equality; or even assessing who will hold a country's key assets ——and extend merger analysis to national security aspects, especially in jurisdictions that lack a foreign direct investment evaluation regime—— are all legal rights that could eventually be injured as a result of a concentration.

Should (and can) competition law accommodate other interests under its standard of analysis?

Although there are certain voices at the comparative level that dispute the foundations of preventive merger control regimes, and question whether the consumer welfare standard should continue to be used as the purpose of merger control, the question that many competition agencies really ask, within the framework of this discussion, is not whether it is correct to protect the competitive process for the benefit of the consumer but rather what should be included within the standard of substantial lessening of competition and what are the limits of this notion.

In short, it cannot be ignored that the choice of the legal test in the light of which to assess the impact of a concentration may respond to political or opportunity criteria, and that it could go beyond the mere substantial lessening of competition. In fact, jurisdictions such as Argentina currently prohibit economic concentrations "*whose object or effect is or may be to restrict or distort competition, in such a way that it may result in harm to the general economic interest*"[208] (free translation)

[208] Article 8 of the current Law 27442, on the Protection of Competition ("Ley 27442, de Defensa de la Competencia"). In practice, the competition authority has redirected the concept of "general economic interest" towards factors related to the proper functioning of markets (see Decision 106, 12/4/1982, "Ifrisa S.R.L. v. Yacimientos Petrolíferos Fiscales Sociedad del Estado y ECSAL S.A.") and there would be consensus that the general economic interest implies the protection of consumers, i.e. the maximization of surplus, both the consumer and the producer, to ensure perfectly competitive markets by promoting the

Moreover, there are a multiplicity of standards in the Latin American region that in certain cases make it difficult to bring together comparative practice. Thus, although jurisdictions such as Colombia or Peru follow a similar standard to Chile[209], this does not necessarily happen across the region.

For example, in Mexico, Article 62 of the Federal Economic Competition Law classifies as "*unlawful*" those "*concentrations that have the purpose or effect of hindering, diminishing, damaging or impeding free competition or economic competition*" (free translation), but then includes, in Article 64, the indicative criteria of an unlawful concentration, specifically indicating (i) the acquisition or increase of substantial power, (ii) the establishment of barriers to entry, or (iii) the facilitation of prohibited anticompetitive conduct[210], which seems to be inspired by the old regime based on a dominance test[211]. In Brazil, on the other hand, the law establishes a combined test that prohibits transactions that eliminate competition in a substantial part of the market or that may create or strengthen a dominant position[212].

In the same vein, it is known that jurisdictions such as South Africa incorporate elements of public interest in the evaluation of the competitive impact of a transaction, assessing, together with the effects on prices or quality, the impact on elements as diverse as employment or the effects on historically disadvantaged populations[213].

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general welfare of society (see Del Pino, M. (13 September 2013), "New dynamics of control of economic concentrations in Argentina", Opinion - Abogados.com.ar, available at: https://mail.abogados.com.ar/index.php/las-nuevas-dinamicas-del-control-de-concentraciones-economicas-en-argentina/33440 [last accessed 13 August 2024]).

[209] For example, in Peru, article 7 of Law 31112, which provides for prior control of business concentrations (*Ley Nº 31112, que establece el control previo de operaciones de concentración empresarial*), states that the purpose of the prior control process is to "identify whether there is a significant restriction of competition in the markets concerned". In the case of Mexico, article 62 of the Federal Law on Economic Competition (*Ley Federal de Competencia Económica*) qualifies as "unlawful" those "concentrations which have for object or effect to hinder, diminish, damage or impede free competition or economic competition". In Colombia, article 11 of Law 1340 of 2009 states that the Superintendent of Industry and Trade shall object to the transaction when he finds that it tends to produce an "undue restriction on free competition".

[210] Specifically, the precept provides that "*The Commission shall consider as indications of an unlawful concentration, that the concentration or attempt thereof: I. confers or may confer on the merging party, the acquirer or the resulting economic agent substantial power within the meaning of this Act, or increase or may increase such substantial power, thereby hindering, diminishing, damaging or impeding free competition and economic competition; II. Has the object or effect, or may have the effect, of creating barriers to entry, preventing third parties from accessing the relevant market, related markets or essential inputs, or displacing other economic agents, or III. Has the object or effect of substantially facilitating the conduct of the parties to such a concentration in the conduct prohibited by this Act, and particularly in the conduct of monopoly practices*", (free translation).

[211] See the contribution of México at OCDE (2009), "Standard for merger review, Series Roundtables on Competition Policy N°102, DAF/COMP(2009)21", available at: https://www.oecd-ilibrary.org/finance-and-investment/standard-for-merger-review_4d67d71a-en (last accessed 4 September 2024).

[212] Article 88.5o of the Law No12.529, of 30 November 2011, which structures the Brazilian system of defense of competition, states that "*Acts of concentration which involve the elimination of competition in a substantial part of the relevant market, which are likely to create or strengthen a dominant position or which may result in dominance on the relevant market for goods or services shall be prohibited*" (free translation).

[213] South African Competition Commission (Mars 20, 2024), "Revised public interest guidelines relating to merger control", disponible en:

Likewise, in the context of the debate generated in recent years about the use of competition law as a means to achieve sustainability objectives, the possibility of incorporating this type of criteria in the analysis of merger control has been raised. For example, at the European Union level, it has been proposed to take into account consumer preferences for sustainable products, services or technologies as a differentiating factor in the area of market definition[214].

Similarly, the need to apply theories of harm based on preventing the loss of sustainable innovation has also been highlighted in order to avoid the so-called *green killer acquisitions*, which aim to eliminate a relevant and 'green' product or technology, which contributes to sustainability objectives[215].

In fact, the European Commission has pointed out that competitive markets are related to efforts to achieve results that are both more sustainable from a social or environmental point of view. Interestingly, recent decisions show that sustainability criteria are already being incorporated into mergers, not only in terms of the analysis of the relevant market[216], but also in the substantive analysis[217].

In this regard, in the *Sika/MBCC* case, the Commission held that innovation efforts and R+D capabilities to develop new polymers and bring more sustainable chemical additive formulations to the market played a key role in the concrete/cement industry. Sika and MBCC were both strong innovators, including in environmental matters, which was one of the main factors taken into account when assessing the competitive closeness between them and against other players[218]. In addition, in a number of recent cases, the Commission has already pursued theories of harm related to the loss of sustainable innovation[219], analyzing barriers to entry related to more sustainable technologies[220] and consumer preferences for sustainable products as elements that could limit the ability of some

https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (last accessed 2 September 2024).

214 European Commission, Competition Policy in Support of Europe's Green Ambition, *Competition Policy Brief*, 2021-01, September 2021, available at: https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en.

215 Ibid.

216 For example, European Commission, Case M.7292 - *DEMB/Mondelez/Charger Opco*, paras. 57-59, where the Commission considered a possible segmentation between non-conventional (organic, fair trade) and conventional coffee, because retailers indicated that some consumers perceive non-conventional coffee to meet different consumer needs, such as ensuring sustainable development.

217 European Commission, EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future, Competition Merger Brief 2/2023, Article 1. See also Deutscher, E., y Makris, S., Sustainability concerns in EU merger control: from output-maximizing to polycentric innovation competition, *Journal of Antitrust Enforcement*, 2023, Vol. 11, pp. 350–399.

218 Case M.10560 – *Sika/MBCC*, para 212-213, 218. Indeed, some of the questions in the customer questionnaires were specifically directed to addressing sustainability issues (e.g., paras. 206, 266, 929).

219 For example, Cases M.8401 – *J&J/Actelion*, M.7278 – *General Electric/Alstom*, M.7932 – *Dow/Dupont*, M.8084 – *Bayer/Monsanto*, M.6166 – *DB/NYSE-Euronext*, M.7275 – *Novartis/GlaxoSmithKline's oncology business*, M.7559 – *Pfizer/Hospira*, M.7326 – *Medtronic/Covidien*

220 Case M.9343 – *Hyundai Heavy Industries / Daewoo Shipbuilding & Marine Engineering*, paras. 1052 et seq.

customers to switch to alternative products to those of the parties to the concentration[221]. Other European authorities, such as the French *Autorité de la Concurrence*, are also applying these criteria in their analyses[222].

Similarly, labor markets have also been the target of interest in terms of merger control, particularly in the United States, where agencies have been focusing in recent years.

In November 2021, the U.S. Department of Justice ("**DOJ**") initiated a lawsuit to block the merger between Penguin Random House and Simon & Schuster for harming U.S. workers, specifically authors, through the consolidation of market power in the workplace by publishers[223]. More recently, the FTC also brought a lawsuit against Tapestry's acquisition of Capri, finding that the merger would create an employer with anticompetitive buying power and remove the incentive for the two companies to compete for employees, which could negatively affect employees' wages and benefits and hurt workers in the luxury industry overall[224].

In fact, this interest of U.S. agencies in theories of harm based on the impact of mergers on labor markets has been reflected in the recently revised joint Merger Guidelines of the DOJ and the FTC[225], which for the first time identify possible effects on the labor market as a reason to challenge concentrations[226].

In light of the new Guidelines, the agencies will assess whether a merger will be able to substantially lessen competition in labor markets (on the demand side) by assessing the ability of merging firms to reduce or freeze wages or salaries, slow wage growth, exert greater influence on negotiations, or generally degrade benefits and working conditions without causing workers to resign.[227]

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[221] Case M.8713 – *TataSteel / Thyssenkrupp / JV*, para. 1381-1382.

[222] French Competition Authority, Decision 21-DCC-161 of 10 September 2021. Carrefour's acquisition of 100 Bio c' Bon stores was authorised subject to conditions. The Authority identified a downstream market for retail distribution of organic products, Conventional and organic products were not substitutable in the eyes of consumers, and general-purpose food retailers were not substitutes for specialist shops.

[223] DOJ, Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster, 31 October 2022, available at: https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed (last accessed 6 September 2024).

[224] FTC, FTC Moves to Block Tapestry's Acquisition of Capri, 22 April 2024, available at: https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-moves-block-tapestrys-acquisition-capri (last accessed 6 September 2024).

[225] FTC y DOJ, Merger Guidelines, 18 December 2023, available at: https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[226] FTC y DOJ, Merger Guidelines, Guideline Nº10, "*When a merger involves competing buyers, the Agencies examine whether it can substantially reduce competition for workers, creators, suppliers or other providers*"", (free translation).

[227] Ibid. In fact, in line with the new guidelines, the DOJ and the FTC have also proposed major changes to the transaction reporting forms under the Harts-ActScott-Rodino, including the addition of a new section on labour markets requiring parties to submit information on the categories of workers employed by each party and the geographical areas where these employees work and where companies hire, as well as the

It cannot be ruled out, *a priori*, that these criteria may be gradually introduced within the standard of substantial lessening of competition at the comparative level.

As stated, the substantial lessening of competition is an indeterminate (or liquid) legal concept that has been delimited by case law and decisional practice and which concurrence must be concluded in each particular case ——as expressly recognized by the CMA Merger Assessment Guidelines[228]——. However, the inclusion of such parameters entails the inherent danger that, eventually, the door will be opened to the possibility that, in the context of merger control, certain considerations or factors of public interest may be sought to be protected, which do not directly imply an impact on 'competition in the markets', which is precisely what the legal test seeks to assess[229].

What can be observed is that there is a tendency to aspire to broaden the boundaries of the application of a legal standard ——whose interpretation has been preeminently given by jurisprudence and soft law instruments—— to elements of public policy and social interests other than the promotion and defense of free competition in the markets.

Considering the generally positive evaluation of the functioning of the antitrust institutions in the different jurisdictions at the Latin American level[230], from a perspective of institutional design and procedural economy, it may be tempting to attribute to the merger control regime the duty to protect other objectives in view of the fact that they could be affected by the same fact ——a concentration——. In short, to implement the tools and powers of the merger control regime to protect and safeguard legal assets that, originally, were not intended to be addressed in this area.

It is therefore worth asking whether the standard of substantial lessening of competition is sufficiently flexible to address other public purposes, or whether these should be subject to

identification of labour violations in the last five years. This would allow agencies to more easily identify possible damage theories based on labour market effects. See FTC, Notice of proposed rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 16 CFR Parts 801 and 803 RIN 3084–AB46, available at: https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

[228] CMA (2021), Merger Assessment Guidelines, para. 2.1.

[229] Levin, F., Picón, A. (2024), "The reformation of the Argentine competition law under the eye of comparative experience: lights and shadows, in Suplemento de Derecho de la Competencia" (*La reforma de la normativa argentina de competencia bajo la mirada de la experiencia comparada: luces y sombras*), elDial.com, Editorial Albrematica, Ciudad Autónoma de Buenos Aires - Argentina. As established by the OECD, in the model followed by most of the countries that make up the organization, competition agencies conduct their analysis according to criteria based on competition factors. Public interest considerations can be adequately safeguarded by a sector-specific regulator, equipped with the appropriate tools and technical analysis to balance legal assets diverse from competition in markets, as environmental or defence and national security criteria.

[230] CeCo UAI (2024), "Study of the perception of practicing lawyers regarding the institutions and authorities of free competition (Argentina, Brazil, Chile, Colombia, Ecuador, Mexico and Peru)", available at: https://centrocompetencia.com/wp-content/uploads/2024/04/Informe-Encuesta-CeCo-2024-1.pdf (last accessed 3 September 2024).

sectoral regulation and their protection channeled through an institutional framework in accordance with the legal interests that are intended to be protected.

It can be argued that the FNE has been consistent in limiting the standard by virtue of which it will analyze its transactions. In general, the FNE has only addressed elements outside the traditional competitive variables to give a little more context by illustrating a substantial reduction in competition and dimensioning the price increases that economic tests would yield ——such as the ' consumers sensitivity' in certain markets to small price increases.[231] In *Copec/GCL*, for example, in the liquid fuels market, the FNE pointed out:

> In order to measure this increase, it is illustrative that comparative jurisprudence has indicated that even small price increases in the retail fuel distribution market could lead to substantial reductions in competition due to the importance that consumers would give to it. This is given that the percentage of expenditure that fuel would represent within the total expenditure of households would be high, which would also be reflected in the fact that distributors would announce prices in very small multiples[232] (free translation).

In fact, the scope of action of the FNE was the subject of discussion in the context of a concentration in which it was evaluated whether national security aspects should be addressed by the merger control regime[233]. In this regard, the FNE was emphatic in stating that it acts within the scope of its competence within the framework of the principle of legality established in the Political Constitution of the Chilean Republic[234], and that the institutional design of the merger control regime does not confer on it powers to decide on the basis of elements of national or public interest (*i.e.*, considerations of geopolitical strategy, of defense or national security, etc.).

Likewise, the FNE indicated that it can only rule on whether or not a concentration may be apt to substantially lessen competition, which is consistent with existing regulatory practices at the international level in the matter, structured based on authorities specialized solely and exclusively in dealing with competition issues[235].

In addition, and consistent with the foregoing, in the same case the FNE refused to rule on the impact of the transaction on the General Law of Electrical Services (*Ley General de Servicios Eléctricos* or "**LGSE**"), given that the interpretation and supervision of the LGSE

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[231] In the same direction, Nexus/Colmena, with respect to consumer health market sensitivity, para. 218.
[232] FNE, *Copec/CGL*, para. 20.
[233] FNE, Clearance Report of the Acquisition of control by State Grid International Development Limited of NII Agencia en Compañía General de Electricidad S.A. and others, Rol F255-2020.
[234] Articles 6° y 7° of the Political Constitution of the Republic ("Constitución Política de la República") and article 2 of Law No. 18.575, Constitutional Organization of the General Bases of the State Administration ("Ley N°18.575, Orgánica Constitucional de Bases Generales de la Administración del Estado").
[235] FNE, Clearance Report of the Acquisition of control by State Grid International Development Limited of NII Agencia en Compañía General de Electricidad S.A. and others, Rol F255-2020, para. 87 y ss.

corresponded to another sectoral regulator, the Superintendence of Electricity and Fuels (*Superintendencia de Electricidad y Combustibles*), and not to the FNE[236].

In this regard, scholars have argued that if a competition agency is involved in national security aspects within the framework of its merger control regime, it would risk losing technical prestige, reducing the predictability of its decisions or allowing other public policies, other than free competition, to be introduced into merger control in the future[237]. It is illustrative that in general in Latin America there are no countries that have a system of foreign direct investment evaluation, and so, many times, the merger control regime is the last voice called upon to evaluate such investment in the country, which naturally generates conflicts between different legal interests at play.

In short, the above shows that the FNE has generally been focused on providing guidelines and guidance on the criteria for analyzing the standard of substantial lessening of competition from a traditional perspective of competition. The possibility of openness and greater flexibility to assume the protection of other legal assets (due to the fact that it is the same concentration that could harm them), is shown to be a rather distant scenario. Not only because of a lack of adequate tools ——like most competition agencies, it would hardly have the way to make new purposes other than competition in the markets operational and manageable—— but also because in their decisions they have strictly delimited their edges of action, in the light of current regulations.

[236] Ibid., para. 177.

[237] Irarrázaval, F. "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", OECD's roundtable «The Relationship between FDI Screening and Merger Control Reviews», 2022.

(iii) What does the analysis of closeness of competition involve?

The notion of closeness of competition

As noted above, the starting point or first filter for scrutinizing the effects of a transaction on competition will generally be to assess the market share that the merged entity will achieve in the market.

However, the calculation of market shares and the definition of the relevant market as an area in which the effects of the transaction will be generated are rigid elements of analysis that fail to capture the intensity of the rivalry between the different players operating in it. These tools ignore the dynamics and competitive pressures that economic agents experience in the competitive field.

This is exacerbated when the products are not homogeneous, but differentiated[238] ——as are the vast majority of products or services that are generally traded——**.** In this regard, the CMA states that:

> [c]loseness of competition is a relative concept. Where there is a degree of differentiation between the merger firms' products, they may nevertheless still be close competitors if rivals' products are more differentiated, or if there are few rivals[239].

In this regard, the TDLC has pointed out that, in some cases, the analysis of the closeness of competition offers greater precision to measure the impact on competition than the traditional relevant market analysis, since:

> In the presence of differentiated assets, the traditional approach of calculating shares in a relevant market is not sufficient to assess the unilateral risks that may be generated by a concentration. The literature holds that the intensity of competition between two products can have some degree of substitution, even if it is imperfect. In turn, despite the fact that one product is an imperfect substitute for another, the former can exert competitive pressure on the latter. This implies that the traditional analysis to define a relevant product market may not be accurate[240] (free translation).

This is consistent with what is stated in the Horizontal Merger Guidelines, which explains that for differentiated goods

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[238] In general, goods which have different attributes but satisfy the same consumer need will be considered as distinct goods.
[239] CMA (2021), Merger Assessment Guidelines, para. 4.10.
[240] TDLC, Judgment N°182/2022, para. 36°.

> [...] the FNE may evaluate the closeness of competition between the products offered by the parties to the Transaction, with a view to determining whether the new entity would have incentives to raise its prices, particularly considering the possible recapture of its sales among the merging parties[241] (free translation).

In essence, what merger control seeks to assess, especially in the area of horizontal transactions, is nothing more than to weigh up what is the rivalry between the parties that are concentrated, which will be lost as a result of the merger. Because a concentration will raise greater concerns if the merging parties exercise competitive constraints and ——because of the way they compete and according to how consumers consider them—— they can be classified as competitors that are 'competitively close', so that a concentration could eliminate to a greater or lesser extent the benefits for consumers generated by this mutual interaction in the market.

In the face of a concentration, the resulting entity may have an incentive to increase its prices or any variable that allows it to increase its profitability to the detriment of the consumer (*i.e.*, quality, innovation, etc.). In any situation, the price increase will necessarily lead to a loss of customers. This discourages the producer from increasing the price of the goods produced and leads to a situation of equilibrium. But in the event of a merger, part of the customers it would lose would be recaptured by the concentrated entity, due to its greater presence in the market. If this recapture is sufficient, the resulting economic agent could have the ability and incentives to increase prices, since (evaluating other variables, such as the margins of the transaction) it could be profitable to do so.

The economic concept behind closeness of competition is the ability to recapture sales. In essence, this notion refers to the ability of the merged party to cover lost sales (diverted to other operators) following a price increase for its own products[242]. In a market for homogeneous goods, the deviation should also be homogeneous since consumer preferences would be indifferent from one supplier to another. However, in a market for differentiated goods, consumer preferences may vary, so that the diversion of customers

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[241] FNE (2022), Horizontal Merger Guidelines, para. 48.

[242] The text of the Guide states: "*This is explained by the fact that, when raising their prices, economic agents face two opposing effects: on the one hand, they obtain higher profits in the units which continue to sell, but on the other hand, they see reduced quantity sold, It is also noted that some consumers choose to consume substitute products or even not purchase the product. Thus, if as a result of an Transaction that economic agent acquires control or merges with a competitor, part of the sales previously lost due to a price increase could be recaptured by the entity resulting from the Transaction, Causing upward pressure on prices. This effect will be greater the higher the value of sales recaptured by the concentrated economic agent, which will depend positively on the competitive proximity between the parties to the Transaction and the margins associated with such retaken sales*", (free translation). In this regard, see TDLC, Decision N°43/2012 in the Rol NC N°397-11 "Consultation of SMU S.A. on the effects on free competition of the merger of the companies SMU S.A. and Supermercados del Sur S.A.", recital 11.4°. See also Merger between Promotora Camino a Canaán S.A. and Nuestros Parques, Rol FNE F36-2014, pp. 11-13; and case Acquisition of TNT Express N.V. by FedEx Corporation, Rol FNE F51-2015, p. 28..

will be greater the closer the goods of the different competitors[243]. Therefore, the FNE's Horizontal Merger Guidelines state that:

> […] when the markets affected by the Transaction involve differentiated products, the FNE may carry out an analysis of competitive closeness as a complement to the definition of the relevant market. In other cases, only an analysis of competitive closeness will be required, and it is not necessary to specify the relevant market[244] (free translation).

Evidence of competitive closeness

Competitive closeness can be analyzed according to qualitative criteria, evaluating different circumstances that determine the preferences of a consumer to choose one supplier over another. Among the criteria generally considered by the FNE are the analysis of the behavior of consumers or economic agents in the industry affected by the transaction, or the characteristics of the products or services that account for similarities in use.

These are elements that the FNE usually collects from various means, such as consumer surveys, *marketing* studies, internal documents of the parties and/or third parties, opinions of competitors, end consumers and/or industry experts[245]. In practice, it is the consistency between the different pieces of evidence ——more than one of them in particular—— that makes it possible to demonstrate the competition closeness between the parties to a merger. This standard of analysis is consistent with international guidelines[246].

In addition to other elements of analysis that it gathers within its investigation, a distinctive feature of the FNE to collect qualitative information on the greater or lesser competitive closeness between the merging parties, has been the preparation of consumer surveys. Such surveys ——generally on the basis of digital questionnaires sent to consumers—— have been carried out as part of the in-depth market analysis that is usually carried out during phase II investigations. They have been designed and formulated according to

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[243] In this regard, the European Commission's Horizontal Merger Assessment Guidelines, para. 28, state that *"The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly (34). For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis […] The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes [...]. It is therefore less likely that a merger will significantly impede effective competition, in particular through the creation or strengthening of a dominant position, when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers".*

[244] FNE (2022), Horizontal Merger Guidelines, para. 48 and 14 y cited case law (*Oxxo/OKM*, pp. 27-28, y Rol FNE F199-2019 "Association between Inmobiliaria Puente Limitada and Compañía de Seguros Confuturo S.A.", pp. 4-5).

[245] Ibid., para. 50 y 51.

[246] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 28.

established international practices in the field, such as the CMA's guidance on Good Practice in the Design and Presentation of Customer Survey Evidence in merger cases[247]. As a best practice, the questionnaire is shared and reviewed by the parties that are concentrated[248], as discussed *above*.

A review of the FNE's decision-making practice shows that it has qualitatively considered diverse circumstances, in different markets, in order to confirm, in each case, the greater or lesser closeness between competitors. Therefore, it is difficult to draw uniform conclusions, since the notion of competitive closeness requires a case-by-case analysis and depends on the context of each market and the parties that are concentrated.

For example, in concentrations in the retail industry, such as supermarkets and convenience stores, the FNE has analyzed elements such as the geographical proximity of the stores, the size of the sales room, the assortment or *mix* of products offered on the shelf and the commercial focus of the supermarket (between supply and replenishment). These factors have been qualitatively considered as indicative of greater or lesser competitive closeness between competitors[249].

The above is reasonable since these elements indeed affect consumer preferences. It is reasonable to assume that a consumer would prefer the supermarket that is geographically closer, which is more similar to the purchase opportunity they are looking for, with the assortment they intend to replace in the one that raised its price. Therefore, a concentration between two stores located geographically close, both focused on supply, with a similar assortment and size, will raise greater competition concerns than the concentration of two distant stores, with different approaches, different assortments, and different sizes.

In this regard, it is interesting to analyze the *Essilor Luxottica/GrandVision case*[250]*,* in the segment of eyeglasses and ophthalmic lenses, in which, based on an analysis of competitive closeness, the FNE considered segmenting the retail market of optical products between independent optical stores and optical chains, considering them as separate markets, departing from the conclusions that the same agency had previously adopted when reviewing the merger between Essilor and Luxottica in 2018[251].

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[247] CMA (2018), "Good practice in the design and presentation of customer survey evidence in merger cases".

[248] FNE (2022), Horizontal Merger Guidelines, para. 50-52. In particular, in the Uber/Cornershop case, "*the design of the survey, both with respect to the questionnaire questions and the methodology for sample selection, took into account the comments made by the Parties.*", who provided comments on the survey methodology and results. FNE, "Annex II Cornershop and Uber Eats End-Consumer Survey" at *Uber/Cornershop*, p. 1.

[249] See: FNE, Clearance Report on Acquisition of control over assets of Inmobiliaria Santander S.A. by SMU S.A., Rol FNE F311-2022 and *Oxxo/OKM*.

[250] FNE, Clearance Report of Acquisition of control of GrandVision N.V. (Rotter & Krauss) by EssilorLuxottica S.A., Rol FNE F220-2019.

[251] FNE, Clearance Report of merger between Essilor International and Luxottica Group, Rol FNE F85-2017 ("***Essilor/Luxottica***").

In *Essilor/Luxottica*, the FNE concluded that independent optical stores exerted competitive pressure on optical chains, based mainly on the results of the analysis of diversion ratios of end customers, *i.e.* to whom consumers turned to if the other competitive option was not available. However, in *Essilor Luxottica/GrandVision*, the FNE carried out a more in-depth qualitative analysis, making a calculation of the reasons for deviation between the optical brands, which enabled it to establish that the chains of the parties were the closest competitors.

As explained above, the greater or lesser competitive closeness between economic agents can also be evaluated quantitatively, for example, through the UPP, an indicator that measures the probability that there are incentives to unilaterally raise prices in the event of a horizontal mergers. One of its variables is the 'diversion ratio', which "*measures the impact on sales of product 2 when it falls enough to sell one more unit of product 1, that is, it represents the competitive closeness of the merged parties*"[252] (free translation).

In the Horizontal Merger Guidelines the FNE also includes other methodologies that could be used to measure unilateral concerns in markets with differentiated products, in particular, the incentives of the parties that intend to merge to increase prices after a concentration, considering as a parameter the greater or lesser competitive closeness of the merging parties[253].

It is interesting that in the *Nexus/Colmena*[254] case, a transaction that was prohibited by the FNE in the private health insurance segment (or *Isapres*), the FNE used a double analysis of competitive closeness, complementing the quantitative analysis with a qualitative examination of the background information collected. With regard to the latter, the FNE concluded that, despite the parties' claims, they could be classified as competitively close competitors based on different features, such as the type of health plans commercialized ——especially free-to-choose individual healthcare plans ——; in prices ——since both *Isapres* concentrated a higher share of customers with lower contributions compared to their rivals——; and in quality standards. On the other hand, the quantitative analysis focused on the GUPPI and CMCR indices[255].

Based on these analyses, the FNE concluded that:

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[252] CeCo UAI, "UPP y GUPPI", available at: https://centrocompetencia.com/upp-y-guppi/#:~:text=El%20Upward%20Pricing%20Pressure%20(UPP)%20es%20un%20indicador%20que%20mide,luego%20de%20una%20fusi%C3%B3n%20horizontal (last accessed 14 August 2024).

[253] AAs GUPPI, IPR or *Compensating Marginal Cost Reduction* ("CMCR").

[254] FNE, Prohibition Report of the acquisition of control of Colmena Salud S.A. by Nexus Chile SpA., Rol FNE F271-2021.

[255] With regard to the GUPPI index, the FNE stated that on occasion Nexus would have incentives to raise prices in a range of between [5.5-7.4]% and [5.8-7.8]%. Regarding the CMCR index, the agency said that Nueva Más Vida should show reductions in its variable costs of the order of [5.9-8.3]%, so as not to have incentives to increase prices or deteriorate quality as a result of the concentration. Ibid., para. 209 and table 7(b).

> […] regardless of whether it is considered a national scenario or with local aspects, NMV's incentives to increase prices would be relevant, in any case, and imply that the Transaction is capable of substantially reducing competition in light of Article 57 letter c) of DL 211[256] (free translation).

This is particularly relevant because, in the case in question, the notifying parties were not the closest competitors to each other, but they were 'close enough' to raise significant effects, and substantially reduce competition. This implies that, for a sufficient share of the demand (although not for all consumers), the merging parties were sufficiently close options so that the diversion of customers that would have been caused, in the event of a price increase ——together with other elements related to the profitability of this conduct—— confer on the resulting entity the ability and incentives to do so. The resulting entity would then have had sufficient market power, as a result of the transaction, to significantly deteriorate the competitive variables in the affected market, even though the concentrated economic agents were not the closest to each other[257].

The FNE justified this notion of 'sufficiently close' competitors in academic literature and recent decisions by U.S. competition agencies[258]. In reviewing the appeal for special review (*recurso de revision especial*) filed by the parties against the FNE's prohibition decision, the TDLC confirmed the quantitative analysis carried out by the agency. It stated that, at least for a share of the clients, the parties could be considered close competitors, ratifying the criteria adopted by the FNE to construct the diversion ratios, which was described as "reasonable" and "duly justified" by the TDLC[259].

Finally, one of the merging parties, Nexus, filed a complaint appeal (*recurso de queja*) against the TDLC decision that confirmed the FNE's decision. The appeal was upheld by the Supreme Court, which annulled the decision and cleared the transaction subject to mitigation measures[260].The transaction, however, was never executed.

Interestingly, the broader notion of closeness of competition and effects on competition ——which considers that a concentration may raise unilateral competition concerns even

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[256] Ibid., para. 213.

[257] FNE, Prohibition Report of the Acquisition of control of Colmena Salud S.A. by Nexus Chile SpA., Rol FNE F271-2021, para. 518.

[258] *"[...] one-sided risk theories do not require that the products of the entities concentrating are the closest possible substitutes for the other. However, they should be considered by consumers as reasonably close substitutes [...] The level at which a merger in a differentiated product market could facilitate a unilateral price increase depends on (1) the relative proximity of the products of the merging firms [...]", (free translation). See in this regard Areeda P. E. and Hovenkamp H. (2010), "Antitrust Law", Volume IV, 3rd Ed. Wolters Kluwer, p. 914. In the same vein, United States v. H&R Block, 833 F. Supp 2d at 83-84); and United States Department of Justice Lawsuit against Beterlsmann SE & Co KGaA, Penguin Random House, LLC, ViacomCBS, Inc and Simon & Shuster, INC before the District Court of the District of Columbia, requesting a prohibition order in respect of the transaction, to. 50, November 2, 2021. In the same vein, In the Matter of Otto Bock HealthCare North America,Inc., a corporation, Respondent. Opinion of the Commission, Docket No. 9378.*

[259] TDLC, Judgment Nº182/2022, para. 60°.

[260] Supreme Court, Judgment of 27 March 2023, Case Rol Nº91.429-2022.

though the parties are not the closest competitors to each other, but removes competitive constraints from a player that, for a relevant group of consumers is a close alternative—— has been strengthened, at a comparative level, in recent decisions in the European Commission. In said decisions it has been pointed out that it cannot be concluded that only a concentration between particularly close competitors can adversely affect competition[261].

[261] Court of Justice of the European Union, Judgement of 13 July 2023, Case 376/20 P, *European Commission v. CK Telecoms UK Investments Ltd.,* para. 191.

(iv) How is the loss of potential competition assessed?

The analysis of the impact of a concentration on competition is a predictive exercise of future conditions of competition, and of what can reasonably be foreseen as the most plausible result, based on the available information and economic principles.

The standard commonly used by authorities to scrutinize the effects of a concentration is to resort, as a basis, an hypothetical scenario: the scenario in which the transaction does not materialize. This is what is called the 'counterfactual'.

Then, the effects of a transaction are examined by contrasting the conditions of competition between the scenario in which the merger is implemented, with the counterfactual. In other words, a hypothetical exercise is exercised to compare the competitive situation in the market after the transaction and the situation absent the merger, which constitutes the counterfactual[262].

Such a comparison may result in a post-transaction situation being less competitive than absent the concentration. These cases pose the most challenges for the merger control regime, since, if the loss of competition due to the merger is significant, we will then be faced with a substantial lessening of competition. Therefore, the legal standard would be met for the transaction to be subject to remedies, or ——if the mitigation measures to address the concerns arising from the transaction are not effective—— it could be prohibited.

Given that merger control is preventive, while the implementation of the transaction is still pending, in most cases the counterfactual that is usually or by default considered are the conditions of competition prior to the merger ——what is called '*status quo ante'* in the academic literature——. This analysis requires approaching the market that is the subject of the transaction from a rather static perspective of the conditions and levels of competition prevailing at the date of the transaction.

The FNE's Horizontal Merger Guidelines indicate that a good indicator of the expected competitive scenario is usually the one that prevails before the transaction and that, therefore, in most cases, the competitive conditions existing at the time of the concentration constitute the most appropriate comparative reference to assess its effects[263].

However, merger analysis is a predictive exercise of future competitive conditions and their impact. Thus, in certain circumstances, agencies may take into account changes that would be reasonably predictable if the transaction is not implemented, and use what is called

[262] FNE (2022), Horizontal Merger Guidelines, para. 6; CMA (2021), Merger Ass,essment Guidelines, sección 3.1; y (ii) European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 9.

[263] FNE (2022), Horizontal Merger Guidelines, para. 6.

'dynamic counterfactual'[264]. The dynamic counterfactual considers the possible entry or exit of economic agents ——such as failing firms—— and the investment or entry plans of the parties before deciding to concentrate, among other elements[265].

Probably the agency that has the greatest development of counterfactual as a merger analysis tool is the CMA in the United Kingdom. It holds that only events that would have occurred in the absence of the transaction examined ——and that are not a consequence of it—— can be incorporated into the counterfactual[266]. They may consist of either the conditions of competition prior to the merger, or weaker or stronger conditions of competition between the merging parties, as compared to the conditions existing before the transaction takes place[267].

In order to determine which is the appropriate counterfactual to evaluate the impact of a transaction on competition, the possible entry of one of the merging firms into the market of the other is considered if the transaction is not implemented, and also whether the merger could eliminate potential competition between the two firms. For these purposes, the likelihood of entry must be analyzed, and, therefore, direct evidence of the players' serious intentions to enter a market[268].

The European Commission contemplates an similar standard and points out in its guidelines and decisional practice that the acquisition of a player with persistent intentions to enter a market, and which has carried out a series of investment acts for that purpose, constitutes evidence that it is a potential competitor in the market whose elimination would negatively impact competition[269].

Precisely because it is a prospective analysis that has a significant impact on the assessment of the transaction, the level of evidence required to evaluate a dynamic counterfactual must necessarily be high. Setting the boundaries of potential competition is relevant not only in the behavioral areas of competition law, but above all in merger control, given the prospective nature of the analysis carried out within this framework.

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[264] See Geradin, D. y Gigenson, I. (2013), *The Counterfactual Analysis in EU Merger Control, Paper prepared for the Conference 'The Pros and Cons of Counterfactuals*, pp. 2-5. CMA, Merger Assessment Guidelines, Secciones 3.9 a 3.11, 3.14 y 3.16, y FNE, Acquisition of control over assets of Entel S.A. by OnNet Fibra, Rol FNE F340-2023 ("***OnNet/Entel***"), para. 68.

[265] FNE (2022), Horizontal Merger Guidelines, para. 7. The FNE also indicates that the possibility of survival on the market of the parties which are concentrated is another element which could alter the counterfactual; impending regulatory changes and other transactions that occur in parallel and have a direct or indirect influence on the target market.

[266] Ibid., section 3.4.

[267] CMA (2021), Merger Assessment Guidelines, para. 3.2.

[268] Ibid., paras. 3.17. y 3.18.

[269] European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 9 and 60.

For this reason, the analysis of potential competition poses challenges ——or even criticism due to the inherent difficulties of projecting future situations——.

On the one hand, a notion of potential competition based on mere conjectures or presumptions of a player's ability to enter a market provides a false notion of market contestability, expands the boundaries of the relevant area in which the transaction will have effects, and generates risks of incurring in 'false negatives'. On the contrary, limiting this notion entails adopting a static view of the conditions of competition, not appropriately weighing the real sources of the competitive constraints faced by the economic agents that merge, which can distort the effects that a concentration implies in the market, and implies de risk of incurring in false positives.

In light of the above, comparative agencies, such as the CMA, consider that the type of evidence available in cases where the analysis of dynamic or potential effects is relevant should focus mainly on internal documents and the vision and expansion plans of market participants[270]. In the same vein, the European Commission carries out an exhaustive analysis of the different and possible alternatives for entry and expansion or exit, particularly considering internal documents, investment plans and other relevant factors depending on the specific case[271].

In essence, a high standard of evidence is generally applied by different competition agencies to be able to consider, within the counterfactual, the projections of entry or expansion of a player in the market, and consequently apply a dynamic counterfactual to a concentration.

Specifically, the elements that comparative competition agencies use to reasonably project ——or rule out—— the potential entry of a player into the market and its consideration or not within the transaction's counterfactual usually consist of internal documents that reflect the will of the economic agent. Among others, financial evidence, statements by senior executives of the company, evaluations of alternatives to the transaction, and internal documents of management bodies related to commercial strategies.

For example, it is interesting to review the framework of analysis used by the European Commission[272] to assess the competitive pressure that a potential competitor could exert in a market ——since it has been the criterion that has been followed by the FNE in recent decisions[273]**.** This standard considers, mainly, two elements.

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[270] CMA (2021), Merger Assessment Guidelines, sec.2.28.

[271] European Commission, Case M. 5549 – *EDF/Segebel*, para. 62 to 83. In this case, the Commission even considered different investment models, which were required of EDF in the context of the analysis of the transaction, in order to demonstrate its status as a potential competitor.

[272] European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 60.

[273] FNE (2022), Horizontal Merger Guidelines, para. 58; Criteria used by FNE, *Nexus/Minsait*, paras. 37-39; FNE, Clearance Report in *Uber/Cornershop*), section 4.2.

First, the analysis focus on whether the potential competitor already exerts significant competitive pressure or whether it will likely become an effective competitor (*i.e.*, if there is evidence that said actor would have entered the market or expanded its transactions strongly or significantly without the transaction).

According to the FNE's criteria, a potential competitor is one that could potentially enter with probability (which depends on the costs, profitability and incentives for such entry to occur[274]), and in a timely (quickly and continuously to generate sufficient competitive discipline[275]) and sufficient way (with a scale capable of exerting effective competitive pressure[276]).

Second, the analysis addresses the existence of a sufficient number of potential alternative competitors in a position to exert relevant competitive constraints after the transaction.

This implies assessing whether the loss of competitive constraints that the transaction would entail could be sufficiently compensated by the repositioning of other players that could exert a competitive pressure equivalent to that which the merging party would have exerted in the market[277].

The recent decisional practice of the FNE sheds light on the application of the European standard at the local level to analyze mergers in which the analysis of potential competition is a relevant element of the assessment of the impact of the concentration on the market.

Although the FNE's Horizontal Merger Guidelines only refer briefly to the analysis of potential competition and its impact on the analysis of concentrations[278], the FNE has extensively analyzed the degree of potential competition in various recent decisions. From them it can be concluded that the appropriate analysis of the loss of potential competition plays a very relevant role in certain transactions, especially those between two potential competitors ——in which the analysis focuses on determining the loss of rivalry between them and whether one could enter the market in which the other operates—— or, when it must be evaluated whether the parties to a transaction could be constrained in the future given the entry of a potential competitor.

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[274] FNE (2022), Horizontal Merger Guidelines, para. 123.
[275] FNE, Ibid., para. 125.
[276] The sufficiency test was used by the United States District Court for the Northern District of California, which states that the FTC cannot rely solely on evidence of Meta's considerable resources and clear enthusiasm for the VR-enabled fitness apps market as a whole; the tests must show that Meta had some viable and reasonably probable path to entry de novo. Meta Platform, Inc./Mark Zuckerberg and Within Unlimited, Inc., Docket No. 9411.
[277] FNE (2022), Horizontal Merger Guidelines, para. 58, que hace referencia al caso "Asociación entre Archer-Daniels-Midland Company y NBM US Holdings, Inc.", Rol FNE F246-2020, para. 7; and FNE, Uber/Cornershop, sección 4.2.1.
[278] FNE (2022), Horizontal Merger Guidelines, para. 57-58.

From a competition policy perspective, this approach is consistent with the dynamic view that needs to be adopted, especially in small economies, such as those in Latin America. As the literature has highlighted, these types of economies have more concentrated markets and it may be easier to fall into a so-called 'market share trap'[279]: using only indicators based on market shares could result in the preliminary conclusion that many concentrations are harmful to competition, which may not be consistent with the real effects of a merger on the market if dynamic aspects of mergers are analyzed such as the entry conditions or the repositioning of players.

In essence, in smaller markets, the evaluation of potential competition and specific market conditions ——beyond the shares exhibited by the parties in the market—— is a key element of the analysis, since it is necessary to adopt a dynamic approach at the conditions of competition in local markets in order to capture the true effect of a concentration on competition.

Specifically, some recent cases evaluated by the FNE ——*Oxxo/OKM*, *Uber/Cornershop, Warner Media/Discovery*[280] and *OnNet/Entel*—— are especially illustrative, in terms of the determination of the appropriate counterfactual in concentrations in new and dynamic markets, the standard of evidence required and the challenges that the qualitative evaluation of the projections of entry and expansion of actors in a market may represent for a competition agency.

According to the applicable standard, the counterfactual analysis must focus exclusively on determining significant changes that affect competition between the companies that are part of the transaction, including the entry of the parties into new markets where they would compete with each other, possible expansion in markets where they are already present or even the exit of one of the parties from the market.

Therefore, the counterfactual does not take into account other elements unrelated to the conditions of competition between the parties, such as the future behavior of third parties, since this would be part of the substantive analysis[281].

The *Uber/Cornershop* case is especially illustrative in terms of Uber's potential entry into the market operated by Cornershop. The FNE carried out an analysis of potential competition in digital markets aimed at determining whether Uber, active in the the transport and delivery

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[279] Gal, M. "Merger Policy for Small and Micro Jurisdictions" en Swedish Competition Authority, "Pros and Cons of Merger Control" (2012), p. 84.

[280] FNE, Acquisition of control in Warner Media LLC, by Discovery, Inc. and others, Rol FNE F290-2021 ("***Warner Media/Discovery***").

[281] CMA (2021), Merger Assessment Guidelines, paras. 3.7 and 3.8. "*3.7. The counterfactual is not intended to be a detailed description of the conditions of competition that would prevail absent the merger. 3.8. Those conditions are better considered in the competitive assessment. The counterfactual assessment will often focus on significant changes affecting competition between the merger firms, such as entry into new markets in competition with each other, significant expansion by the merger firms in markets where they are both present, or exit by one of the merger firms*".

of restaurant products, would enter the market where Cornershop operated, the online delivery of supermarket products, in order to evaluate the expected competitive behavior of Uber, and the possible reactions or repositioning of third parties.

In that case, the FNE analyzed in the light of the requirements set forth in the Horizontal Merger Guidelines, (i) Uber's intention and likelihood of entry into the market for delivery of supermarket products and what that entry would have been (*i.e.*, the possible quality of service that would have been developed after such entry[282]); and (ii) what would eventually be the reaction of competitors to Uber's entry into the supermarket delivery market.

As for the probability of entry, the FNE gathered information and evidence that proved that Uber was seriously planning to enter the segment of digital platforms of supermarket products and that, in fact, it had actively deployed various acts aimed at that end[283-284].

As for the entity of the entry, the FNE relied on internal documents of the company to conclude that the entry strategy was focused on an initial model similar to that of Uber Eats. To do this, the FNE relied on statements, studies, reports and other internal documents of Cornershop's third-party competitors, both from other digital platforms and supermarkets, which included expansion plans and commercial strategies[285].

On this basis, the FNE concluded that "*the most likely counterfactual scenario of the transaction would have involved the entry of Uber as a digital platform for supermarket products, so it is appropriate to evaluate the effects of the loss of that competitor on the development of the market*"[286] (free translation).

However, even assuming Uber's entry into the Cornershop market as probable, the FNE concluded that even in this counterfactual scenario, the resulting entity would face sufficient competitive pressure, precisely in the potential competition of third parties in the online delivery segment of supermarket products[287].

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[282] FNE, *Uber/Cornershop*, para. 144.

[283] Indeed, according to the FNE decision, Uber had initiated a pilot test to assess the possibilities of an alliance with a supermarket chain that would allow it to make deliveries from their establishments through Uber Eats delivery agents. This pilot was developed within the framework of an overall strategy by Uber to incorporate into its services the distribution of supermarket products in different countries, as contained in various internal documents of the company, they detailed the characteristics of business plans in each market. FNE, *Uber/Cornershop,* para. 151.

[284] The Prosecution took into account the existence of pilot plans to incorporate Uber in the supermarket sales market and, after analyzing the corresponding evidence, stated that "[e]n final, the examined background accounts for serious intent and actual likelihood of entering the supermarket segment within a limited time by Uber, which was part of an overall plan and which had been successfully developed in the early stages in Chile, so it is reasonable to argue that the acquirer had already generated the necessary capabilities to enter the market and offer the service". Clearance Report at *Uber/Cornershop*, para. 152.

[285] FNE, *Uber/Cornershop*, para. 143.

[286] FNE, *Uber / Cornershop*, para. 138.

[287] The increase in sales via the internet, the impetus given by the pandemic situation experienced in 2020 and the confinement that almost forced the supply through digital means, the existence of expanding competitors

In another decision in the convenience store segment, *Oxxo/OKM,* the FNE considered Oxxo and OKM as potential competitors in several geographic markets under analysis within the framework of the counterfactual analysis. Specifically, the FNE held that, in accordance with the expansion plans of both parties, new store openings would be made by one of the parties, in places where the other was already present[288]. These openings referred to those in which the parties already had a lease agreement signed on the date of the evaluation of the transaction[289], which demonstrated that indeed, absent the concentration they would effectively entry as a new competitor in each of their respective markets[290].

Another decision in which the FNE analyzed a potential competition scenario is *Warner Media/Discovery*. In that case, the standard set forth in *Uber/Cornershop* was replicated, and the two criteria to determine that the elimination of a potential competitor would generate a substantial lessening of competition were applied: (i) that there is a high probability of successful entry of the potential entrant; and (ii) that its entry would exert a relevant competitive pressure on the current market participants[291].

In its analysis, the FNE considered that although the first requirement would be met ——as there was evidence that Discovery would have a real and serious intention to enter the local OTT-SVOD market with its Discovery+ platform, in which Warner Media would participate through its HBO Max brand——, the second would not be fully complied with ——as there are other relevant sources of competition in the market——. Finally, the FNE considered that although the transaction could eliminate the entry of Discovery+ as an independent player, it would be unlikely that it would interrupt its entry into the Chilean market. For all of the above, the FNE ruled out that the eventual elimination of Discovery+ as a potential competitor was able to substantially lessen competition and cleared the transaction conditional on certain remedies[292].

As for the difficulties of determining the appropriate counterfactual against which to analyze the effects of a concentration, there are cases in which the evidence collected is not clear

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and the possibility for supermarkets to launch their own online sales channels led FNE to state that *"the expansion projects of the players in the segment of digital platforms of supermarket products in view are at a relatively advanced stage of development, making them likely and able to exert competitive pressure on the merged entity. The foregoing, together with the fact that it is not apparent from the background studied that Uber has a position that could not reasonably have been replicated by other actors, lead to the conclusion that the removal of Uber as a potential entrant to this segment would not have entailed a change in market conditions, which would mean a substantial reduction of competition", (free translation).* Report *Uber/Cornershop*, para. 165.

288 FNE, *Oxxo/OKM*, para. 189.

289 FNE, Ibid., footnote 313.

290 FNE, Ibid. In addition, the FNE also assessed the parties' internal documents and the replies submitted by the parties and third parties which described the expansion plans, as well as confidential information gathered from responses to trades and various take-statements. Based on this analysis, the FNE ruled out that Spid and other stores could be considered as potential competitors, in so far as they did not meet the criteria of the FNE, paras. 259-266.

291 FNE, *Warner Media/Discovery*, para. 62.

292 FNE, *Warner Media/Discovery*, para. 63 et seq.

and the conclusion of who actuallycompetes in a market, who could enter which players only exercises potential competitive discipline, is not evident.

During the investigation of the *OnNet/Entel* case, the FNE evaluated two possible counterfactuals, firstly considering Entel as a potential competitor of OnNet in the market for wholesale supply of fiber optic networks. After analyzing the evidence of Phase II, in the conditional clearance decision the FNE concluded that Entel was a current competitor of OnNet, so the analysis of the effects of the transaction should be carried out by analyzing the loss of competition between two rivals in the market, and not the loss of the entry of one actor in the market of the other[293].

In essence, these cases highlight the importance of carrying out a thorough analysis of the effects of the transaction, which goes beyond measuring the impact of the concentration on the direct rivalry between the parties in the markets in which they operate ——which turns out to be a more obvious effect—— or the extent of the market shares they exhibit. Such analysis also requires a dynamic look, and to evaluate whether, as a consequence of the transaction, potential competition and the eventual entry of an actor into the market are lost, and how competition is impacted by the loss of the competitive constraints that are exerted with the threat of entry of one of the parties to the concentration into the market in which the other operates.

[293] FNE, *OnNet/Entel*, sec. III.

(v) How are non-competition clauses ancillary to a transaction analyzed?

Within the framework of a merger transaction, it is common for the parties to agree on non-competition obligations or non-compete clauses, whereby the buyer seeks protection ——for a limited period of time and in a specific business and area—— from possible competition from the seller.

The substrate that justifies the possibility of lawfully agreeing not to compete with a rival ——which in other areas would have no reasonable justification but would constitute an anti-competitive agreement—— is that the main transaction might not be reasonable to engage with if after its implementation the seller could, immediately after the acquisition, use its experience and *know-how* in the market to compete directly with the buyer, developing in parallel the same business that is being disposed through the transaction. This would obviously not only significantly reduce the value of the transaction, but would most likely jeopardize the buyer's interest to enter into the transaction in the first place.

The same logic operates, in general, with respect to non-compete clauses that apply to employees of the entity being sold ——non-solicitation clauses—— with respect to the buyer or acquirer in the transaction. By means of such clauses, what is agreed is an obligation of the sellers not to hire certain employees of the acquired business. Although on some occasions such obligations are agreed upon with respect to all employees, in general, they are usually justified with respect to relevant executives of the company, who due to their specific role are the ones who have the experience and gather the specific *know-how* of the business being sold.

The logic of these covenants is, as in non-compete clauses between companies, to protect the buyer from the eventual competition of workers who concentrate the expertise of the business, and who, if they develop their skills and talents related to the acquired business immediately after the transaction, could substantially reduce its value and the interest in carrying out the business.

However, when agreed upon with respect to workers, this type of clause also impact other public policy principles, such as labor rights and freedom of work. In light of the above, other jurisdictions have proposed to implement an absolute ban over this type of agreements[294].

[294] In fact, the U.S. FTC has recently adopted a quasi-absolute ban on non-compete clauses in labor contracts, noting that these types of clauses keep wages low and affect innovation, limiting the dynamism of the U.S. economy and the emergence of new businesses. See FTC, "Non-Compete Clause Rule," 16 CFR Parts 910 and 912 RIN 3084-AB74, available at: https://www.govinfo.gov/content/pkg/FR-2024-05-07/pdf/2024-09171.pdf. It should be noted that on 20 August 2024, the U.S. District Court for the Northern District of Texas has agreed to a nationwide injunctive stay of the ban. See Memorandum Opinion and Order of 20 August 2024, *Ryan LLC v. FTC*, Civil Action No. 3:24-CV-00986-E, available at: https://www.uschamber.com/assets/documents/Order-Granting-SJ-Setting-Aside-Rule-Ryan-v.-FTC-N.D.-Tex.pdf

In Chile, to assess the lawfulness of non-compete clauses agreed in the framework of a merger transaction, both the TDLC ——even before the new merger control regime—— and the FNE use the guidelines issued for this purpose by the European Commission in the 'Communication from the Commission on restrictions directly related and necessary to the implementation of a concentration' of 2005[295] ("**Notice on Ancillary Restraints**").

This is a graphic example of 'diffusion' of a competition policy that is imported into newer competition jurisdictions, adopting it internally as an accepted standard ——including with direct recognition in judicial and administrative jurisprudence, as is the case in Chile and Peru——.

Rather than a mere 'transplantation' of foreign standards ——a notion that reveals certain imbalances and frictions—— in the case of the adoption of the criteria of the Notice on Ancillary Restraints, it was rather a gradual policy learning process, of progressive application and incorporation of a best comparative practice, whose parameters were applied by the TDLC from its inception, when faced with this type of agreements.[296] Consistently, the adoption of such standards in the framework of a merger control regime at its starting point is an option that fills the regulatory gaps inherent to the creation of a new competition subsystem, which is unable to address, from the outset, the range of analytical criteria that are necessary to properly assess the effects of a merger on competition.

Criteria for evaluating a non-compete clause as an 'ancillary restraint'.

The main criterion established in the Notice on Ancillary Restraints is, precisely, that if the competition authority declares that a concentration may be cleared either unconditionally or conditional upon compliance with certain remedies ——or in terms of European law, if it declares that 'the concentration is compatible with the common market'—— such authorization should automatically cover the restrictions that are directly linked to the implementation of the concentration and that are necessary for that purpose, without the authority having to assess such restrictions individually, to the extent that they are covered by the limits established in the aforementioned communication[297].

There are two basic elements established by the aforementioned European legislation that support the analysis of non-compete clauses agreed upon in the context of a concentration: (i) the ancillary nature of the clause; and (ii) the proportionality of the clause.

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[295] European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, available at: https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A52005XC0305%2802%29.

[296] See, among others, TDLC, Decision N°23/2008.

[297] European Commission, Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, recital 21.

First, it must be determined whether the obligation agreed is ancillary to the concentration. This is evaluated in the light of whether the clause is directly linked to the transaction, and whether it is necessary for its implementation[298].

In light of the criteria of the Notice on Ancillary Restraints, the direct link between the clause and the transaction is nothing more than the economic dependence between the restraint and the main transaction, so as to allow a smooth transition into the new structure of the company once the concentration has been implemented. This means that, without the restriction, the merger would either not be entered into, or it would be entered into under more uncertain conditions, with greater costs or difficulties or in a longer period of time[299].

Regarding when a direct relationship between the clause and the concentration can be held to exist, the FNE has stated that:

> [...] objective parameters must be taken into account, and it is not enough that this is affirmed by the parties or that it is entered into in the same context or at the same time as the transaction. On the contrary, it is an economic link, in the sense that the clause under analysis allows an adequate transition to the new structure after the transaction[300] (free translation).

If the restrictive agreements are directly related to the concentration, they are prone of being authorized as ancillary to the merger. Otherwise, the FNE interprets that they are agreements that are different from the transaction, independent of its implementation and, therefore, must be reviewed outside the scope of the merger analysis, in light of the general rules applicable to vertical or horizontal agreements[301].

Once it has been determined that the ancillary restraint is directly related to the transaction, it must then be assessed whether it is necessary for its implementation. It is understood that a non-compete clause may be necessary to enter into the transaction depending on its nature, if it aims at protecting the value transferred, preserving the supply or allowing the start-up of a new entity. For the clause to be considered necessary, it must be essential for the transaction to take place. It is in those cases where the transaction would simply not materialize without the existence of such clauses that they may be considered ancillary.

Second, it is necessary to determine the proportionality of the clause. According to the criteria of the Notice on Ancillary Restraints, the practice of the FNE and settled case law of

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298 FNE, Clearance Report in Acquisition of control in Servicios de Respaldo de Energía Teknica Limitada and Enersafe S.A. by Legrand Chile Btcino Limitada, Rol FNE F348-2023 ("***Legrand/Teknica***"), para. 54.

299 European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, paras. 11 and 12.

300 FNE, *OnNet/Entel* Clearance Report, para. 277.

301 In Europe, Articles 101 and 102 of the Treaty on the Functioning of the European Union would be applicable. In Chile, Article 3 of DL 211 and other applicable articles. In this regard, see conclusion in *OnNet/Entel*, paras. 339 et seq.

the TDLC[302], non-competition obligations must be limited in three aspects: (i) in their material scope (*i.e.*, the obligation must not extend beyond what is strictly necessary to guarantee the effectiveness of the main transaction); (ii) in their geographic or spatial scope, since the covenant must not exceed the geographic area in which the main agreement produces effects; and (iii) in their temporal scope, as these provisions cannot extend beyond what is strictly necessary to guarantee the purposes of the main transaction and its effects (*i.e.*, ensuring the continuity of supply, the loyalty of the transferred customer base, etc.).

As a general rule, European criteria indicate that non-competition clauses are considered ancillary and necessary to the extent that[303] : (i) the material scope is limited to the products and services that constitute the economic activity of the business transferred[304] (or are at an advanced stage of development); (ii) the geographic scope is limited to the area in which the seller offered the relevant products or services (and the areas it had planned to enter into) prior to the transaction; and (iii) the temporal scope is limited to a maximum of two years, or three years when it involves the transfer of *know-how* or technical knowledge. Non-solicitation clauses are governed by the same limits[305].

It should be noted that the elements of limitation, including the time threshold, and the criteria of material and geographic scope are included in various decisions of the FNE and the TDLC[306]. Other Latin American agencies, such as INDECOPI[307] or COFECE, follow very similar criteria[308].

It is interesting to note that, in European legislation, the analysis of non-competition clauses has its own characteristics in the case of jointly controlled joint ventures. In these cases, the European Commission and the CMA consider that non-competition obligations between the (controlling) parent companies may be necessary to fully utilize the assets of the joint venture and enable it to assimilate the know-how and goodwill provided by the parent companies, or the need to protect the interests of the parent companies in the joint venture

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302 TDLC, Extrajudicial Agreement between the FNE and SMU, Case Rol AE N°2/2010, p. 2 and *OnNet/Entel*, para. 339-344. European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, para. 13.

303 European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, paras. 20 to 24.

304 They will not be considered necessary if the transfer is limited to tangible assets (such as land, buildings or machinery) or to exclusive industrial and commercial property rights. See European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, para. 21.

305 European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, para. 26.

306 FNE, Clearance Report, subject to mitigation measures, in *Legrand/Teknica*, para. 59.

307 INDECOPI, Decision 076-2022/CLOC-INDECOPI (Expte. 001-2022/CLC-CON), in which INDECOPI sets out the general principles of its analysis of ancillary clauses, based on guidelines and comparative practice of the European Commission, CMA, FNE and other authorities.

308 See, COFECE (2021), Guía para la notificación de concentraciones, pp. 62 to 65. Available at: https://www.cofece.mx/wp-content/uploads/2021/06/GUIACON_2021.pdf. Unlike other jurisdictions, in the case of Mexico, a duration of the non-compete obligation of 3 years is generally considered justified, regardless of whether or not the transaction involves the transfer of *know-how* and clientele.

against acts of competition facilitated, among other factors, by the parent companies' priority access to the goodwill and know-how transferred to or developed by the joint venture[309].

For this reason, the European Commission and the CMA hold that agreements that serve to facilitate the joint acquisition of control over an undertaking may be considered directly linked to the implementation of the concentration and necessary for that purpose, for the entire duration of the full-function joint venture[310], thus departing in such cases from the two- or three-year time criterion.

Finally, it should be noted that the Notice on Ancillary Restraints[311] and the CMA Jurisdictional and Procedural Guidelines[312] also provide guidance for the assessment of certain clauses incorporated in license agreements and purchase and supply obligations, which under certain conditions may also be considered ancillary to a transaction.

Comparative *enforcement* of ancillary clauses

The Notice on Ancillary Restraints establishes the principle of self-assessment of ancillary restraints, whereby it is up to the undertakings concerned themselves ——for example, parties that concentrate—— to determine to what extent their agreements are ancillary to a main transaction, in the light of the parameters of that guide.

Interestingly, the European Commission is not obliged to individually assess the ancillary restrictions that are agreed, and their conclusion is covered by the clearance of the transaction (or declaration of compatibility with the common market). Its role in relation to this type of agreement is rather residual, and its intervention is only at the request of the companies concerned, in cases where there is uncertainty as to the legality of a clause, in which case the Commission will expressly assess its ancillary nature[313].

The CMA, for its part, also applies a similar approach to restrictions ancillary to a transaction, leaving it to the parties' discretion and self-assessment of the necessary and ancillary nature of the restrictions, attributing a residual role limited to the analysis of elements giving rise to genuine uncertainty as to the impact of a restriction, at the request of the parties[314]. This is

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309 European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, para. 36.

310 "*Such non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the joint venture*." European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, para. 15 and Section IV, paras. 36 et seq.; CMA (2024), "Guidance on the CMA's jurisdiction and procedure", para. C-8.

311 European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, sections III-B and III-C.

312 CMA (2024), "Guidance on the CMA's jurisdiction and procedure", paras. C-20 to C-28.

313 European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, paras. 1-3.

314 CMA (2024), "Guidance on the CMA's jurisdiction and procedure", para. C-2.

due to the understanding that it is the parties to the concentration ——and their advisors—— who are best positioned to determine whether contractual arrangements are ancillary to a concentration, which is why the agency does not normally rule in its decisions on whether or not a restraint is ancillary.

Consequently, neither the Commission's nor the CMA's decisions generally contain an analysis of the ancillary clauses of the transaction or remedies involving amendments to of non-compete clauses or other ancillary restrictions to the parameters of the notice, in the context of a merger control proceeding.

Likewise, there are other jurisdictions, such as Spain, where role of the National Commission for Markets and Competition (*Comisión Nacional de los Mercados y la Competencia* or "**CNMC**") is limited to assessing the conformity of the ancillary restraints to the Notice on Ancillary Restraints, expressly authorizing the clauses as ancillary to the transaction only to the extent that they respect the limits established therein. Whatever exceeds these limits (for example, the term of the non-competition clause beyond two or three years) would remain subject to the application of the general competition regulations, without any specific obligation to modify them[315]. In this way, the authority leaves to the parties' the possibility of trying to enforce a restrictive clause whose limits exceed what is considered as ancillary, subject to control by the national courts.

This is consistent with the Notice on Ancillary Restraints itself, which provides that possible discrepancies that may arise between the parties to the transaction as to whether the restrictions are covered by the authorization decision of the European Commission (or a national agency of a Member State of the European Union) may be resolved by national courts[316]. This is due to the fact that the party affected by the clause will have the greatest interested in disputing its duration and being removed from it, in order to avoid being constrained by the clause for longer than the guidelines allow and to be able to compete in the market removed from any constraint.

However, the CNMC has publicly stated that it is increasingly monitoring the ancillary clauses that are incorporated in merger transactions and that exceed the limits indicated. This has involved requests for information from companies that have participated in recent

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[315] See, for example: CNMC, Board Decision of 29 December 2020, authorizing, subject to commitments, the transaction between Areas S.A.U., and Autogrill Iberia, S.L.U. (Expte. C/1145/20, *Areas / Autogrill*), which provides "*this Chamber considers that they will not be considered as ancillary and necessary restrictions to the transaction, being therefore subject to the rules on agreements between companies: (i) in relation to the geographical scope of the competition clause, which exceeds the area of influence of the catering services of each means of transport; (ii) in relation to the temporal scope of the Confidentiality, Non-Solicitation and Non-Competition Clause, which exceeds the two years provided for in the Notice; (iii) in relation to the material scope of the Non-Competition Clause, purely financial investments that do not directly or indirectly confer on the partners managerial functions or an influence and (iv) the buyer's obligation of confidentiality*", (free translation). Available at: https://www.cnmc.es/sites/default/files/3379466_4.pdf.

[316] European Commission (2005), Notice on restrictions directly related and necessary to the implementation of a concentration, para. 2 *in fine*.

mergers (to verify whether they maintain in force clauses that exceeded the Commission's guidelines) and, in fact, has warned that maintaining non-competition or non-solicitation clauses may lead the authority to initiate sanctioning proceedings (*i.e.*, investigations)[317].

In fact, in a concentration by which Telefónica acquired control of Vivo (a Brazilian company owned by Portugal Telecom), the CNMC identified a reciprocal non-compete clause by which Telefónica and Portugal Telecom would refrain from competing in each other's home country ——*i.e.*, Spain and Portugal——. Therefore, it was a non-compete agreement in a market different to the one in which the transaction took place (Brazil). The Commission ended up imposing a fine on the parties ——amounting to 79 million euros——, considering that this clause was not only not ancillary to the main transaction, but was in fact an anticompetitive agreement[318].

This implies that, with respect to restrictions ancillary to a concentration, these authorities limit their intervention to exceptional cases. Apart from these cases, the decisions of the agencies clearing a concentration, in general, do not include an express declaration on the lawfulness of ancillary clauses. On the contrary, they are left to the self-assessment of those who enter into such clauses, who also assume responsibility for the risks of incurring in anticompetitive conduct by agreeing not to compete without the rationale that justifies such agreement ——the concentration and the need to protect future competition in order to ensure the value of the investment——.

In the framework of merger control in Chile, it is clear that the FNE (and the TDLC prior to the reform) has applied the first two basic elements of the above-mentioned European legislation as founding criteria for its analysis of ancillary restrictions ——predominantly non-competition clauses, but also exclusivity clauses agreed within the framework of a transaction——, incorporating as standards of analysis the ancillary nature of the restriction to the transaction, its direct link and necessity, and the criteria for limiting the material scope, geographical extension and term of such agreements.

However, regarding the agency's role in the enforcement of non-competition clauses, the FNE does not seem to have adopted a residual role in the analysis of such agreements. On the contrary, as a public policy option, the FNE has gradually played a more active role in the assessment of ancillary restrictions that may have been agreed upon during a merger transaction and that, in its opinion, could be anticompetitive.

Directly applying the criteria and guidelines of ancillary and necessity of the restriction inspired by the Notice on Ancillary Restraints, already outlined, the FNE ——mainly from year 2023 onwards—— has analyzed these agreements under the rationale that everything

[317] MLEX (24 February 2024), "Merged companies examined by Spanish watchdog over extent of 'no-poach' clauses," available at: https://content.mlex.com/#/content/1545921/merged-companies-examined-by-spanish-watchdog-over-extent-of-no-poach-clauses (last accessed 6 September 2024).

[318] European Commission, Decision of 23 January 2013, Case AT.39839 - *Telefonica/Portugal Telecom.*

that exceeds the parameters of limitations of material and geographical scope can generate anticompetitive effects in the market and therefore must be limited according to such boundaries, generally prior to (and as a condition for) the transaction to be authorized[319].

Indeed, there are several decisions of the competition authority explaining how to analyze these agreements and the principles under which they can be considered lawful and when not[320].

It should be noted that the FNE's enforcement policy in this matter has focused particularly on the temporal and geographic extension of the restrictions. Specifically, the FNE has concluded, in several recent decisions, that restrictions exceeding two years are not ancillary to the transaction and that this period may be extended to three years only if it is reliably proven that the concentration involves the transfer of know-how[321], applying the criteria set forth in the Notice on Ancillary Restraints. In this regard, the FNE has echoed the settled case law of the TDLC on the matter[322] and previous decisions of the FNE[323].

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[319] See FNE, *OnNet/Entel*.

[320] FNE, Clearance Report subject to mitigation measures, Acquisition of the annuity business of Zurich Chile Seguros de Vida S.A. by Ohio National Seguros de Vida S.A., Rol FNE F368-2023, paras. 27 et seq. In the latter case, the FNE held that "*the Non-Solicitation Clause contemplates a term of three years after the end of the transitional services and the Non-Solicitation Clause of the TSA establishes a term of one year after the end of the transitional services. [...] the Non-Solicitation Clause exceeds the time period that both the Honorable H.TDLC and this Prosecutor's Office have deemed acceptable in previous decisions, considering in particular that it has not been proven that the Transaction involves a transfer of know-how. Consequently, this Division considers that the Non-Solicitation Clause is not proportional from a temporal point of view*" (para. 27) (free translation). The transaction was cleared by the FNE subject to the reduction of the term of both clauses to two years from the closing of the transaction (para. 28). See also FNE, Clearance Report, subject to mitigation measures, in Power Train Technologies Chile S.A. by Marubeni Corporation, Rol FNE F360-2023, in which the term of the non-competition obligation was reduced from 5 to 2 years, from the closing of the transaction.

[321] FNE, Clearance Report subject to mitigation measures, in Acquisition of assets of Marfrig Global Foods S.A. by Minerva S.A., Rol FNE F377-2023, para. 34.

[322] Cited by Legrand/Teknica Report, footnote 67. See: TDLC Decision N°20/2007, p. 43 "*In the transaction subject of the consult, prohibitions, restrictions or conditions to the participation of the seller and its subsidiaries [...] that exceed the term of two years from the date of this resolution may not be established*"; Decision N°23/2008, p. 36 "*The participation of Banco Santander Central Hispano S.A. and/or its subsidiaries [...] may not be* prohibited, *restricted or conditioned for a term exceeding two years*" (free translation); Decision AE N°2/2010, pp. 1-2 "*And with respect to the limitation to lease real estate for the installation of supermarkets, established in the so-called "Santo Domingo Framework Contract", its temporal extension is limited to two years, counted from the date of approval of the agreement by this court*" (free translation); and Decision N°43/2012, pp. 115-116 *"[...] in order to facilitate the entry into the market of players that have already acquired know-how about it and in accordance with the measure proposed by SMU itself, SMU shall modify the non-competition clauses agreed with the previous controllers of the chains acquired by SDS, adjusting them to a maximum term of two years from their original subscription*" (emphasis added) (free translation).

[323] Cited by Legrand/Teknica Report, footnote 68. See: (i) AE FNE/SMU, p. 4 "*The non-competition clauses that SMU enters into in the context of new acquisitions shall have a maximum duration of two years, counted from the date of their subscription. The same term shall apply to the non-competition clauses signed by SMU to date, which shall be counted from the date of approval of this out-of-court agreement*" (free translation); (ii) Maicao/Socofar Report, para. 32 "[...] *with respect to the temporal scope, the initial term of 10 years is reduced to two years as of May 9, 2012*"(free translation); (iii) Tecsa-ICEM/Salfacorp Report, para. 88 *"[...]* in principle, this Prosecutor's Office considers that this Prosecutor's Office considers that, in the case of the *non-competition clauses entered into by SMU in the context of new acquisitions, the duration of the non-*

In practice, the FNE has conceived that longer clauses may unnecessarily restrict competition[324]. In certain cases, the FNE has also urged to reduce the geographic scope of the non-compete clause[325].

Notwithstanding the fact that the main transaction does not raise competition concerns, the FNE has submitted to the parties the existence of such risks, in the terms of article 53 of DL 211, stating that the agreements exceeded the terms and limitations mentioned above. Faced with such allegations, in most cases, the parties have offered behavioral remedies, adapting their clauses to the material, temporal and geographic parameters and limitations outlined above, before the closing of the transaction.

In general, transactions have ended up being cleared subject to the reduction and/or amendment of the ancillary restraint to said parameters. However, to date, there is no evidence of any investigation extended to Phase II solely due to competition concerns arising from a non-compete clause[326]. Most of the cases in which risks to competition have arisen as a result of such covenants have been remedied by the parties within Phase I.

Considering that it is only possible to extend to Phase II a transaction that would likely substantially lessen competition, the question arises as to whether it is indeed possible to conclude that a transaction meets this legal standard only because it contains a non-compete clause that is not limited in one of its areas, even if the main transaction does not raise competition concerns.

In light of the Notice of Ancillary Restraints, any provision that exceeds the material, temporal and geographic scope limits of the non-competition clause would not be directly linked to the transaction and would not be ancillary to it. Therefore, it is valid to question whether this non-compete agreement, which exceeds the limits, could then imply a substantial lessening of competition in merger control. Or, if in essence, this covenant not to compete should be

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competition clauses shall be a maximum of two years, counted from the date of their execution. In principle, this Office considers that, in general terms, non-competition clauses longer than two years unnecessarily restrict competition, unless they also involve know-how, in which case their extension for up to one additional year is accepted" (free translation); and (iv) Uno Salud/Dental Salud Report, para. 23 *"[...] it has been understood that non-competition clauses longer than two years unnecessarily restrict competition*" (emphasis added) (free translation).

[324] FNE, Clearance Report, subject to mitigation measures, Investigation on the takeover of "Empresas Tecsa" and 80% of ICEM by SalfaCorp, Rol N°1810-11, para. 88. "*This Office considers that, in general terms, non-competition clauses longer than two years unnecessarily restrict competition*" (free translation).

[325] See also FNE, Clearance Report, subject to mitigation measures, in Power Train Technologies Chile S.A. by Marubeni Corporation, Rol FNE F360-2023, in which it was considered that the geographic extension of the non-competition and non-solicitation clauses was excessive because it covered the territories of Brazil, Mexico and Colombia where the target entity had no activity.

[326] See: FNE, Clearance Report, Acquisition of control over assets of Elanco Animal Health, Inc. by Merck & Co., Rol F386-2024; Clearance Report, Acquisition of control over Fairfield Chemical Carriers Pte, Rol F367-2023; Clearance Report, Acquisition of control in Power Train Technologies Chile S.A. by Marubeni Corporation, Rol F360-2023; and Clearance Report, Acquisition of assets of Marfrig Global Foods S.A. by Minerva S.A., Rol F377-2023.

reviewed as an agreement in itself that restricts competition, under the legal standards of article 3 of the DL 211, not linked to the transaction in reference.

The view of the competition agencies in Latam

Other authorities in the region, such as INDECOPI, seem to follow in their practice a position closer to that of Anglo-Saxon agencies, and in their unconditional clearance decisions they generally do not include an analysis of the clauses that are ancillary to the transaction[327].

However, in a recent case[328], INDECOPI accepted as ancillary and necessary to a concentration a non-compete clause of five years' duration, which exceeded the parameters generally considered at a comparative level[329].

To this effect, and with the support of several decisions of COFECE[330] and the European Commission[331], INDECOPI based its decision on the fact that the know-how of the divested business was specialized, and due to the features of the sellers and managers, they could easily develop products and compete actively in the markets in which the buyer operated, so that their entry into such markets in the short term raised concerns vis-à-vis the transferred business[332]. For these reasons, it was considered that the five-year non-compete agreement was justified, on an exceptional basis.

However, recently, INDECOPI conditioned the clearance of a joint venture in the fiber optic network segment between Pangea LuxCo, Telefónica Hispanoamérica S.A. and Entel Perú S.A., to the reduction of certain wholesale non-compete clauses ——from 15 to 3 years—— because it considered that such agreement ——together with other types of clauses such as price equalization and exclusive purchase clauses—— raised barriers that prevented the entry or expansion of current or potential competitors in such market[333].

COFECE, similarly to the FNE, has also been active in enforcing ancillary clauses even in transactions that did not raise competition concerns, and has even conditioned the

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[327] See, for example, INDECOPI, Decision 038-2024/CLC-INDECOPI (Expte. 018/2023/CLC-CON); Decision 036-2023/CLC-INDECOPI (Expte. 020-2022/CLC-CON); Decision 043-2022/CLC-INDECOPI (Expte. 007-2022/CLC-CON).

[328] INDECOPI, Decision 076-2022/CLOC-INDECOPI (Expte. 001-2022/CLC-CON).

[329] In addition to Chile, the European Union and the United Kingdom, INDECOPI also cited the standard followed by COFECE, the CNMC and the Finnish competition authority.

[330] COFECE, Concentration between Profluent Plastic Technologies and Plastics Technology de Mexico, pp. 14 (CNT-002-2020), where the authority finally concluded that the proposed non-competition clause had an excessive duration.

[331] Among others, European Commission, Comp/M1901 - CAP Gemini /Ernst&Young, COMP/m.1980 - Volvo / Renault V.I., or COMP/M.5778 - Novartis/Alcon, in which non-competition clauses of 5 years duration were accepted.

[332] INDECOPI, Decision 076-2022/CLOC-INDECOPI (Expte. 001-2022/CLC-CON), para. 338 and 344.

[333] INDECOPI, Decision 187-2024/CLC. Press release September 23, 2024.

authorization of certain transactions to the modification of clauses that exceeded the generally accepted parameters[334].

On this it is also interesting to refer to the regime in Argentina. Traditionally, the practice of the National Commission for the Defense of Competition (*Comisión Nacional de Defensa de la Competencia* or "**CNDC**") understood that ancillary clauses should be considered admissible for a term of up to 5 years when there is a transfer of know-how, as they allow the acquirer to ensure the transfer of all the assets and protect its investment. It was considered a reasonable term for the acquirer to adapt and incorporate into its business structure the new products or services produced by the acquired company, avoiding during that period of time the competition of who was previously the holder of such know-how[335]. The CNDC conditioned the clearance of transactions to the modification of the contracts when the ancillary clauses exceeded those limits conceived in the practice of the agency[336].

However, in 2015[337], the Federal Civil and Commercial Court of Appeals (*Cámara de Apelaciones en lo Civil y Comercial Federal*) issued a relevant ruling that significantly altered the practice of the competition authority. Specifically, the CNDC had ordered to condition the clearance of a transaction to the modification of non-compete and confidentiality clauses, to a maximum of five years. However, the Court has considered, in accordance with civil law principles, that the parties are free to agree on their contractual obligations and that it was not demonstrated that the ancillary clauses neither imposed any damages to the general interest nor in any way affected competition in the market, so that if the transaction did not raised competition concerns, neither would the ancillary clauses[338].

In light of the above, it is clear that, although at the regional level the European Commission's Guide on Ancillary Restraints is generally undertaken as a reference for the analysis, and its criteria inspire the evaluation of covenants ancillary to a concentration, there is no uniform pattern in terms of the enforcement of such clauses throughout different Latin American jurisdictions.

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334 COFECE, Plenary Decision of 18 June 2020, File CNT-002-2020.

335 CNCD, Memoria 2012, pp. 8-9, Available at: https://www.argentina.gob.ar/sites/default/files/memorias_cndc_2012.pdf (last accessed September 7, 2024).

336 See, for example, CNDC, Opinion No. 864 (Expte. S01:0248254/2010, "No-Till Cooperativa U.A. y Miguel Angel Pla S/ Notification Article 8º Law 25.156"), para. 83.

337 Judgment of Chamber I of the Federal Civil and Commercial Court of Appeals of 15 December 2015 (Clariant Participations Ltd y Otros C/ Promotion of Competition S/ Apel Resol Comisión Nac Defensa De La Compet" (Causa 25.240/15/CA2), which revoked the resolution of the Secretary of Commerce of the Ministry of Economy n. 63/2015 of 14 April 2015, available at: https://www.argentina.gob.ar/sites/default/files/2022/07/clariant_participations_ltd_y_otros_c-defensa_de_la_competencia_sobre_apel_resol_cndc.pdf (last accessed on 7 September 2024).

338 For further development of the issue, see Trevisan, P. (2021), "Analysis of ancillary restrictions in the context of the control of economic concentrations" (*Análisis de las restricciones accesorias en el marco del control de concentraciones económicas*), Revista Jurídica Argentina La Ley, No2021-A. pp. 325-338".

(vi) What is the relevance of the entry or expansion of players as a counterweight to the effects of a concentration?

Entry or expansion as a central element of risk analysis

Comparative case law on merger control concurs that the assessment of whether a transaction gives rise to a substantial lessening of competition necessarily involves an assessment of the conditions of entry to the market in which the merger produces its effects.

According to the OECD, the analysis of barriers to entry is relevant because competition will not be reduced by a merger if new firms could easily and quickly enter the market. In other words, if an agency seeks to prohibit a transaction, it will require proof that barriers to entry or expansion in that market make it unlikely that new entrants will enter quickly and sufficiently[339].

The FNE, consistent with the standard applied by comparative agencies, such as the European Commission and the CMA, considers that when entry into a market is plausible, it is unlikely that a merger will pose a significant risk to competition[340]. Therefore, the analysis of entry of new players or expansion of competitors is a central element in the overall assessment of the competitive impact of a transaction.

The above is consistent with what was stated in Chile by the TDLC in the *Ideal/Nutrabien* case ——a transaction in the sweet snacks market prohibited by the FNE and later brought to the TDLC for judicial review—— indicating that in transactions that preliminarily represent risks to competition "[...] *it is required to examine the conditions of entry of new competitors or the possibility that the incumbents rearrange their brands or reposition their products*"[341] (free translation).

In fact, at the comparative level, it has even been pointed out that in cases in which the transaction does not lead to a substantial lessening of competition, the conditions of entry should not even be analyzed[342]. In the same sense, the FNE argues that the conditions and probabilities of entry will be evaluated only when it is necessary to determine how certain dynamic elements of competition could influence the competitive scenario once the transaction is implemented[343].

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[339] OECD (2007), "Competition and Barriers to Entry, Policy Brief", p. 2. Available at: https://www.oecd.org/competition/mergers/37921908.pdf.

[340] FNE (2022), Horizontal Merger Guidelines, para. 119; CMA (2021), Merger Assessment Guidelines, section 8.29; European Commission (2004), Guidelines on the assessment of horizontal mergers, para. 68.

[341] TDLC, Judgment N°166/2018, considering 107°.

[342] CMA (2021), Merger Assessment Guidelines, section 8.29. *"If the CMA considers that an SLC would not arise from the merger, it may not conclude on the evidence regarding entry and expansion or even consider it. This means that when the CMA does consider the evidence on effective entry or expansion, it will be doing so in cases which have features that might lead to competition concerns (eg the market is concentrated)"*

[343] FNE (2022), Horizontal Merger Guidelines, para. 118.

Likelihood, timeliness and adequacy of input

In Chile, the FNE and the TDLC have been open to evaluate entry conditions as an element that can mitigate or reverse the risks of a concentration on competition. The Horizontal Merger Guidelines state that, if upon analyzing the entry conditions of a market, the FNE is convinced that the entry of new competitors is likely, timely and sufficient, this could generate sufficient competitive pressure to mitigate the competitive concerns that the transaction would entail"[344].

Even in those cases where a transaction may potentially result in horizontal concerns, the consistent international guidelines throughout jurisdictions hold that if the analysis of the entry conditions shows that the entry of new competitors meets the triple standard of likelihood, timeliness and sufficiency, this could generate sufficient competitive pressure to offset the concerns raised with the transaction[345].

The FNE's statement regarding the possibility of mitigating concerns derived from a merger due to the entry or expansion of players has had a relevant practical application in recent decisions. In several cases in which the parties reached a relevant joint market share, and were even competitively close, the FNE (or the TDLC in a judicial review) has decided to authorize the transaction due to the competitive discipline that would be generated by the probable, timely and sufficient entry or expansion of third-party rivals.

As for the **likelihood of entry or repositioning**, this criterion is evaluated by assessing the incentives that an economic agent has to enter or expand into a given market, taking into consideration the existence of barriers that may hinder or prevent such entry or realignment.

In order to analyze this criterion, the authority must evaluate regulatory barriers; sunk costs that must be incurred to enter or expand into the market ——and that the entrant cannot recover within a reasonable period of time upon exiting the market——; the need for brand development, sales channel formation or distribution system, all elements that allow competing in the market; the maturity of the market ——for example, that may tend towards slower growth—— and regulatory uncertainty regarding the future of the market, among other factors that may affect the incentives to enter or expand into a market.

[344] Ibid., para. 188.

[345] Ibid., para. 119; CMA (2021), Merger Assessment Guidelines, Section 8.28: "*If there is effective entry and/or expansion as a result of the merger and any consequential adverse effects (e.g., a price increase), the effect of the merger on competition may be mitigated. In these situations, the CMA could conclude that no [substantial lessening of competition] arises as a result of the merger*" (free translation).

In light of the above, it is evident that a key factor in deciding to enter or expand into a market is the expected profitability of such strategy, taking into consideration the magnitude of the costs to be incurred ——whether financial, accounting or opportunity costs——[346].

In terms of **timing**, this relates to the time in which an eventual entrant could generate sufficient competitive discipline to mitigate the exercise of market power by the resulting entity.

In this regard, although it is established that the maximum period of time to consider an entry as timely is two years[347], this parameter must be evaluated with flexibility. Indeed, the FNE establishes that the maximum period of time in which the entry must occur to be considered timely depends on the characteristics and dynamics of the specific market, and that the more frequent the transactions and the shorter the remaining duration of the contracts, the shorter the tolerable time for the entry to be considered timely[348].

In light of this criterion, the timing of entry and the two-year period should not be considered as a static parameter or as a single threshold. On the contrary, the timing of entry should always be weighed in light of the context of the specific market. In dynamic markets undergoing permanent technological change, such as digital markets, entry in two years may not be considered timely, as the case may be in more static markets exposed to less change.

Regarding the analysis of probability and opportunity of entry of new players or the expansion of players from neighboring markets, the analysis carried out in *Ideal/Nutrabien* is very illustrative. In that case, the TDLC gave a series of guidelines as to when, in light of the evidence gathered in a case file, it should be concluded that the entry is sufficient to mitigate the risks associated to the transaction.

In that case, the TDLC disputed that the FNE had ruled out the possible expansion of a third party from a neighboring market to the segments that implied a greater concentration of the parties as a result of the merger. On the contrary, the TDLC concluded that entry into that market was likely. This, on the basis that it was profitable to enter a market with growth prospects, such as the one affected in this case; and that although the brand recognition of the concentrated parties may imply a barrier to entry, this does not constitute a barrier to expansion with respect to recognized players in neighboring markets that also have consolidated brands in related products; and that there were plans to relocate players from adjacent markets that were not appropriately considered by the FNE[349]. Likewise, it was

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[346] FNE (2022), Horizontal Merger Guidelines, para. 123.
[347] Ibid., para. 124 et seq.
[348] Ibid., para. 127.
[349] TDLC, Decision N°166/2018, recital 116°: "*the plans of [-] to reposition itself towards the other product categories can be qualified as relevant. Indeed, this actor expresses its willingness to compete in the short term, acquiring machinery, as evidenced by documents attached to the Investigation File, and describing the*

assessed that *de novo* entry would be timely if a new player planned to enter within two years.

Finally, the **sufficiency** criterion is related to reaching a scale of such magnitude as to cause competitive pressure to the resulting entity[350]. This element requires that the economic agent entering or expanding into the relevant market reaches a scale of such entity that it is capable of causing effective competitive pressure on the entity resulting from the transaction[351].

This criterion is central to the analysis, since, although an entry is likely and may occur in the short term, it will not imply an actual competitive constraint if the entity of competition is not very significant or close to the merging parties. Therefore, the analysis of the sufficiency of the entry is key, since it allows weighing whether the entry that would occur will actually operate as a counterweight to mitigate the risks to competition raised by the transaction. Among the factors that affect the possibility of entry of a new competitor, or of the repositioning of a player participating in a nearby market, with sufficient scale, are, among others, the difficulties in reaching a minimum scale of customers or the high switching costs faced by customers.

There are two relevant elements that have been analyzed ——especially in Phase II decisions of the FNE—— and that affect compliance with the sufficiency criterion.

First, the existence of switching costs that affect the ability of a player planning to enter a market to be able to reach a minimum efficient scale and thus to compete profitably in it. When the mobility of demand (consumers or customers) in a market is limited, this has a direct impact on the entity with which a player enters the market and whether such entry could be sufficient to discipline the merging parties. Such restrictions may be due to regulatory or contractual elements, or even to information asymmetries that affect decision making and limit the options for switching suppliers[352].

The second element is related to the entity and competitive closeness of the entry. The FNE has held, consistently with comparative standards, that in markets for differentiated goods or services, when an entry is small-scale or a 'niche' entry, it does not constitute sufficient entry into the market, since such competition would fail to competitively discipline the parties

business model of the new products that would be covered by its umbrella brand. It is a competitor in growth and with consolidated brands in neighboring markets, so it would not need to acquire patents" (free translation).

350 FNE (2022), Horizontal Merger Guidelines, p. 41.

351 Ibid., p. 17.

352 FNE, Report of prohibition in Acquisition of control in Colmena Salud S.A. by Nexus Chile SpA, Rol FNE F271-2021, para. 455 et seq.

and restore lost competition as a result of the merger. This is reflected in the FNE's guidelines, as well as in previous decisions and comparative case law[353].

Similarly, it is necessary that the entry is competitively close to the merging parties, that the entrant aims to address a relevant part of the activities in which the parties operate and that it can restore competitive pressure in the market[354]. In other words, if the merger involves the elimination of a player from the market, only an entry that can restore the competition lost with the merger may be able to mitigate the risks that such elimination entails.

This standard is relevant since the sufficiency requirement will ultimately require a competition analysis in itself. In order to be eventually able to invoke the entry or expansion of players as a countervailing argument, it will be necessary to examine not only the entity of the entry ——compared to the entity of the concentrated parties——, but also the lesser or greater competitive closeness of the entrant.

It is interesting in this regard that the lack of competitive closeness between the entity resulting from the merger and the incoming economic agent has been recognized in several decisions of the FNE as an element that has allowed to rule out that the entry could mitigate the risks of the transaction, precisely due to the lack of sufficiency[355].

In practice, the sufficiency assessment will weigh the circumstances of the entry in order to determine whether the entry exerts sufficient competitive pressure on the resulting entity to counterbalance the risks arising from the notified concentration. In this regard, the FNE has indicated that:

> An entry may be probable and timely, but also of a sufficient entity to discipline the parties to the transaction. To this end, it is crucial to assess the greater or lesser competitive closeness between the resulting entity and the economic agent that enters or expands[356] (free translation).

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[353] FNE, Clearance Report on the merger between Cementos Polpaico S.A. and Cementos Bicentenario S.A., Rol FNE F71-2016, Annex I, pp. 61-62; CMA (12 August 2015), "A report on the anticipated acquisition by Reckitt Benckiser Group plc of the K-Y brand in the UK", section 9.37.

[354] "*Entry into differentiated product markets, even on a relatively large scale, may be insufficient unless the new entrant's products are sufficiently close competitively to the merged entity's products (e.g., are good substitutes for the products in which they overlap) and are thus capable of attracting a significant number of diverted consumers in response to a price increase (or a reduction in non-price variables) that is unprofitable on a lasting basis. Put another way, new entry and expansion must address a sufficient portion of the overlap between the notifying parties*." Parker, J. and Majumdar, A. (2016), *UK Merger Control*, 2nd Edition, Hart Publishing, p. 688.

[355] FNE, Clearance Report with mitigation measures, in Merger between Fiat Chrysler Automobiles N.V and Peugeot S.A., Rol FNE F233-2020, para. 179 ("***Fiat*/*Peugeot***"); Clearance Report in Acquisition by Telepizza Chile S.A. of the assets of Administradora de Restaurantes Aresta S.A., Administradora de Restaurantes Delco S.A. and Administradora de Restaurantes Fastcom S.A., Rol FNE F16 3-2018, para. 70; Clearance Report in Acquisition of control in GrandVision N.V. (Rotter & Krauss) by EssilorLuxottica S.A., Rol FNE F220-2019, para. 260.

[356] FNE, Prohibition Report in Acquisition of control in Colmena Salud S.A. by Nexus Chile SpA. Rol FNE F271-2021, para. 478.

In *Nexus/Colmena*, in the private health insurance market or Isapres, the FNE pointed out that the entry of a new health insurance company ——which had occurred pending the investigation of the transaction in Phase II—— constituted a 'niche' or small-scale entry, not relevant in terms of its entity and not competitively close to the merging parties. As such, it did not constitute a sufficient entry to the market, since it could not competitively constraint the parties and reestablish the competition lost as a result of the transaction[357].

In this regard, U.S. competition agencies have noted that an entry would be sufficient if the entrant manages to at least replicate the scale, power and duration of one of the merging parties[358].

In particular, it is illustrative that the decision of the FNE and/or TDLC to intervene (clearing transactions subject to remedies or prohibiting them) but even not to intervene (authorizing the transaction unconditionally) has been based, to a large extent, on the detailed evaluation of the existence or not of barriers to entry and/or the expansion of players in the market under analysis.

Thus, in certain cases, the agency has intervened by evaluating in depth the existence of external competitive discipline and the regulatory, strategic or structural barriers that the merging parties will face[359]. In other cases, the FNE has cleared mergers outright, despite the fact that merging parties significantly increased concentration in the market in question. In such cases, the FNE has justified its decision to authorize without mitigation measures, especially considering the low barriers to entry and the actual possibility of third parties entering or expanding from neighboring markets to exert competitive pressure in the market affected by the transaction, considering market contestability as a key element of the analysis[360].

For example, in the *Nexus/Minsait* case, in the card payment processing market, the FNE analyzed whether the entry of a third party into the issuing processing segment was likely; timely (if there was certainty that such a player would enter the market as an effective competitor within a limited period of, at most, two years); and sufficient to offset the potential loss of competition resulting from the transaction[361].

The analysis illustrates the evidentiary standard for considering whether or not the parties to a transaction will be constrained by potential competition once merged. The FNE

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[357] FNE, Prohibition Report on the acquisition of control in Colmena Salud S.A. by Nexus Chile SpA, Rol FNE F271-2021, paras. 499 and 500.
[358] See DOJ - FTC (2023), "Merger Guidelines", p. 32.
[359] FNE, *Clínicas de Iquique*, Sections V and VI; *VTR/Claro*, Section VIII; Notificación de Operación de Concentración Ideal S.A. - Nutrabien S.A., Rol FNE F90-2017, Section II.f); and *Nexus/Colmena*, Section IV.6, among others.
[360] FNE, Nexus/Minsait and Veolia/Suez cases.
[361] FNE, *Nexus/Minsait*; para. 37-39.

concluded ——on the basis of internal documents of the new entrant, statements from its executives and even from future customers of the third party[362] —— that the potential entry of such player, which would discipline the parties, was reasonably projected, and that it was not mere conjecture, but instead had factual support[363-364].

Another example, very recent, is the case of *CJ Selecta/Bunge*, in the soy protein concentrate market, in which the FNE cleared the concentration of the market in a single actor ——where previously there were two, CJ Selecta and Bunge, although the latter alleged to have exited the market under factual circumstances that the FNE did not consider sufficiently proven in the investigation—— by having demonstrated the existence of a probable, sufficient and timely entrant. In that case, the FNE evaluated the existing evidence regarding the entry of a new supplier, which would have already overcome the main barrier to entry existing in the market, which would have unequivocally expressed its intention to enter the market in an immediate time, and which was sufficient to mitigate the effects of the transaction. The FNE assessed such sufficiency following the guidelines of the U.S. competition authorities, based on a structural analysis[365].

From the above cases, in order to invoke the entry or readjustment of players as a counterweight to the risks of the transaction, it must be evidenced that such entry is possible, timely and sufficient. This requires proving that this player could not only enter in the short term, but that it will compete directly (head-to-head) with the merged entity. In addition, any possible intention to exercise its greater economic incentives to raise prices or affect other competitive variables because of the merger would be counteracted by direct, prompt, and close competition from a new entrant or expanding rival.

In essence, regardless of their intervention, competition authorities have considered that the analysis of entry conditions is a central element that allows them to analyze whether there will be competitive pressure from third parties after a merger, as well asto assess the stability of the market and thus be able to conclude whether the transaction raises competition concerns[366].

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[362] FNE, *Nexus/Minsait*; footnotes 42 and 47.

[363] Such as the existence of service agreements signed with clients, (which generated legal effects, beyond a mere intention to change supplier); that the third party's clients had begun the process of migrating to the third party's technological systems, and that said actor was in the process of obtaining the necessary regulatory authorizations for its incorporation, *Nexus/Minsait*; para. 37.

[364] In light of this background, the FNE could reasonably project, and incorporate in its analysis, that the entry of the third party into the market was a fact and that it was a potential competitor of the merged parties, which could reach a scale of such an entity that it would be capable of causing effective competitive pressure to the merged entity.

[365] FNE, Clearance Report of the acquisition of CJ Selecta by Bunge Alimentos S.A., Rol FNE F376-2023 ("***CJ Selecta/ Bunge***").

[366] FNE (2022), Horizontal Merger Guidelines, para. 133: "[...] *barriers to entry allow the exercise of market power by the economic agents that participate in the market, during a determined period of time, by protecting them from external competitive discipline*" (free translation).

(vii) How have mergers in digital markets been assessed?

In terms of digital markets, Latin America contrasts with the prioritization of competition *enforcement* by foreign competition agencies, mostly Anglo-Saxon, in new and dynamic markets.

It can be said that the region is still awaiting comparative regulatory developments, at a stage of evaluating the landscape of foreign jurisdictions, questioning what role competition laws and authorities should play faced to new competitive structures. There is a sort of dilemma as to whether the challenges posed by the digital economy should be addressed through *ex ante* regulation to prevent anticompetitive behavior in digital markets ——as has been implemented in European countries—— or whether competition rules, together with preventive merger control, are useful and sufficiently flexible mechanisms to address them.

In order to address the challenges posed by the digital economy, and even when there are relevant competition actions related to anticompetitive conducts[367], the FNE has preeminently resorted to merger control as a tool to address digital markets.

Indeed, the first guideline on how the FNE will approach the natural differences exhibited by dynamic markets and digital platforms was set out in the Horizontal Merger Guidelines, which contain a chapter dedicated to these markets. In this chapter, the FNE established the distinctive criteria of digital platforms and the elements that differ from the analysis of traditional markets, such as the existence of indirect network effects; the possibility of '*tipping*' ——tendency of a market, once a certain scale of operation is achieved, to concentrate and eventually close under a single or dominant actor——; and the importance of the use of and access to information in the ability to compete in a market, among others[368].

It is particularly interesting that in this guide, the FNE has identified the scenarios in which it will carry out a more detailed analysis of a concentration involving such platforms, distinguishing, among others, the possible elimination of potential competitors or recent entrants; the existence of risks of impairment of variables other than price, such as incentives to innovate or privacy, or the raising of entry or expansion barriers as a result of the combination of certain information assets of the merging parties, among others.

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[367] FNE investigation on delivery platforms Uber Eats, PedidosYa and Rappi regarding clauses that could affect free competition, subscribed with restaurants, Rol N°2653-21 that derived in the subscription of out-of-court agreements with mitigation measures cleared by the TDLC. See: TDLC, Extrajudicial Agreement between the National Economic Prosecutor's Office and Uber Portier Chile SpA, Rol AE N°29-2023; Extrajudicial Agreement between the National Economic Prosecutor's Office and Delivery Hero E-Commerce Chile SpA, Rol AE N°30-2023; and Extrajudicial Agreement between the National Economic Prosecutor's Office and Rappi Chile SpA, Rol AE N°31-2023.

[368] FNE, Horizontal Merger Guidelines, section 5.

During these years of the new regime, in several cases the FNE has assessed the competitive pressure exerted by e-commerce with respect to traditional products or services markets (or *brick–and–mortar*), being a usual element of analysis in the FNE's decisions in different markets. However, the concentrations involving digital platforms have significantly helped to shape the analysis that the agency performs in digital markets and to shed light on the substantive criteria applicable in thiese type of markets[369].

The most relevant case reviewed by the FNE to date is *Uber/Cornershop*, which assessed the acquisition by Uber ——a digital global platform active in Chile mainly through its ridesharing and restaurant delivery services——, of Cornershop ——a Chilean supermarket delivery application, with activities in Chile, Mexico and recent entry in some states in the U.S. This transaction was preceded by the failed acquisition of Cornershop by Walmart, which, although cleared unconditionally by the FNE, was prohibited by the COFECE in Mexico, and was finally withdrawn by the parties.

In this case, the FNE evaluated different theories of harm, both horizontal ——such as the elimination of incentives to innovate—— and conglomerate ——including both exploitative (of consumers and collaborators or *shoppers*) and exclusionary due to the bundling of services and concentration of information or data.

The main theory of harm analyzed was horizontal, consisting in the loss of potential competition by Uber in the supermarket delivery market. The FNE's analysis focused on determining whether, given that there was direct evidence that Uber planned to organically enter the supermarket delivery segment, the merger would have killed the purchaser's independent effort to expand into a new but related market to those in which it was already present. To this end, the FNE used a dynamic counterfactual scenario, in which Uber would have entered the digital platform market as a competitor of Cornershop[370], and assessed whether such potential loss of competition would have a negative effect on competition, considering both the entity that Uber's entry into the segment would have, and the possible reaction of Cornershop's competitors to such entry.

In other words, what was evaluated was whether the transaction could have involved a sort of '*reverse killer acquisition'*, in which the player planning to venture into a new related market instead decides to take acquire an economic agent already active in that market. This way, it would opt for inorganic growth through an acquisition, undermining the buyer's

[369] Among the cases in which the FNE has analyzed concentrations related to digital markets we can mention: FNE Roles F81-2017, *Time Warner/AT&T*; F116-2018, *CDF/Turner*; F161-2018, *Walmart/Cornershop*; F217-2019, *Uber/Cornershop*; F243-2020, *Maritime Association*; F295-2021, *Liberty/América Móvil*; F319-2022, *Automotive Association*; and F320-2022, *Activision Blizzard/Microsoft*.

[370] FNE, *Uber/Cornershop*, para. 137 et seq. For further development, see section III.b.(iv) of this work.

effort to grow organically in a market. The loss of that potential entry, through the merger, is what can ultimately negatively affect competition[371].

The great challenge for the FNE in this case was to assess whether the market affected by the elimination of a potential competitor could become one in which there could be little room for competition ——'*winner takes* all' type——, and prone to '*tipping',* that is to say, a market with a trend to concentrate, and eventually foreclose, towards this dominant platform or around a single player[372-373].

In its assessment, the FNE concluded that the incumbents and potential competitors ——not only other delivery apps, but above all the supermarkets and their innovation efforts in creating digital delivery platforms to react to increases in demand for *delivery* due to the COVID-19 crisis—— could exert sufficient competitive pressure on the merged platforms[374]. In addition, internal documents evaluated by the FNE showed that there was room for significant demand growth and relevant plans by market players to increase their transactions and compete on a peer-to-peer basis with the parties to the transaction.

A relevant piece of evidence was the survey the FNE conducted among Cornershop users, customers in the supermarket delivery segment. As a context, this survey was carried out during the period of travel bans and quarantines ordered by the authorities due to the COVID-19 pandemic. It was a practical and useful mechanism to gather relevant information on substitution patterns, diversion ratios and the existence of *multi homing* or *single homing* of applications ——multiple parallel applications for the same purpose, or recurrence to a single application, respectively——. Surprisingly, the survey showed a trend towards *single homing* and the increasing substitution of Cornershop by supermarkets, both physical and in their incipient online versions.

In the end, the transaction was cleared unconditionally. Although, under a static view, Cornershop was the main player in the supermarket delivery segment, the FNE adopted a dynamic view of competition, especially considering in its analysis how challenging and transitory such leadership was in view of the projections of imminent and future competitive discipline of third parties that were entering and expanding rapidly in digital commerce.

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[371] These types of acquisitions are often evaluated internally in terms of 'buy versus build', i.e., "*the incumbent was making (or thinking about making) an organic foray into this new market. Then the opportunity arises to buy instead. Once bought, the target may be cannibalized by certain assets to boost the incumbent's own effort. Or the incumbent's own project may be quietly shelved. Either way, the buyer's innovative effort in the target's market is extinguished. It is the death of one of the two efforts, but not of the target, but of the buyer.*" Hence the reference to a 'reverse' killer acquisition. Cafarra, C., Crawford, G. and Valleti T. (2020), "'How Tech Rolls': Potential Competition and Reverse Killer Acquisitions", *Competition Policy International*, available at: https://www.competitionpolicyinternational.com/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions (last accessed September 6, 2024).

[372] FNE, *Uber/Cornershop*, para. 33, 140.

[373] Stigler Committee on Digital Platforms (2019), Final Report, pp. 7-8, available at; https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report.

[374] FNE, *Uber/Cornershop*, paras. 120, 142, 165, 226, 230, 309, 331.

Backward-looking, one reading that could be made of that decision is, in the hypothetical scenario (and under s static approach) that the transaction would have been considered to meet the legal standard and thus able to substantially lessen competition ——since Cornershop was the player that had first successfully ventured into the market, or the '*first mover'* and held high market shares and the entry of third players had not yet occurred in a relevant way—— how would a concentration between digital platforms would have been conditioned to remedies?

In light of the facts, it was simply not feasible to condition the authorization to the application of structural mitigation measures ——it would have been difficult to establish a package of assets to be divested given the nature of the businesses involved——. On the other hand, in view of the imminent entry of third parties, behavioral obligations binding the merged entity would probably only have introduced competitive distortions which would have eventually discouraged the entry or expansion in the market. In other words, a Type I error would have been likely incurred[375].

In retrospect, the dynamics of the *delivery* market in Chile showed that the competitive scenario projected by the FNE was appropriate, since new operators indeed entered the market in question, and the industry still shows clear signs of competition among the different players, in line with what it was able to project in such decision. Meanwhile, after the FNE's decision, COFECE also unconditionally authorized the acquisition of Cornershop by Uber.

Another relevant case involving digital markets evaluated by the FNE was *Activision Blizzard/Microsoft*, between international operators active in the development, publication and distribution of video games, which overlapped their activities both horizontally and vertically in Chile.

The FNE's analysis focused mainly on the assessment of vertical concerns, and whether Microsoft ——producer of videogame consoles and platforms—— could post-transaction deploy an input foreclosing conduct and stop supplying video games of global relevance (such as *Call of Duty*) to its competitors in the videogame consoles segment.

The FNE was able to discard such risk theory, not only considering the competitive pressure that Activision Blizzard faced from other players, but also considering the lesser relevance that the *Call of Duty* videogame would have in Chile, compared to other regions of the world, in light of local consumption patterns. The FNE also ruled out the risks of *tipping* in the commercialization of videogame consoles and videogame subscription services, considering that Activision Blizzard's videogames, although important, were not the most relevant for consumers in Chile.

[375] Type I error would involve subjecting to restrictive measures a transaction that would not raise competition concerns.

What is interesting in this case is that, in order to measure the consumers preferences of of videogames and videogame consoles, the FNE conducted a survey to *Call of Duty* franchise gamers, with an Internet Protocol address or IP address located in Chile, in order to measure substitution patterns between video games and between platforms in the country. This survey was agreed with the notifying parties and was carried out in accordance to the CMA's criteria on the matter[376].

The survey results were relevant to measure local consumption patterns, which differed from the patterns of videogame players in other countries. Together with other information gathered in the investigative docket, the FNE was able to conclude that the deployment of an input foreclosing strategy (either total or partial foreclosure) would not have been profitable for the merged entity. The above, because the *Call of Duty* franchise (of the *shooter* genre) did not have for gamers in Chile and Latin America (with a greater preference for sports games, especially soccer games such as FIFA), the relevance it exhibited in other countries of the world.

The FNE concluded that, in this region, the parties' ability to affect competition was limited by the presence of other players offering video games capable of exerting competitive pressure vis-à-vis the titles offered by the Parties[377]. In essence, the local analysis mainly explained why the FNE cleared the transaction unconditionally, which contrasts to the analysis carried out in other latitudes (mainly northern hemisphere jurisdictions) who raised concerns regarding the transaction's possible impact on competition.

Additionally, there are other interesting decisions of the FNE in digital markets, with theories of harm focused on data exchange platforms, where the information obtained through them serves as an input to compete, and in which the possibility of interoperating and/or jointly using databases by merging platforms, in light of the particular case, could have the effect of hindering the entry or expansion of competitors in the market, if it provided a significant and non-replicable competitive advantage for competitors[378].

For example, in *Maritime Association*, the FNE analyzed the creation of a joint venture for the development of the Global Shipping Business Network platform to accelerate the development of digital solutions in the shipping industry[379]. The analysis carried out focused on whether a joint venture could facilitate coordination between the constituent shipping companies, which overlapped in their activities in various routes that included ports in

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[376] FNE, *Activision Blizzard/Microsoft*, Exhibit 1, Video game player survey methodology; CMA (2018), "Good Practices in the design and presentation of consumer survey evidence in merger cases".

[377] The FNE considered particularly illustrative the situation of Nintendo, which did not offer titles of the Call of Duty franchise, but had nonetheless managed, through a differentiation strategy, to position itself as the most marketed console in Chile. FNE, *Activision Blizzard/Microsoft*, para. 131.

[378] FNE, Horizontal Merger Guidelines (*Guía de Análisis de Operaciones Horizontales)*, para. 115.

[379] FNE, Partnership between CMA CGM, COSCO Shipping Lines, SIPG, Hapag-Lloyd, PSA, Hutchinson Ports, OOCL and Quingdao Port Lines, FNE Role FNE F243-2020 ("***Maritime Partnership***").

Chile[380]. The FNE's preliminary assessment showed that the transaction could entail an additional instance of contact between direct competitors that would raise concerns, which could facilitate their coordinated behavior either through the use of the platform itself, giving them access to sensitive and strategic commercial information of their competitors; or in the instances of joint management of the joint venture.

However, the FNE evaluated the type of information that could be accessed through the platform and the use of blockchain-enabled solutions within it, concluding that the information shared through the platform would be encrypted and only accessible to the parties to a specific transaction. In this way, the FNE was able to discard that the members to the joint venture could coordinate their behavior through the platform[381].

Likewise, in *Asociación Automotriz*[382], the FNE analyzed a transaction consisting of the creation of a joint venture between eleven shareholders active in different segments of the automotive industry to operate a data exchange platform, in the context of a European research and development initiative[383].

The FNE assessed whether the platform could create an additional point of contact between direct competitors[384]. First, it analyzed the nature of the information that would be exchanged and concluded that the users of the platform could not access information that could be qualified as commercially sensitive or as 'operational data'[385]; that the members of the joint venture could not store data and that the platform will include certain contractual, technical and organizational safeguards, such as contractual provisions, technical barriers and organizational measures aimed at preventing any type of anticompetitive interaction[386]. Therefore, the FNE concluded that the platform could not facilitate coordination between the parties or other competitors, and cleared the transaction unconditionally[387].

These cases show the FNE's first approaches to the evaluation of concentrations in dynamic markets or mergers between digital platforms. Although all of them show an analysis structure aligned with the guidelines of jurisdictions with more experience in mergers in this type of markets, the application of surveys to local consumers ——as in *Uber/Cornershop* and *Activision Blizzard/ Microsoft*—— as a tool to measure diversion ratios and substitution

[380] FNE, *Maritime Association*, para. 32.
[381] FNE, *Maritime Association*, paras. 47-54.
[382] FNE, Association between BASF SE, NMW Holding B.V. and Others, Rol FNE F319-2022.
[383] Initiative that brought together 111 companies and development institutes -including the shareholders of the joint venture- to develop a collaborative, open and uniform data ecosystem for the automotive industry, based on the standards and principles for data infrastructure of the GAIA-X project. FNE, Automotive Association, para. 15.
[384] FNE, *Automotive Association*, para. 33.
[385] The exchange concerned only the information necessary for compliance with certain environmental and socially responsible investment criteria, CO2 emissions and circular economy motives.
[386] FNE, *Automotive Association*, paras. 35-40.
[387] FNE, *Automotive Association*, para. 47.

patterns show certain originality of the agency in terms of developing agile investigation tools, which complement the other elements of the docket.

The results also show that international standards and best practices should be applied according to the reality of each country's markets and competitive dynamics, echoing the fact that merger control is ultimately a local, rather than a global, exercise.

c. Questions concerning the notification procedure

(i) When is a concentration deemed to be implemented, resulting in a breach of the standstill obligation?

The infringement behavior in Chile

The early implementation of the concentration ——commonly known as gun jumping—— implies an anticompetitive conduct and is exposed to relevant sanctions for the merging parties. It would not be reasonable to establish an *ex-ante* merger control regime, under which certain transactions must be mandatorily notified to the FNE prior to its implementation, without sanctions in case of failing to notify a transaction or when the transaction is implemented prematurely, before the authority's decision.

A gun jumping conduct will be triggered, on the one hand, when implementing a concentration without prior notification to the authority ——*i.e.,* failure to notify——. This corresponds to a conduct of a procedural nature, in which the transaction is implemented without notifying the agency, but in a prior and independent manner.

On the other hand, in Chile, as in most of the international jurisdictions that have an *ex-ante* merger control regime, there is an obligation to suspend the execution of the transaction ——known as 'standstill obligation' or suspensive effects of the notification—— by virtue of which, from the act of notification, the parties cannot implement the concentration in question until the FNE clears the transaction (or until there is a judgment that ends the procedure, as in the case of judicial review)[388].

Thus, gun jumping will also arise when a merger is implemented while the transaction is under review by the authority and the standstill obligation is breached (pending the standstill period triggered by the notification of the transaction, known as *procedural* gun jumping), or when the parties to a transaction exchange sensitive competitive information or coordinate their competitive conduct in the market either before the merger notification or during the standstill period (known as *substantive* gun jumping).

Any assessment of whether there is an infringement of the obligation not to implement a transaction pending review by the competition agency starts by establishing the limits of the concept of materialization or implementation of a concentration.

[388] Article 49 of DL 211 provides: "The economic agents that plan to concentrate may not perfect the concentrations that they have notified to the National Economic Prosecutor's Office, which will be suspended from the act of notification until the resolution or sentence that definitively terminates the corresponding procedure is final".

The legislative discussion following Law No. 20,945 of 2016, which introduced the latest reform to the competition regulations in Chile, is very illustrative, as it reflects under what criteria the FNE understands that the implementation of a concentration occurs. IIn particular, it was established that the proposed legislation:

> like most of the comparative legislations, establish the notification obligation on the **basis of an economic fact such as the implementation of the transaction and not on the basis of a legal fact such as the implementation of the acts or agreements** that serve as its source. The materialization of the transaction [...] refers to the **moment when the independence of two players ceases**, that is, **when the buyer acquires the possibility of exercising decisive influence** over a company. Typically this event occurs when the legal transaction has a significant degree of structuring [...] However, it may also happen that the factual situation of cessation of independence occurs before the implementation of the legal act or acts that serve as a vehicle, as **would happen if the merged entities begin to operate in that condition before everything is signed**[389] (free translation).

The only case to date in which the FNE has brought an action for infringement of the standstill obligation was the injunction against two international meat companies, *Minerva/JBS*. In this action the FNE shed light on the concept of *gun jumping*, clarifying that it understands this concept from an economic approach, and not necessarily under a legal approach. According to the FNE, regardless of the legal form adopted:

> [...] what is relevant for a concentration to be considered implemented is that, as a result of it, an economic agent has the **possibility of exercising decisive influence** over the management of one or more other previously independent agents[390] (free translation).

In this case, once the transaction in Chile was notified, but pending the decision of the FNE, there was an acquisition of control by the target in Brazil. In view of this, the parties tried to implement a *carve out* regarding Chile ——a mechanism consisting of different legal acts aimed at preventing the parties from concentrating in Chile, remaining as independent economic agents——.

In this regard, the FNE concluded that setting a mechanism such as the one implemented, aimed at impeding the materialization in the market of the effects of a change of control over the management of an entity, did not alter the fact that there was a *gun jumping* situation in place, since the transfer of shares already granted the possibility of exercising decisive influence and thus the ceaseof independence was indeed verified[391].

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[389] History of Law No. 20,945, p. 614 [emphasis added].

[390] FNE, Injunction 5 April 2018 filed in the Rol TDLC C N°346-2018 titled "FNE injunction against Minerva S.A. and another", paras. 24 and 26 ("***Minerva/JBS***").

[391] Ibid.

The foregoing evidences the economic parameters on which not only the concept of gun jumping rests, but also merger control and competition law itself. In essence, the notion of implementing a transaction is based on the economic effects on the market of a given circumstance, despite the legal forms it may adopt. Therefore, the mere ability to exercise decisive influence, from an economic standpoint, is sufficient for the transaction to be deemed to have been executed, regardless of whether such influence has been *de facto* exercised[392].

Based on the criteria outlined by the relevant case law, there are mainly three ways that incede in what can be understood as a *gun jumping* situation, while the review by the competition authority is pending, which may imply the acquisition of the ability to exercise decisive influence on a different economic agent: (i) exchanging information between the economic agents involved in the transaction; (ii) suscribing contractual clauses between the entities taking part in the transaction that give rise to rights to exercising decisive influence on another independent economic agent; and (iii) the execution of certain actions implying a premature implementation of the transaction in the market, prior to the notification and during the review of the transaction by the authority[393].

The FNE has actively investigated gun jumping conduct, as part of an effort to actively protect the merger control regime. Its efforts have focused mainly on its procedural gun jumping cases, due to failure to notify.

In *Bresler/Carozzi*, the FNE closed an investigation that started due to a complaint regarding the acquisition of assets of Unilever's ice cream business by Carozzi, which lasted for more than two years. The complaint alleged that the transaction would have been implemented without prior notification to the FNE, which could give rise to a violation of the duty to notify.

In its investigation, the FNE reviewed Unilever's accounting and financial information to verify whether the individual turnover merger threshold had been met, which would have make the notification of the transaction mandatory. In particular, the FNE evaluated the post-invoice discounts that Unilever made in the ice cream business, concluding that such discounts could be deducted from the company’s sales to the extent that it was appropriate to account for them as a discount from sales, and not as an expense. On that basis, the

[392] However, as shown below in local and comparative jurisprudence, in general, in the cases in which an action has been brought against a situation of *gun jumping*, a relevant element for its accreditation has been the exercise, in practice, of different factual circumstances that have represented a decisive influence of the acquiring economic agent over the acquired one.

[393] In this regard, the Brazilian competition authority, CADE, in its Guide for the Analysis of Preliminary Consummation of Mergers, states: "*This section aims at setting brief guidelines on the types of business activities related to merger transactions that may generate gun jumping concerns. Such activities can be divided into three major groups: (i) the exchange of information between economic agents involved in a merger; (ii) the definition of contractual clauses governing the relationship between economic agents; and (iii) the activities of the parties before and during the implementation of the merger*" (free translation). CADE, "Guide for the Analysis of Preliminary Consummation of Mergers", p. 7.

FNE concluded that Unilever did not meet the individual turnover threshold, and therefore the transaction was not notifiable[394].

Likewise, the FNE recently analyzed the existence of a *possible gun jumping* conduct in the acquisition of Punto Ticket by CTS Eventim and Sony Music, by which the Eventim-Sony joint venture became the holder of 65% of the capital stock of Punto Ticket ("***Punto Ticket/Eventim Sony***")[395]. The FNE analyzed whether the parties met the individual and joint merger thresholds for mandatory notification. As a result, it determined that despite Punto Ticket exceeded the individual turnover threshold, the Parties did not meet the joint threshold, since according to its corporate structure Eventim-Sony not only did not develop activities with sales in Chile prior to the transaction, but from a corporate perspective, it would not be part of the corporate group of its shareholders, so the sales of its corporate groups should not be considered for the calculation of the merger thresholds. Therefore, the transaction was not subject to mandatory notification, and there was no violation for failing to notify.

While in *Punto Ticket/Eventim Sony* the FNE investigation lasted only a few months, other cases such as *Navimag*, *Bresler/Carozzi* or *Equifax/Siisa*[396] lasted almost the entire statute of limitation period the FNE has to issue an injunction if it would have concluded there was an anticompetitive concentration.

Gun jumping at comparative level

The criteria applied by the FNE in its decisions directly echoe European standards on the matter. The most emblematic case at the European level is *Altice/PT Telecom*[397] where the acquirer was fined for *gun jumping* considering that certain clauses of the respective share purchase agreement gave the acquirer *de facto* veto rights over the commercial policy of the acquired company, which would allow it to exercise decisive influence over the acquired business before the European Commission cleared the merger.

Specifically, the approach of the Court of Justice of the European Union ("**CJEU**" or "**Court of Justice of the EU**") in this case is interesting, holding that the enforcement of a concentration takes place:

> When the parties to a transaction execute concentrations that contribute to a lasting change in control over the target […] control results from rights, contracts or any other means which confer the possibility of exercising decisive influence

[394] FNE, *Bresler/Carozzi*, para. 49.
[395] FNE, Closing report on ex officio investigation of the acquisition of Punto Ticket by CTS Eventim and Sony Music, Rol FNE F383-2024.
[396] Complaint regarding the acquisition of assets of Servicios Integrados de Información S.A. by Equifax Chile Limitada, FNE Case F240-2022 ("***Equifax/Siisa***").
[397] Judgment of the Court of Justice of the European Union of 9 November 2022, Case C-746/21 P, *Altice v. European Commission* ("***Altice/PT Telecom***").

> on an undertaking and, in particular, rights or contracts which confer a decisive influence on the composition, voting or decisions of the organs of an undertaking[398].

According to the CJEU, the European Commission properly considered that the veto rights provided for in the share sale and purchase agreement agreed between the parties went beyond what was necessary to preserve the value of the *target* until the completion of the transaction, by giving the acquiror the possibility of exercising control over the target. A particular element of analysis was the fact that these clauses were in force, highlighting that "[...] *in the absence of any indication to the contrary, they applied immediately. The applicant therefore had the possibility of exercising that decisive influence as from the date of signing the SPA on 9 December 2014*"[399].

The case is also interesting with regard to the exchanges of information between the parties prior to the authorization of the transaction, which the European Commission considered to be an integral part of the *gun jumping* conduct and a contributing factor to Altice's premature acquisition of control over PT Telecom.

At the level of judicial review, it was held that the exchanges, which continued after the signing of the purchase agreement, had contributed to demonstrate that the purchaser had exercised decisive influence over certain aspects of the target's business activity[400].

Also illustrative is the judgment of the Court of Justice of the EU in the *KPMG Denmark* case, in the context of an acquisition by Ernst&Young ("**EY**") Denmark of the Danish entity of KPMG ("**KPMG DK**"), which was notified to the Danish competition agency (*Konkurrence- og Forbrugerstyrelsen*). The facts are that, by signing the sale and purchase agreement (and pending clearance by the Danish Competition Authority) KPMG DK terminated its cooperation services agreement with KPMG International. The authority authorized the transaction, but ruled that KPMG DK engaged in gun jumping, considering that the termination of the service agreement was irreversible and generated effects on the market, and that it was a strategic business decision that could not be taken independently by KPMG DK.

In simple terms, the competition authority's question was whether, without the eventual acquisition, EY would not have terminated the service agreement with its franchisor and whether such act was unilateral and independent of the transaction.

The matter reached the Court of Justice of the EU, which ruled contrary to the Danish authority's interpretation. In particular, the CJEU's analysis in setting the boundaries of the

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398 Ibid., paras. 167 and 168.
399 Judgment of the General Court of the European Union of 22 September 2021, Case T-425/18, *Altice v. European Commission*, paras. 131 and 132.
400 Ibid., para. 227.

notion of gun jumping is very illustrative. The Court held that not any act in the interim period between the notification and the decision of the authority necessarily implies gun jumping conduct. Though, it held that the standstill obligation is limited to acts that confer control over the target prematurely, without covering ancillary and preparatory acts to the implementation of the concentration that do not materially confer control over the acquired entity, as was the case there[401], where both entities remained independent until the clearance of the merger.

These cases are consistent with case law in the United States[402] and the United Kingdom[403] which are illustrative of when premature integration between the parties to a transaction is deemed to exist.

In Latin America, most of the existing precedents relating to early implementation of mergers refer to procedural *gun jumping* cases, resulting from the lack of notification of merger transactions that met the regulatory thresholds[404].

However, certain decisions contain relevant criteria for the purpose of interpreting when a concentration is deemed to have been implemented. For example, the Colombian SIC ruled in the context of a non-notified concentration involving a series of contracts between Cable Vista, Cable Unión and UNE UPM, pointing out certain practical scenarios that illustrate the narrow limits between competition and integration:

> the simple fact of giving a competitor the administration of the clients of another competitor, as well as the power to provide settlement services, invoicing, etc., implies having initiated the execution of a business integration, to the extent that

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401 Judgment of the Court of Justice of 31 May 2018, Case C-633/16, *Ernst & Young v. Konkurrencerådet*, paras 61-62 ("***KPMG Denmark***").

402 *United States v. Flakeboard America Limited, et al.*, Civil No. 3:14-cv-4949 (N.D. Cal. filed 7 November 2014). In this case, the parties were condemned for agreeing to close a manufacturing facility and transferring customers to the acquired entity before the expiration of the standstill period. In doing so, it was claimed that transactional control of the business had been transferred in breach of the duty not to perfect the concentration transaction.

403 CMA (24 September 2019), "Completed acquisition by PayPal Holdings, Inc. of iZettle AB. Notice of penalty." In that case, the UK authority found that PayPal's contact with potential iZettle consumers undermined the parties' ability to compete independently, undermining the parties' separate brand and sales identities. In this way, potential consumers in the UK could perceive that the two businesses were integrated and did not appear independent or separate to third parties, pending the authority's decision.

404 For example, COFECE, "Cofece imposes fines above 51 million pesos on AT&T and Warner Bros Discovery for failing to notify a concentration" (*Cofece impone multas por más de 51 millones de pesos a AT&T y a Warner Bros. Discovery por no notificar una concentración*), press release of 8 September 2022, available at: https://www.cofece.mx/multas-por-mas-de-51-mdp-a-att-y-warner-bros-discovery-por-no-notificar-una-concentracion (last accessed 2 September 2024)/, or " Cofece fines six companies with more than 58 million pesos for failing to notify two concentrations" (*Cofece multa con más de 58 millones de pesos a seis empresas por no notificar dos concentraciones*), press release of 16 May 2024, available at: https://www.cofece.mx/cofece-multa-con-mas-de-mas-de-58-millones-de-pesos-a-seis-empresas-por-notificar-dos-concentraciones/ (last accessed 2 September 2024); Superintendence of Industry and Commerce (*Superintendencia de Industria y Comercio*), Decision 56629 of 18 October 2011, opening of investigation against MOLINOS ROA S.A., MOLINOS FLORHUILA S.A. and ALIENERGY S.A. for not notifying a concentration.

> the parties began to have structural economic links that are the very object of the ex-ante review of business integrations by the SIC[405] (free translation).

Another relevant example is found in Peru, where INDECOPI sanctioned the early implementation of a concentration that had been notified to it. Specifically, the transaction concerned the acquisition of exclusive control by Enel over Endesa, an entity previously jointly controlled by Enel and Acciona, which controlled several subsidiaries in Peru. Once the transaction was notified, and before the authority granted its authorization, the transaction was implemented in Spain, which led to the opening of a sanctioning procedure and the imposition of a fine on Enel.

Despite safeguard measures had been implemented ——to prohibit the directors from performing any act that could change the control structure in the Peruvian companies concerned until INDECOPI issued its decision—— the agency considered that the closing in Spain immediately generated effects in the Peruvian market. Ultimately ——and consistent with what was determined in *Minerva/JBS* in Chile—— INDECOPI concluded that:

> the structure of control [of the holding company] was modified, and consequently, the structure of control of the companies involved operating in Peru was as well. (...) the fact that no acts have been carried out that reveal the exercise of acquired control, such as the removal of directors or changes in commercial policies related to the competitive strategy of the companies involved, does not imply that Enel is not in a position to do so, which is the effect of having implemented the concentration[406] (free translation).

Finally, there is also relevant case law in Mexico, where COFECE sanctioned two companies, HP and Poly, for implementing the transaction before obtaining the authority's clearance, arguing that the companies' intentional actions impeded or hindered its ability as a competition authority to safeguard competition[407].

Likewise, COFECE sanctioned Banco Santander ("**Santander**") for the early execution of the acquisition of Banco Popular Español ("**Banco Popular**") in 2018[408]. According to the Resolution of the plenary of the agency, in June 2017, Santander acquired the entire capital stock of Banco Popular. Said purchase transaction was executed immediately upon signing.

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[405] Superintendence of Industry and Commerce, Decision 49903 of 2014. Specifically, the SIC held that, despite the fact that the clients had not been transferred, the parties did begin to execute the integration and to concentrate economically through a mandate contract that implied the granting of the power to manage the clients, which was sufficient to understand that the transaction had been executed in advance.

[406] Decision No. 001-2010/CLC-INDECOPI. It should be noted that this sanction was appealed and, through Decision No. 0794-2011/SC1-INDECOPI, the fine imposed was reduced to 100 UITs.

[407] COFECE, Análisis del caso: sanción por incumplir el procedimiento de notificación de concentraciones: HP and POLY, available at: https://www.cofece.mx/wp-content/uploads/2023/04/art-hppoly.pdf (last accessed 19 August 2024).

[408] COFECE, Decision of the Chamber,of 8 December, 2017, Banco Santander, S.A. and others, Case VCN-003-2017, available at: https://www.cofece.mx/CFCDecisiones/docs/Condiciones/V44/2/4059005.pdf (last accessed 4 September 2024).

Thus, the acquisition by Santander implied that, indirectly, it acquired 24.99% of the share capital of the target operating in the Mexican financial market, which meant that the transaction had legal and material effects in Mexico from the moment of signing. This acquisition gave Santander different decision-making powers with respect to the management and operation of Banco Popular. In fact, some of the members of the board of directors appointed at the signing date were also members of the board of directors of Santander or some of its subsidiaries.

In light of the above, COFECE's criterion in the decision is interesting, aligned with the standards applied by the FNE in Chile, since it expressly concluded that there was an implementation of the transaction from an economic point of view, regardless of the legal form adopted.

(ii) What is the role of third parties within the merger control procedure?

The merger control regime in Chile grants a central role to the notifying parties in the framework of the FNE's investigation. The law provides them with several prerogatives in the procedure, such as the right to be informed of the competition concerns identified by the FNE, before the FNE issues a resolution extending the investigation to Phase II or prohibiting the transaction based on the background of the investigation; the right to be heard throughout the procedure; the right to express their opinion regarding the transaction and the background information provided by third parties; the right to propose the investigative measures they deem relevant; the right to offer the remedies they consider appropriate to mitigate the risks that the transaction may raise; and the right to file an appeal to trigger judicial review before the TDLC in the event the transaction is prohibited by the FNE[409].

Third parties external to a notified transaction do not have a role as relevant as those who take part in the transaction. This is not only due to a structural logic of the system ——since the notifying parties are the primary source of information on the transaction and the market in which it will have effects—— but also has as an explanation the (excessive) rekevance prominence that third parties external to the concentration held under the system prior to Law No. 20,945. Lacking clear borders about roles and powers, the evaluation of many merger transactions by the TDLC in non-contentious proceedings as well as its judicial review before the Supreme Court was triggered by third parties that were alien to the merger.

This was not necessarily negative (because many mergers were subject to remedies, so that competition authorities indeed concluded that said transactionscould negatively affect competition). Rather, it was the lack of clarity and limits on the intervention of third parties, their role in the procedure and the lack of mandatory notification of certain transactions that ended up shaping the system that exists today, and the particular roles allocation and powers between the parties to a transaction and third parties.

In this regard, the evaluation of the merger control regime executed by the OECD prior to the current regime in Chile established as a basic pillar of an eventual new regime the

[409] Article 53 first to third paras. of DL 211: "*The notifying party may always request the National Economic Prosecutor to provide it with information regarding the course of the investigation, and shall have the right to be informed, before it issues any of the resolutions contemplated in articles 54 or 57, of the risks that the notified transaction may produce for free competition based on the background of the investigation.*
The notifying party shall always have the right to be heard and may express to the National Economic Prosecutor its opinion regarding the notified concentration, the background information provided by third parties to the investigation, the investigation itself and the information provided to it pursuant to the preceding paragraph. The notifying party may propose the investigative measures it deems pertinent.
Likewise, for the purposes of the provisions of Articles 54(b) and 57(b), the notifying party shall always have the right to offer the National Economic Prosecutor the measures it deems appropriate to mitigate the risks that the notified transaction may produce for free competition. The measures shall be offered in writing and shall not constitute, in any case, an acknowledgment of the existence of the risks that they are intended to mitigate" (free translation).

delimitation of the role of third parties in the procedure. The OECD considered that a merger regime should prevent third parties from freely challenging mergers at any time, which required isolating the system from private interests that may jeopardize competitive transactions. This, considering that a solid merger control system is a public competition policy whose purpose is none other than the protection of the dynamics of the competitive process, consumer welfare and economic efficiency in general[410].

However, the DL 211 makes a relevant distinction and refers to the notion of 'interested third parties' in the concentration. Such notion includes suppliers, competitors, customers or consumers[411], who ——although not involved as a party of the notified concentration ——have an interest in its results and in the market in which it has effects.

The law also provides to the interested third parties with an active, albeit limited, role in the proceedings before the FNE. This role is essentially restricted to being a source of information throughout the development of the FNE's investigation, being an addressee of the FNE's powers to gather information in the framework of its investigations ——such as requests for information or summons for depositions[412]—— but also having the right to provide information to the proceedings, which may even lead to a well-founded opposition to the transaction[413].

The relevance of involving third parties in the merger regime is reflected in the publicity measures established by DL 211. For example, the FNE has the duty to publish the decision to initiate an investigation on its institutional website[414] and the obligation to keep a public file regarding investigations that have been extended to Phase II. It is during this phase of the investigation, in which the FNE carries out an in-depth analysis of the effects of the transaction on competition and the markets concerned, that the law expressly contemplates the active intervention of third parties.

Specifically, the FNE has to communicate the issuance of the decision to extend the investigation to Phase II to:

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410 The OECD's evaluation of the merger regime prior to the Title IV Special Procedure established as a basic pillar of an eventual new regime the delimitation of the role of third parties in the procedure. Thus, "*[t]he current procedures in Chile leave room for opportunistic actions by third parties. Under a system of effective ex ante control, only the Parties should be empowered to initiate a merger analysis process through a notification or the authority through its ex officio power. The rights of third parties should be limited to expressing their views on a transaction under analysis, and to inform the authority of any notifiable concentration transaction that was not notified*." OECD (2014), OECD Report, pp. 110 and 57.

411 Article 55, para. 2 of DL 211.

412 Article 39 letters h) and j) of DL 211, as expressly referred to in Article 52.

413 The FNE may also inform interested third parties of the measures offered by the notifying parties in order to determine whether they are responsible for resolving the risks to competition arising from the concentration (article 55, final para. of DL 211).

414 Available at: https://www.fne.gob.cl/fusiones/buscador/ (last accessed 6 September 2024) and at: https://www.fne.gob.cl/comunicaciones/noticias/ (last accessed 6 September 2024).

> [...] the authorities directly concerned and the economic agents that may have an interest in the transaction. Those who receive such communication, as well as any third party interested in the concentration, including suppliers, competitors, clients or consumers, may provide background information to the investigation within twenty days following the publication [...] (free translation).

Likewise, the FNE may inform third parties of the proposed remedies offered by the parties in order to receive their feedback regarding the remedies' ability to address the concerns the transaction may raise and that could impact such parties (or to perform a market test of the remedies).

Indeed, the involvement of third parties in the due design of the remedies offered by the notifying parties ——with respect to their effectiveness, but also regarding their proportionality in relation to the concerns that the transaction entails—— has been a key element in the decision-making practice of the FNE in transactions that required modifications in order to be authorized. The above, especially in transactions in which the concerns required to be mitigated through remedies that directly affected third parties, such as divestments[415] or access to essential inputs[416].

Third parties can also play (and have played) an active role in reporting merger transactions that were not notified to the FNE by the parties involved, which can trigger the exercise of the FNE's power to initiate investigations into transactions that have already been implemented, up to one year after they have been closed[417].

It is quite illustrative that many of the cases in which the FNE has exercised the power to investigate mergers ex post, that have already been implemented, resulted from a third party's complaint to the FNE, warning of a transaction that may have been anticompetitive[418]. This shows the relevance of private enforcement of competition law and the role of third parties in monitoring compliance within the preventive merger control regime.

For example, a third-party complaint gave rise to the investigation initiated by the FNE against Navimag, an operator in the local maritime transport market, for having monopolized a maritime route to the south of Chile through the acquisition of the only cargo vessel that

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[415] In *Oxxo/OKM*, the parties offered a divestiture of assets (consisting of a package of 16 stores) and tangible and intangible assets for its proper transaction, to a buyer that was to be considered as suitable by the FNE, which corresponded to the initial buyer solution according to Scenario II of the FNE Remedies Guide. The attractiveness of the package for third parties and the suitability of such buyer was evaluated by the FNE in the framework of the procedure.

[416] In *Fiat/Peugeot*, a mitigation measure was established in favor of a third party, Toyota (due to the *joint venture* between Peugeot and Toyota for the development, manufacture and supply of some compact light commercial vehicles, precisely the model in which the parties would concentrate a relevant share of the market in Chile. The remedy consisted of Peugeot's offering an annual capacity of Toyota light vans exclusively for Chile to Toyota, if the latter so requested. This lowered the barriers to entry to introduce such models in Chile, from a third party competing with the parties in other global markets, but not in Chile.

[417] DL 211, article 48, para. 9.

[418] FNE, *Bresler/Carozzi*.

competed on that route. This investigation, after three years, resulted in the filing of an injunction before the TDLC, in which the FNE accused Navimag that, as a result of the acquisition, it was left as the only operator on the route, raised the rates to the level prior to the period in competition with the target and reduced the supply of maritime transport services for roll-on/roll-off cargo on the route[419].

Similarly, the FNE investigated Carozzi's acquisition of Unilever's ice cream business, which operated the Bresler and Melevi brands, following a complaint from a third party who warned the FNE that the deal should have been notified before being implemented, arguing that the acquisition implied conglomerate concerns[420].

However, while the DL 211 contemplates the participation of third parties, it also expressly excludes their intervention. Indeed, the fourth paragraph of Article 48 of DL 211 states that "[t]*hird parties that have not taken part in the concentration may not carry out the notification*" (free translation).

Viability of administrative appeals

The law contemplates a special challenge regime exclusively attributed to the notifying parties, which applies only in the event the FNE prohibits a concentration. Indeed, the regulation expressly states that:

> against the decision of the National Economic Prosecutor prohibiting a transaction, the notifying party may file a special review appeal (*recurso de revision especial*) before the Competition Tribunal within ten days of notification of the decision, which must be substantiated[421] (free translation).

This special review appeal (*recurso de revisión especial*) is heard by the TDLC and triggers judicial review of the FNE's prohibition decision. Interestingly, the way in which the procedure was designed implies that the participation of third parties in the administrative procedure before the FNE ——by way of providing background information to the investigation—— is the element that triggers the right to intervene during judicial review, in the public hearing before the TDLC regarding the special review appeal.

However, third parties are barred from challenging the decisions issued by the TDLC under the special review appeal (*recurso de revisión especial*), since the appeal against the

[419] Although such action culminated in a settlement agreement with a fine, with its filing the FNE declared the relevance of the use of the power to investigate transactions that are not notified, but may result in an anticompetitive effect, and that "[...] *The FNE has the power to investigate anticompetitive illicit transactions derived from concentrations even when those involved in them do not exceed the sales thresholds that oblige them to notify"*. FNE, press release, 22 November 2021, available at https://www.fne.gob.cl/fne-presento-requerimiento-contra-navimag-por-monopolizar-ruta-maritima-entre-puerto-montt-y-chacabuco-comprando-embarcacion-de-su-unico-competidor/ (last accessed 9 September 2024).

[420] FNE, *Bresler/Carozzi*.

[421] DL 211, article 57.

TDLC's ruling on the FNE's prohibition decision can only be the subject of a complaint appeal before the Supreme Court, and can only be exercised by the notifying parties[422].

In designing the regime, it was expressly decided not to subject all merger control decisions of the FNE to challenge by third parties ——which would make it impossible to provide predictability in terms of timing for completion of the transaction after the administrative authorization——. Indeed, the FNE has pointed out that the regime seeks to prevent unnecessary impacts on the development of lawful economic activities in Chile[423] as a result of the intervention. This, precisely considering that the main purpose is to speed up the decisions and to avoid that the implementation of a transaction cleared may, in the end, be left to the discretion of third parties not involved in the transaction. This would precisely go against the legal certainty sought by the creation of the regime.

However, there is one example in which an administrative appeal was filed seeking the FNE's reconsideration of the decision to clear a concentration[424]. In this case, the FNE stated that, from an administrative law perspective, such an appeal regime is incompatible with the merger control regime and its special procedure nature[425].

In essence, the FNE's opinion in that case was that general administrative appeals by a third party, provided for in Law No. 19,880 of General Bases of Administrative Procedures (*Ley N°19.880 de Bases Generales de los Procedimientos Administrativos*) ("**LBPA**"), do not apply against a decision clearing a concentration. The FNE based this conclusion on the special nature of the merger control regime, which has its own instances of appeal ——the special review remedy (*recurso de revisión especialt*) in cases of prohibition of mergers, which is heard by the TDLC—— and the need for speed in the decisions. Both factors are incompatible with establishing rights of appeal in favor of third parties outside the notified transaction.

In addition, the FNE rejected the admissibility of an appeal for reconsideration (*recurso de reposición*) based on administrative case-law of the Office of the Comptroller General of the Republic, which affirms the need to reconcile the special procedure with the general rules established by the LBPA, and that the general procedural rules will be applicable to special

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422 DL 211, article 57, *in fine*.

423 FNE, Decision of 28 May 2021 rejecting an administrative appeal for reconsideration, RoI FNE F255-2021, para. 31.

424 Appeal for reconsideration as provided for in Article 59 of Law No. 19,880 of the Bases of Administrative Procedures.

425 See: FNE, Decision of 28 May 2021 rejecting the administrative appeal for reconsideration, RoI FNE F255-2021. Specifically, the FNE argued that the supplementary application of the ordinary appeal of the LBPA was not reconcilable with the special procedure provided for in Title IV of DL 211, "*contrary to the nature and principles underlying the merger control regime and hindering the fulfillment of its purpose"*.

procedures as long as they do not hinder the normal functioning of the stages or mechanisms[426].

In addition, the FNE pointed out that when the merger regime was introduced in Chile, the recommendations made by the OECD in relation to the previoussystem were considered. Part of these recommendations had to do with the fact that the unregulated intervention of third parties could undermine the need to maintain an effective control system for a large number of mergers that, not being anticompetitive, should equally be subject to a mandatory control regime[427].

However, with respect to the applicability of administrative appeals, it should be noted that although the FNE has rejected the possibility of hearing general appeals for reconsideration (*recursos de reposición*) exercised by a third party (which seek to have the agency reconsider the substantive decision regarding a transaction), the agency has recognized that the notifying parties always have the right to request clarifications and rectifications to a decision[428].

The Chilean regime's approach to administrative appeals and the participation of third parties has some similarities and differences with international practice. For example, in the European Union, as in Chile, there are no administrative appeals in the administrative notification procedure. However, third parties do have the possibility to file a direct appeal before the General Court of the European Union to revoke an administrative decision.

It is also interesting to note the contrast between the Chilean and Peruvian regimes, since in Peru both prohibition decisions and authorization decisions subject to conditions may be appealed before the Court of INDECOPI. In Argentina, on the other hand, the applicable criterion is that notified and authorized concentrations cannot be subsequently challenged in administrative appeals on the basis of information and documentation verified by the

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[426] FNE, resolution of 28 May 2021 that rejects an administrative appeal for reconsideration, Rol F255-2021, para. 18, which states: "*it will proceed insofar as it is reconcilable with the nature of the respective special procedure, since its objective is to solve the gaps that it presents, without affecting or hindering the normal development of the stages or mechanisms that such procedure contemplates for the fulfillment of the particular purpose assigned by law*" (free translation).

[427] OECD (2014), OECD Report, p. 86 ("*Mergers can be exposed to third parties' opportunistic action in Chile, since article 18 (2) of the Competition Act has been construed by the TDLC as allowing third parties with a legitimate interest to lodge a consultation procedure before the TDLC. However, a private legitimate interest is not the general interest, nor is it aimed at the preservation of competition. In addition, it grants third parties the power to suspend a merger project at their sole discretion, since a consultation ex ante is suspensory no matter who lodges the procedure. Third parties admitted to the TDLC procedure are also granted the right to challenge a TDLC decision (resolution or ruling before the Supreme Court, which can further delay the review process upon their own will*"), and p. 94 ("*Chile's current procedures leave room for third parties' opportunistic actions. Under an effective ex ante merger control system, only the Parties should be empowered to start the merger review process with a notification or the enforcer with ex officio powers. Third parties' rights should be limited to expressing their views on a merger under review and to informing the enforcer of any un-notified and reportable merger* ").

[428] Pursuant to the right enshrined in Article 62 of the LBPA.

Court. The only way to challenge them is if it is evidenced that the decision was based on false or incomplete information provided by the notifying party[429].

In Brazil, third parties may also challenge Phase I decisions before the Administrative Court of Economic Defense (*Tribunal Administrativo de Defensa Económica*), which suspends the implementation of the transaction. However, such appeal cannot be submitted by any third party, but only by those interested in the results of the transaction[430]. Likewise, in Colombia it is possible for a third party to appeal in reconsideration the decisions of the Superintendent of Industry and Commerce to object, condition or clear an integration.

This shows that in Chile the participation of third parties ——although it can be actively exercised by collaborating with the FNE in the framework of the investigation carried out—— lacks direct actions once a clearance or prohibition decision is issued.

However, third parties have somehow found a key place in the procedure, exercising a relevant role as private enforcers, through complaints of non-notified concentrations, which have ended up in several competition actions.

[429] Article 15 of the Argentinian Law on the Defense of Competition (*Ley de Defensa de la Competencia*).
[430] Article 65 of Law No. 12,529.

(iii) When is there a 'significant modification' of the background information provided in a notification?

The facts, acts or agreements that constitute a concentration may naturally change during the course of a merger proceeding, according to the flexible nature of the business they imply. DL 211 contemplates the possibility that, in the course of the notification procedure, the information on the concentration that was notified may be, in any way, modified. In effect, the law provides:

> The parties notifying the transaction shall inform the FNE about the facts, acts or agreements that modify in any way the background, estimates, projections or conclusions that they have provided, as soon as such facts, acts or agreements are acknowledged. In the event that the modification communicated by the notifying parties to the FNE is significant, the FNE shall issue a resolution declaring the above, as from which the terms of the proceeding shall restart as if it were a new notification[431] (free translation).

What is relevant is that, although the law recognizes that there may be changes in the background information provided ——which includes both the concentration itself that is notified and the information that supports the notification——, it is the FNE who qualifies, by means of a substantiated resolution, whether such modification is 'significant'.

Such qualification has a relevant procedural effect, since, once such resolution is issued, the terms of the procedure are counted as if it were a new notification. In other words, if a modification is classified as significant in the framework of a Phase II investigation, the FNE can backtrack the investigation and restart the investigation term, which has a significant impact on the time periods involved in a transaction.

The logic behind this rule is based on the very nature of the regime. If the notifying parties are the primary source of the information by virtue of which the impact of a transaction on competition is assessed, and the FNE's scrutiny is focused on comparing the scenario with the transaction with the counterfactual, the notification somehow provides a photograph of the transaction' and of the markets it affects.

The law places on the parties the burden to provide the FNE with any background information they acknowledge and that may significantly alter this photograph, since an erroneous or incomplete representation of the facts or projections will most likely distort the FNE's analysis of the impact of the transaction on competition.

According to the FNE's Competition Guide, in the event that a concentration, which has already been notified, undergoes substantial modifications, the assessment by the FNE ——already carried out or in progress——, could be affected. In particular, the Guide refers

[431] Article 48, para. 5, DL 211.

to alterations related to the type of concentration[432], its duration and/or its geographic nexus[433]. However, while there is no general criterion as to what the FNE considers a substantial modification, the criteria has been laid down in the decisions in which a specific modification has been qualified as significant, as discussed *below*.

In this regard, a query that arises is whether under the aforementioned regulation the notifying parties are obliged to provide the FNE any modification of what was reported in the notification that may be significant ——considering that the Regulation not only requires information of the parties themselves, but of the market structure and even of third parties[434] —— or, if the obligation is limited to proprietary information of the notifying parties (including a broad view of the entities that take part in the transaction and their business groups, but limited to what may be under their control).

The obligation is stated in very broad terms, and aims for the notifying parties to update the FNE on relevant changes in the concentration and the market, so as to allow an analysis that is adequate to the competitive landscape. However ——based on what has been stated by the FNE both in the Competition Guide and in its significant modification resolutions——, the obligation to inform the FNE about background information that modifies what has been reported seems to have narrower edges, and to be proposed in terms of the notifying parties' own information rather than information from the market or third parties.

In any event, this reporting obligation to the FNE about information that substantially modifies the data provided in the notification is only an example of the notifying parties' general duty of cooperation vis-à-vis the FNE ——recognized as a pillar of merger control[435] and which has been expressly set forth in the Remedies Guide[436] and in the Pre-notification

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[432] Under the terms of article 47 of DL 211. In particular, articles 2 number 4 letter a) and 7 number 4 letter a) of the Regulation both require the notifying parties to indicate the structure of the concentration and the ownership and control transaction projected after the concentration, including the legal nature of the transaction, and to indicate which letter of article 47 of DL 211 corresponds to it, explaining why it is considered that it corresponds to such letter.

[433] FNE (2017), Competition Guide, p. 30.

[434] Article 6 of the Regulation requires, for example: (i) the pre- and post-transaction ownership and control structure of the entities involved in the transaction and certain related, financial statements, balance sheets, among other information of the notifying parties; (ii) the identification of relevant markets, including "*the size of the reportable relevant market or its best estimate, and the market shares of each of the economic agents taking part in the transaction*"; and (iii) the indication of the three main competitors of the economic agents taking part in the transaction.

[435] The History of Law No. 20,945 (*Historia de la Ley 20.945*) already provided for the "*establishment of an efficient, transparent, predictable and collaborative procedure for the analysis of concentrations*". Specifically, "*the proposal contemplates a procedure with clear rules that will allow the control of concentrations to develop smoothly, allowing the economic agents that participate in it to know in a timely manner the requirements of the authority and to collaborate in the clarification of the doubts that may exist about the existence of anticompetitive risks*" (free translation). See History of Law No. 20,945, p. 11.

[436] The FNE's Remedies Guide expressly states that the legislative design of the prior merger control system "*rests on the duty of the parties to act in good faith, with special celerity, in a coordinated manner among themselves and in collaboration with the FNE*" (free translation). This is because only parties are entitled to propose mitigation measures and the FNE must be convinced whether or not they are adequate to prevent the transaction's ability to substantially reduce competition. FNE (2017), Remedies Guide, para. 14.

Instruction[437]—— in return of the FNE's duty to cooperate within the proceeding with the merging parties[438], under which the regime is based.

Likewise, the FNE can always exercise its investigative powers and gather additional market information to clarify possible modifications to the situation reported in the notification, particularly regarding the entry of third-party competitors or structural changes in the market not related to the parties to the transaction.

Requirements for a modification to be significant

The Competition Guide addresses what is meant by 'substantial modifications' to a concentration transaction ——which should be understood to refer to the significant modifications established by law—— and distinguishes three scenarios depending on the time at which this modification occurs.

Firstly, such guidance states that for those modifications that take place prior to the notification of the transaction to the FNE, the filing must fully reflect the concentration transaction that is intended to be completed as of the date of such filing[439]. This provision is quite evident, since the assumption of the law aims to update the FNE of substantial changes in the information provided in the notification, so it is assumed that it also addresses any changes prior to the notification.

Secondly, in the event that the substantial modification occurs once the transaction has been notified and the investigation has been initiated by the FNE, but before there is a decision clearing the transaction, it is stated that such new information must be immediately reported to the FNE, which will evaluate whether to continue the analysis of the transaction within the same proceeding, or whether a new one must be initiated because it is considered a new concentration, thus restarting the investigation deadlines[440].

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[437] The collaborative nature of the system is also clearly illustrated in the pre-notification process. Indeed, in its Pre-Notification Instructions, the FNE seeks to generate "*a voluntary, informal, collaborative and confidential stage [...] aimed at resolving specific questions or doubts, both substantive and procedural, that can be addressed in a constructive manner between the FNE and the Parties*", creating a stage that allows the merger control system to be as expeditious and effective as possible. These principles are later reiterated in the instructions, expressly stating that "*the Pre-Notification is a collaborative stage, which seeks to ensure that consultations are carried out in the most efficient manner and are resolved in the shortest possible time, according to their complexit*y" FNE, Instruction on Pre-notification (*Instructivo de Prenotificaciones*), paras. 4, 5 and 10 (free translation).

[438] The TDLC has interpreted this principle as follows: "*the new merger control system, as explained below, **assumes that the Prosecutor's Office has an attitude of dialogue and contrast with the notifying parties during the proceedings before it**. In relation to the mitigation measures, this implies that the FNE, once it receives them, must initiate a dialogue process with those involved in the transaction so that, together, they identify those measures that are most in line with the identified risks*" (free translation; emphasis added). TDLC, Judgment N°166/2018, recital 138°.

[439] FNE (2017), Competition Guide, p. 30.

[440] Ibid.

Finally, the Competition Guide also explains that the modification can occur once the transaction has been cleared by the FNE, either an outright clearance or conditioned to remedies. In such case, it is established that the parties must inform such change to the FNE, who will analyze the modification and evaluate whether or not it can be considered the same transaction; whether or not the modification alters the compliance and implementation of the remedies that had been agreed (if any); and the need or not to start a new merger procedure[441].

In this regard, when assessing whether or not a modification is significant, the change in the structure of the concentration, its duration or geographic nexus, are considered particularly relevant elements to consider[442].

If the FNE considers that the modification is significant and that it implies a new transaction, which must be evaluated within a new procedure, the modified transaction should be notified again, as a different filing, in order for the FNE to evaluate its impact on competition.

Distinguishing between those modifications that qualify as significant and those that are not, has an impact on the legal certainty provided by the merger clearance resolution ——whether an outright clearance or conditioned to remedies—— issued by the FNE. In light of the provisions of Article 32° of DL 211, such resolution confers a 'benefit of immunity'[443] according to which there is no anticompetitive liability whatsoever to the extent that the acts or contracts (such as a concentration) are executed or entered into in accordance with the FNE's resolutions[444].

In this regard, the FNE has stated:

> That the decision issued by the FNE pursuant to Articles 54 or 57, as the case may be, refers to a singular and specific concentration, so that the subsequent implementation of a transaction's structure different from the one expressly authorized will not have the exemption from liability set forth in Article 32 of DL 211[445] (free translation).

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[441] Idem.

[442] Ibid., para. 116.

[443] Term used in: Montt Oyarzún, S. (2012) "Conditions imposed by the Tribunal de Defensa de la Libre Competencia in the framework of a concentration in Chilean law" (*Condiciones impuestas por el Tribunal de Defensa de la Libre Competencia en el marco de una operación de concentración en el derecho chileno*), *Anuario de Derecho Público UDP 1*, p. 466.

[444] DL 211, article 32: "*The acts or contracts executed or entered into in accordance with the decisions of the Court for the Defense of Free Competition, or in accordance with the resolutions of the National Economic Prosecutor's Office in the case of concentrations, shall not entail any liability in this matter, except in the event that, subsequently, and on the basis of new information, they are qualified as contrary to free competition by the same Court, and this as soon as the resolution that makes such qualification is notified or published, as the case may be...*" (free translation).

[445] FNE, Assignment of assets of Patio Comercial SpA to a fund managed by Larraín Vial S.A. Administradora General de Fondos, Rol FNE F181-2019 ("***Patio/Larraín Vial***"), recital 10.

Therefore, if the FNE concludes that the cleared transaction has undergone significant amendments ——concluding that it is a new transaction——, and this results in the implementation of a concentration that is different than the one expressly authorized, it will not be protected by the liability exemption set forth in Article 32 of DL 211[446-447].

The most significant case in Chile is *Patio/Larraín Vial*[448] in which the FNE considered that amending the way through which the parties ceased its independence ——from an acquisition of assets, as notified, to an acquisition of control or decisive influence, under which the transaction was closed—— and the change in the control structure of the resulting economic agent ——from the exclusive control of the assets to a hypothesis of joint control—— implied not only a significant change in the transaction, but also the implementation of a different transaction from the one cleared[449], which therefore, had to be again filed to the FNE[450].

In this sense, it was concluded that modifying the way in which the Parties will cease their independence, and the legal mechanism that serves as the structure for the acquisition, are essential elements to identify the transaction to be analyzed by the FNE, and impacts the analysis of the concerns the transaction may raise, The above since, in light of such changes, a different competition analysis may be required[451].

While in *Patio/Larraín Vial* the key element of the significant modification was the diverse control structure and the way the parties ceased its independence, it was less evident that a different competitive analysis was required ——the acquisition of assets provided in Article 47(b) can be understood as a specification of an acquisition of control or decisive influence set forth in letter b) of said provision——[452]. However, there are other scenarios in which the competition analysis does differ substantially, such as the hypothesis of control (sole versus joint) or the analysis of the impact on competition arising from the creation of a *joint venture*

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446 Article 32º DL 211.

447 FNE, Decision of 8 November 2019 in *Patio/Larraín Vial*, p. 3; Decision of 23 June 2020 in *Uber/Cornershop*, p. 3.

448 FNE, Patio/Larraín Vial.

449 FNE, Decision of 8 November 2019 in *Patio/Larraín Vial*, p. 3.

450 In particular, the originally cleared transaction contemplated that Patio Comercial SpA ("Patio") would transfer real estate assets intended for commercial rental to the companies of an investment fund called LV-Patio Renta Inmobiliario II (the "Fund"), managed by Larraín Vial Activos S.A. ("Larraín Vial"), in addition to entering into an agreement whereby the subsidiaries would hand over the management of the properties to a company controlled by Patio, Gestor de Rentas Inmobiliarias S.A., which in turn would acquire shares of the investment fund (less than 10%) without control rights. This would constitute a concentration transaction under Article 47 letter d) of DL 211, i.e., an acquisition of control of assets. However, once cleared, the parties decided that the Fund would not acquire the properties individually but would acquire decisive influence over the companies owning the assets, through the purchase of 65% of the capital of each of them, which would constitute a concentration under article 47 letter b) of DL 211.

451 Ibid, paras. 8 and 9.

452 FNE, Competition Guide, para. 96 ("*Indeed, letter d) of Article 47 makes it explicit that the acquisition of decisive influence over an economic agent, which gives rise to a concentration, may also take place through the acquisition of assets*" [free translation]).

(in which, for example, the impact on the constituent parties' competition dynamic is assessed).

In contrast, in the *Uber/Cornershop* case[453], the original structure of the transaction consisted in the acquisition by Uber of at least 51% of the capital stock in Cornershop's parent company, which would allow it to decisively influence Cornershop's management through which it would control its subsidiaries in Chile. Subsequently, and once the transaction was cleared, the parties informed the FNE of a change in the structure of the transaction, which would now consist of the acquisition by Uber of rights and interests for at least 51% that would give it decisive influence in a different company of its corporate group, which would therefore become the Chilean subsidiaries' controller.

The FNE considered, in that case, that although this new structure altered the identity of the target company, it did not modify the legal mechanism through which the Parties would cease their independence, its duration or the geographic links of the concentration with Chile. Consequently, the new structure under which the Parties would implement the transaction would not impact the competitive assessment made by the FNE. Likewise, there would not be a change in the nature of control or decisive influence exercised by Uber in Cornershop, but only a change in the company that would control the Chilean subsidiaries[454].

Therefore, the FNE concluded that such modification would not be a significant change, and if it were to be implemented as such, it would not imply a significant modification of the transaction that would alter the analysis carried out by the FNE when clearing the transaction[455].

In *Veolia/Suez*, the FNE also ruled on the edges and criteria to conclude the existence of a significant modification. Specifically, Veolia notified the sole control acquisition over Suez through a public offer of shares. Once the merger investigation started, Veolia reported several modifications regarding the structure of the transaction due to negotiations between the parties that took place after the notification. These included the creation of a new entity to which some of Suez's assets would be divested and which would subsequently be transferred to an acquiring consortium.

These modifications were reported to the FNE, which declared significant the modification of the information, estimates, projections or conclusions of the first notification submitted by

[453] FNE, *Uber/Cornershop*.
[454] FNE, Decision of 23 June 2020 in *Uber/Cornershop*, p. 3.
[455] Ibid., p. 4.

Veolia; and ordered the parties to make a new joint filing, under the ordinary notification procedure[456-457].

In light of the Chilean experience, it is illustrative that COFECE recently sanctioned the company Gebr. Knauf KG and two individuals for implementing a concentration under different terms from those initially authorized by the agency. Specifically, the modification consisted in the fact that the sanctioned company and individuals agreed a non-competition clause which was not originally informed in the notification forms filed to COFECE. Therefore, the existence, accessory nature and necessity of such clause was not analyzed by COFECE, making it impossible for the Commission to assess its effects on the market[458].

[456] Article 9, para. 2, letter d) of the Regulation on the Notification of a Concentration.

[457] This case exemplifies the effect of significant modifications while the FNE review is pending. Since the effect of such a declaration is to count the term of the proceeding as if it were a new notification, in *Veolia/Suez* the terms returned to zero, almost 4 months after the notification.

[458] COFECE, Press release of 19 April 2024, "Cofece fines company and two individuals for closing a transaction under terms different from those previously authorized" (*Cofece multa a empresa y dos personas por cerrar una operación en términos distintos a los previamente autorizados*), available at: https://www.cofece.mx/cofece-multa-a-empresa-y-dos-personas-por-cerrar-una-operacion-en-terminos-distintos-a-los-previamente-autorizados/ (last accessed 19 August 2024).

(iv) What is the intensity of judicial review of a prohibition decision?

Introduction

In competition law, judicial review has traditionally been understood as a mechanism to ensure the accountability of competition authorities to the law.

A relevant discussion when designing the preventive merger control regime in 2016 in Chile was the fact that, if decision-making powers were assigned to the FNE in merger matters ——granting the agency adjudicatory powers that were not natural to within the logic of a 'bifurcated agency model' in which the investigating agency resorts to the specialized court in search of sanction[459] ——, then which body, to what extent and under which assumptions the FNE's decisions would be reviewed at the jurisdictional level?

In light of the Chilean institutional design, the regime crystallized the FNE's administrative decision-making power, guaranteeing judicial review by the TDLC with "*broad powers to review and decide on merger matters through a review procedure"* (free translation), taking into account its nature as a specialized court and a reviewing venue of FNE decisions[460].

Thus, the judicial review of the FNE's decisions was embodied under a special regime, only triggered by the notifying parties, in which only when a concentration is prohibited, the notifying parties can file a special review appeal before the TDLC. This appeal is structured under the assumption that only those who have provided information to the FNE's investigation have the right to intervene in the public hearing, also restricting the possibility of third parties to challenge the decisions issued by the TDLC[461].

At first glance, it could be argued that the special institutional design of the preventive merger control system in Chile, which only provides for special administrative actions in the event that the FNE prohibits a transaction ——the only case in which a judicial review of the decision by the TDLC could be triggered—— would lack sufficient mechanisms for checks and balances. In other words, that there is no due *accountability*[462] exercised by judicial review of administrative decisions, as there would be no due counterbalance to the FNE's decisions to clear transactions[463].

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[459] Trebilcock, M. J. and Iacobucci, E. M. (2010), "Designing Competition Law Institutions: Values, Structure, and Mandate", *Loyola University of Chicago Law Journal* 41, n°455, p. 459.

[460] OECD (2014), OECD Report, p. 106.

[461] Articles 18 N°5 and 31 bis of DL 211.

[462] Scott, C. (2000), "Accountability in the Regulatory State", *Journal of Law and Society* 27 (1), p. 38-60 and Gerardin D. & Petit N. (2011), "Judicial review in European Union Competition Law: A quantitative and qualitative assessment", *Tilburg Law and Economics Center (TILEC), Law and Economics Discussion Paper* 2011-008.

[463] Intervention of the former Minister of the TDLC Mr. Radoslav Depolo before the Economy Committee of the Chamber of Deputies, contained in the Report of the Economy Committee of 24 September 2015. In particular, on that occasion it was stated: "[...] *the project as it is drafted, has certain decision points in which*

The institutional design was a public policy option to encourage that, if certain mergers should be suspended from being implemented pending its administrative review, such suspension should be brief and should not duly affect the implementation of lawful businesses. As indicated at the time, "[...] *the worst mistake is for the system to be* slow".[464] The speed of the decisions was a relevant parameter to avoid judicializing each decision of the FNE in merger control matters.

At the time, it was expressly decided not to submit all the FNE's merger control decisions to challenge by third parties ——which would impede foreseeing the time frame in which a transaction could be completed after administrative clearance——. It was considered that the fundamental purpose of merger control is not only the speed of decision-making, but also the independence of the FNE and the overall system, avoiding that FNE decisions and the implementation of cleared transaction could eventually be left to the discretion of third parties unrelated to the transaction. This would be at odds with the legal certainty that the very creation of the system was intended to provide.

From a regulatory theory perspective, judicial review operates in the framework of a 'weak balance' between ensuring regulator's decisions are subject to an scrutiny of legality and rationality ——constraining administrative action so as to avoid that its decisions may depart from its public policy purposes in favor of special interests—— and conferring some degree of discretion to the technical body, in order to achieve its purposes, such as the FNE being able to develop its competition policy, which is the primary reason for its delegated powers.[465] Safeguarding the technical autonomy of the FNE is an even more relevant criterion than the speed of its decision making.

However, the Chilean system does not coexist under a somehow 'permanent tension' between, on the one hand, the need for fast and independent decision-making by the FNE and, on the other hand, the lack of judicial review of merger clearance decisions.

Indeed, the FNE has pointed out that the regime seeks to prevent that its intervention may have an unnecessary impact on the development of lawful economic activities in Chile[466]. And the way that has been found to balance the lack of judicial review of merger administrative decisions is, precisely, the predictability of its decisions, aiming to provide

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the National Economic Prosecutor's Office has no counterweights, as occurs for example in concentrations, when the FNE clears them or does so with conditions, there is no balance or check of that administrative action; no remedies are enshrined" (free translation).

[464] Intervention of the former National Economic Prosecutor, Mr. Felipe Irarrázabal, before the Economy Committee of the Chamber of Deputies, contained in the Report of the Economy Committee of 24 September 2015.

[465] Black J., Muchlinski P., Walker P. (eds.) (1998), *Commercial Regulation and Judicial Review*, Oxford: Hart Publishing.

[466] FNE, Decision of 28 May 2021 rejecting an administrative appeal for reconsideration, Rol FNE F255-2021, para. 31.

legal certainty ——not only about the deadlines involved, but also about consistency in the application of review standards—— as well as to ensure the due protection of the fundamental rights of the different economic agents operating in the regime.

Boundaries of judicial review in merger cases

The TDLC faced its first judicial review case in a merger between sweet *snacks* producers, *Ideal/Nutrabien*. A key issue that arose was the scope and intensity of judicial review, and whether a reviewing court should be 'deferential' to the decisions adopted by the competition agency, or instead carry out an in-depth scrutiny of the merits and background considered in the administrative decision. In other words, the discussion focused on whether the role of the TDLC when reviewing merger cases should be limited to a 'marginal' review[467].

As to the intensity with which judicial review should be exerted in merger cases, some decisions issued at the time reflected a lack of unanimity among former TDLC's judges about the scope of judicial scrutiny under the new merger control regime. Specifically, there was divergence as to whether the FNE's prohibition should be merely "reviewed" ——under a merely formal approach——, or whether the TDLC should itself decide whether the transaction substantially lessens competition ——under an appeal-type approach, with review of facts and law——.

Regarding the scope of the court's work, in *Ideal/Nutrabien*, the TDLC held that, when a FNE's merger prohibition decision is challenged, the TDLC is entitled to conduct an in-depth review of the entire decision, including the criteria supporting the administrative decision, issuing a *de novo* ruling and not merely reviewing the legality or reasonableness of the decision.

The TDLC's decision, by majority vote, was to overturn the FNE's prohibition and clear the transaction conditioned to the remedies offered by the notifying parties before the FNE. This ruling provided guidelines as to the scope of the TDLC's review in the context of this special review action:

> In [the] scope of review covered by this appeal, this Court scrutinizes both the merits and the validity of the FNE's resolutions prohibiting a concentration [...] [which is] consistent with the provisions of Article 31 bis of DL 211, which provides that "in order to issue a ruling, the Court may rely not only on the background information contained in the FNE's investigation file, but may also use the information it gathers, either ex officio or at the request of a party[468] (free translation).

[467] Jaeger, M. (2011), "The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?", *Journal of European Competition Law & Practice* 296.

[468] TDLC, Judgment N°166/2018, recital 6°.

It does not make sense, then, that the law confers the power to request additional background information to the TDLC if its review is only limited to aspects of due process and legality of the decision.

Interestingly, the TDLC's minority vote held that the scrutiny of a primary decision must be essentially 'deferential' to the organ that issued it and only focus on evaluating the legality and reasonableness of the decision[469] and that "*in this case we are in the presence of a scrutiny and not a de novo decision. In other words, the analysis must be aimed at establishing the correctness of the decision adopted, but without replacing it*"[470-471] (free translation).

It is worth noting that, on this issue, the TDLC provided clarity, to a large extent, based on the scope of judicial review held in the European Commission, and mostly considering the relevance of the judicial review body being a specialized collegiate body. The TDLC expressly endorsed the standard of full review of the administrative decision established by the Court of Justice of the European Union, and discarded the standard of administrative deference in merger control, stating that:

> […] "*Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*" (C-12/03 P Commission v Tetra Laval BV, [2005] I-987, §39 [...]). For the particular case before this Tribunal, this standard of review, referred to in comparative case law with respect to economic information, can be considered even more reasonable in the case of a specialized collegiate body[472] (free translation).

Meanwhile, in *Nexus/Colmena*, the TDLC took this discussion for granted, and only limited itself to indicate that as it was resolved by the TDLC in *Ideal/Nutrabien*, the scope of the special review appeal involves an evaluation of both the merits and the grounds of the FNE's resolutions prohibiting a concentration, and that in light of that standard ——which involves an in-depth examination of the concentration and its effects—— the TDLC can review the competition analysis carried out by the FNE in the prohibition decision[473].

It is relevant that the Supreme Court evaluated the TDLC's ruling through a complaint appeal filed by Nexus against the TDLC's judges. In its decision, the Supreme Court upheld this criterion, expressly stating that the scope of the appeal for review entails an in-depth scrutiny

[469] TDLC, Judgment N°166/2018, dissenting vote of Ministers Eduardo Saavedra and Javier Tapia.
[470] TDLC, Judgment N°166/2018, issued in case *Ideal/Nutrabien*.
[471] TDLC, Judgment N°166/2018, minority vote, p. 50.
[472] TDLC, Judgment N°166/2018, recital 9.
[473] TDLC, Judgment N°182/2022, considering 7°.

of the grounds of the FNE's resolutions, in light of an analysis of the factual, legal and economic assumptions that underlie the appealed resolution.

What is relevant, meanwhile, is that the Court noted that such scrutiny ——which falls within the scope of the special review action—— is precisely the review to be made by the Supreme Court ——in the context of a formal complaint——[474].

The intensity under which judicial review of agency actions in merger matters should be exercised has recently been discussed at the European Commission level. In the decision prohibiting the proposed merger between telecommunications operators Three and O2 in 2016 (which involved a move from three operators to two) the Commission held that the combination of Three and O2 would have created a new leader in the UK mobile market. Through the elimination of a major competitor, with few remaining mobile operators able to challenge the merged entity, the merger would have resulted in a substantial lessening in competition.

Although the General Court annulled this decision at first instance[475], the CJEU overturned the General Court's initial ruling by concluding that the standard of proof set at first instance was not adequate, but disproportionate and excessively high, since this standard is based on a 'balance of probabilities'. That is, to prohibit a transaction:

> [...] it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition[476].

Interestingly, according to the CJEU, given the prospective nature of the Commission's assessment in *ex ante* merger control, a higher standard of proof[477] would not be compatible, as this could reduce the effectiveness of the mechanism.

The judgment is also illustrative with respect to the weighing of economic evidence. Thus, although the CJEU recalls that the Commission has a margin of discretion in economic

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474 "[...] *such analysis should be made by this Court, under appeal and in second instance, in order to determine whether the decision of the FNE not to authorize the merger between the Isapres, as corroborated by the appealed judges, was in accordance with the aforementioned legal regulations*" (free translation). Supreme Court, judgment of 27 March 2023 in Rol N°91.429, recital 12.

475 Whereas the Commission failed to prove each and every one of its theories of harm under the "strong likelihood" legal standard (that the transaction would result in a substantial lessening of competition) that the General Court found applicable, since the parties to the transaction were not "particularly" close competitors and the efficiencies were not duly considered by the Commission in its quantitative assessment. This ruling was interpreted, at the time, as a relevant increase in the Commission's evidentiary standard for prohibiting mergers. Judgment of the General Court of the European Union of 28 May 2020, Case T-399/16 *CK Telecoms v. Commission*.

476 Judgment of the Court of Justice of the European Union of 13 July 2023, Case C-376/20 P, *Commission v. CK Telecoms*, ECLI:EU:C:2023:561, para. 87.

477 Ibid., para. 86.

matters which justifies that a judicial review in merger cases is limited to "*ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment*"[478], this does not preclude control of the interpretation of data of an economic nature and must verify, in particular:

> [...] whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it[479].

It should be noted that in certain jurisdictions the intensity of judicial review of merger transactions is more limited. Thus, for example, the CMA's decisions on concentrations, as well as decisions accepting or eliminating remedies, are only subject to review by the Competition Appeals Tribunal ("**CAT**") on three grounds: *illegality, irrationality* and *procedural impropriety*[480]*.* This makes the judicial instance a rather marginal or cassation-type judicial review body, which reviews without issuing a *de novo* decision.

[478] Ibid., para. 124.

[479] Ibid., para. 125. This ruling confirms the landmark judgment of the Court of Justice of the European Union in Case C-12/03 P, *Commission v. Tetra Laval*, which had already stated in 2005 that " *Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect*" (para. 39).

[480] Lord Diplock in Council of Civil Service Unions and Others (Appellants) and Minister for the Civil Service (Respondent), [1985] AC 374 [House Of Lords], available at: www.bailii.org/uk/cases/UKHL/1984/9.html (last accessed 16 August 2024): "*one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety"*. See also OECD (2019), *The standard of review by courts in competition cases - Background Note*, 4 June 2019, DAF/COMP/WP3(2019)1, para. 40, available at: https://one.oecd.org/document/DAF/COMP/WP3(2019)1/en/pdf (last accessed 16 August 2024).

(i) How can remedies to which a transaction was conditioned be lifted?

Introduction

DL 211 does not expressly contemplate a rule that addresses the possibility of modification or elimination of remedies to which the clearance of a concentration has been subject, after the decision of the FNE.

However, Article 32 of DL 211 contemplates an open rule, applicable to all types of acts and conducts, which, as explained *above*, provides a sort of immunity with respect to those acts or contracts that are executed in accordance with a decision of the TDLC or the FNE. The above, with the exception that there could only be liability if subsequently, on the basis of 'new information', these acts or contracts were qualified as anticompetitive by the TDLC, through a new ruling.

This rule has been applied in relation to the possibility of eliminating or modifying remedies ——both before the FNE and the TDLC—— based on the existence of new information, i.e., when there has been a change in legal and economic circumstances that render the measures ineffective.

However, and following the comparative trend in this area, the usual practice under the merger control regime is that the possibility of a change of circumstances that makes it plausible to review the modification or lifting of remedies is expressly regulated as a review clause within the same package of remedies offered by the notifying parties to the FNE.

For example, in *OnNet/Entel* a review clause was expressly contemplated, stating:

> The FNE may, upon request of both Parties, evaluate whether to waive, modify or amend the Remedies [...] to do so, it must be demonstrated that there are sufficient grounds to modify or waive the Remedies, **proving the existence of a change of circumstances that make them unnecessary**[481] (free translation).

In *Fiat/Peugeot*, meanwhile, there is a similar provision:

> Upon a reasoned request from the Parties, the FNE will evaluate whether to waive, modify or amend one or more of the Undertakings. The FNE may also decide that the Undertakings shall remain unaltered. In their request, the Parties must prove that **significant** and permanent **material changes** have occurred in the market structure or in the competitive dynamics of the market, rendering one

[481] FNE, *OnNet/Entel*, Annex N°1.

> or more of the Undertakings inoperative or irrelevant for the purposes originally intended by their imposition[482] (free translation).

In this regard, in the *Bayer/Monsanto* conditional clearance decision, the FNE indicated that:

> [...] the FNE may reduce the deadlines [...] in response to a definitively grounded request [...]. The request must demonstrate that there is sufficient cause for this, **proving the existence of a significant and permanent change in the structure of the market**[483] (free translation).

In one of the first cases reviewed by the FNE under the new regime, *Atlantia/Abertis,* in the toll road market, it is interesting that the remedies contain, although not a review clause, resolving conditions establishing the remedy will be deemed ineffective for "[...] ***another reason that renders the measure unnecessary****, subject to clearance by the FNE, such as the entry of a relevant competitor, a technological or* regulatory *change*"[484] (free translation).

Consequently, the procedural standard applied for the modification or elimination of remedies in force, with respect to concentrations cleared under the new regime, is that the first step is to comply with the provisions of the remedies themselves, regarding their review clauses. Alternatively, the occurrence of a change of circumstances may be interpreted as making their validity unnecessary, for which the respective lifting or modification must be requested to the FNE.

Criteria for analyzing a change in circumstances

Both the TDLC and the FNE have set the boundaries of when there is 'new information' that allows modifying or lifting a remedy. In this regard, the request for review and lifting of remedies reached between Tianqi Lithium Corporation ("**Tianqi**") and the FNE, cleared by the TDLC in an out-of-court settlement in 2018 is illustrative[485]. Despite the transaction that motivated such remedies was the acquisition of a non-controlling minority stake in a competitor, Sociedad Química y Minera de Chile S.A. ("**SQM**") ——which was not a concentration—— the FNE's analysis and the underlying criteria are also applicable for the lifting or modification of remedies in merger cases due to change of circumstances.

In its request, Tianqi invoked the occurrence of several changes in market conditions ——improvement in competition conditions, decrease in the participation of competing companies, reduction of the degree of concentration of the market, overcoming of entry

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[482] FNE, *Fiat/Peugeot*, Annex B.
[483] FNE, Notification Clearance Report, Merger transaction between Bayer AG and Monsanto Company, Rol FNE F97-2017, Annex.
[484] FNE, Clearance Report, subject to compliance with mitigation measures, Merger between Atlantia SpA and Abertis Infraestructuras S.A., Rol FNE F87-2017 ("***Atlantia/Albertis***"), Anexo N°1.
[485] TDLC, Extrajudicial Agreement between FNE and Tianqi Lithium Corporation, Rol AE N°16-2018.

barriers and possible entry of new competitors, as well as low probability of coordinated effects——. It also pointed out that the lifting of the measures would bring about various efficiencies.

When faced with a request for modification or lifting of mitigation measures, the analysis carried out by the FNE is to determine whether the factual conditions under which the remedies were agreed have changed significantly and permanently, in a way that they are no longer justified according to the purpose for which they were imposed in the first place. Therefore, their modification or lifting is necessary based on new information, which constitutes a substantial and permanent change of circumstances with respect to those that were taken into account to impose them.

For the configuration of such new background, the FNE indicated that any alteration of the factual circumstances is not sufficient, but that the measures may be subject to review (modification or lifting) only when the factual, economic, or legal assumptions on which they were based change substantially or significantly[486].

Tianqi's request was ultimately rejected by the FNE[487], but it is interesting to review the pragmatic view of the FNE, which stated that its role ——when reviewing the plausibility of lifting or modifying renedies—— is limited to examine whether the circumstances that resulted in the competitive concerns have changed substantially and permanently, so as to justify changing the remedies in accordance with the purpose for which they were agreed. The FNE considers that it is not appropriate to reopen substantive discussions on conclusions that were adopted at the time the transaction was conditionally authorized.

The TDLC decisions reviewing remedies imposed prior to the reform that introduces merger control in Chile delve into the fact that the key element in the analysis of chang in circumstances is to determine the purpose of the remedy[488]. Indeed, the conditions imposed in non-contentious proceedings must be interpreted considering their purpose and motivation, in order for the proposed measure to be effective. In this regard, the TDLC established that

> Every remedy is composed not only of an object -this is, a mandatory conduct- but also of an objective […] Therefore, in order to determine the meaning of the measures imposed by this Court [...] one must not only consider the literal meaning of the words (formal or semantic perspective), but also the economic aim

[486] See TDLC, Judgments N°117/2011, recital 21°; N°53/2018, recital 123; N°57/2019, recitals 50 *et seq*. See also, TDLC, Judgments N°77/2023, recital 7; N°147/2015, recital 10°. In the same sense, Judgments N°64/2021 and N°70/2022, which accepted the request to lift the conditions imposed in the broadcasting and supermarket markets, respectively.

[487] FNE, Exempt Decision No. 95 of 2 March 2023.

[488] TDLC, Judgment Nº70/2022, recital 7.

> or the purpose of such measure with respect to the fact, act or convention under review[489] (free translation).

This standard is similar to the one applied in other jurisdictions, such as, for example, the European Commission, where there have been several cases involving the modification or lifting of mitigation measures adopted as a condition for the clearance of a concentration. In different decisions[490], the Commission has conditioned the lifting or modification of the remedies imposed in the framework of a concentration upon the concurrence of the following circumstances: (i) substantial modification of the market circumstances that led to the adoption of the decision, or a part thereof; (ii) exceptionality of the review or waiver; (iii) laps of a relatively long period of time since the adoption of the decision; (iv) lasting or permanent nature of the change of circumstances that motivates the review or waiver of the remedy; and (v) proportionality of the review or waiver from the perspective of general interest.

Among them, the main factor is the existence of a relevant and permanent change in the affected market, which is consistent with the criterion followed in Chile.

For example, in *Newscorp/Telepiu*, the European Commission precisely assessed the existence of changes in market circumstances arising from the significant development and growth of digital terrestrial television (DTT) in Italy and the launch of a tender that created an opportunity for growth in the sector. Both aspects, together with the entry of new players and technological changes, were considered by the Commission to agree on the lifting of the remedies[491].

On the other hand, the CNMC of Spain has also assessed on different occasions the possibility of modifying or lifting the remedies approved in the framework of a concentration, pointing out that the standard for lifting is high, requiring a truly substantial modification of the conditions of competition that led to the adoption of the decision, such that

> the substantial modification must be such that under the new market conditions a significant deterioration of the conditions of effective competition does not result from the comparison of both scenarios. That is, not any substantial modification of the conditions of competition in the market is sufficient. It must affect the circumstances that led to the adoption of the decision[492] (free translation).

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[489] TDLC, Judgment N°147/2015, recital 10.

[490] European Commission, Cases M.2876 - *Newscorp/Telepiu* and M.950 - *Hoffmann-La Roche/Boehringer Mennheim.*

[491] In this regard, the Commission held that " since the adoption of the Decision, and due to the effects of the Commitments, new players (Mediaset, Telecom Italia/Dahlia) have entered into the Italian Pay TV market through DTT [...]" and that " The DTT platform has already become the first platform for digital TV consumption in Italy and the number of viewers that are concerned by the digital switch-over is increasing". See European Commission, Decision of 20 July 2010 in Case M. 2876 - *Newscorp/ Telepiu*, para. 35.

[492] CNMC, Decision on the enforcement of the Decision of 7 July 2010, Exp. VIG-003-08, *Gas Natural/Unión Fenosa*, p. 6.

Likewise, the Spanish authority itself recognizes the exceptional nature of this possibility of review. This is because, to the extent that the merger control analysis is prospective in nature, both the parties and the authority take into account the foreseeable evolution of the markets, so that, although there may be certain divergences with what is foreseen:

> [...] it is difficult for really substantial unforeseen variations in the conditions of competition to occur, especially if we take into account a relatively short period of time. The contrary would mean giving rise to a sort of continuous review procedure of the authorizations and, in general, of the obligations contained in the decisions of the administrative bodies, contrary to the administrative efficiency principle and the legal certainty of the administrated parties[493] (free translation).

According to this decision, it is interesting to note that the authority considers that the lifting of remedies does not proceed merely in the event of substantial changes in the conditions of competition, since it is always subject to the principle of proportionality. Therefore, the lifting of remedies may not be authorized despite a change in market circumstances, when lifting the remedies would be disproportionate, from the perspective of the general interest. And consistent with other jurisdictions, the burden of proof regarding the elements of exceptionality and substantial changes in the factual situation is on the party requesting the lifting or modification of the measures[494].

On the other hand, the inherent doubt that arises from these cases is about the timing of the remedies. Most of the cases of review of remedies arise with respect to behavioral remedies that have been imposed to mitigate a substantial reduction of competition, which is not necessarily limited in time.

Therefore, in order for a party to claim that they are no longer necessary for the purpose imposed, how much time must elapse between the clearance of the transaction subject to remedies and the request invoking a change of circumstances? There is no threshold, since it will depend on the dynamism of the market in question. Although Chilean law indicates that the new information must occur 'subsequently', without giving a time limit, clearly the agency must have a certain perspective to be able to assess whether structural market changes have occurred and evaluate whether in light of the purpose of the measure it should be kept in force[495].

In the matter of *ex post* review of remedies, the vision of the CMA to consider the remedies applied in a merger control context ——and also any market investigation—— as an

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[493] Ibid., p. 7.
[494] Ibid.
[495] In the *Tianqi* case, such change was invoked after four years of effectiveness of the measures, while in *SMU/CorpGroup*, the parties to a transaction that had been conditioned to comply with mitigation measures by the TDLC ——in the framework of a non-contentious matter in 2012—— requested the TDLC to lift and modify its measures in view of changes in economic and regulatory circumstances that had occurred. TDLC, Decision No. 70/2022.

enforcement measure that it can exercise *ex officio*, in case of changes of circumstances, and not only at the request of a party, is also interesting.

As a public policy option, the agency considers that having remedies in place when they are no longer required should be avoided, and is in favor of establishing limits to the duration of remedies ——including long clauses such as *sunset* clauses—— after which the remedies will no longer be applicable. The review of remedies, *ex officio* or at the request of a party, generally proceeds when it is not possible to foresee the time for which the remedy will be necessary to avoid harm to competition[496].

The aforementioned local and comparative criteria may be of interest for the eventual evaluation of requests for modification of commitments both in Chile and in the region. One of the main shortcomings of behavioral mitigation measures is that they operate as a tool for market regulation, and therefore, if they are not limited in time, they may introduce distortions with respect to the competitive behavior of the affected players.

In conclusion, a challenge that arises from the local experience is that, at the time of clearing a transaction subject to remedies, the duration of the remedies should be specially evaluated, with preeminence to establishing remedies limited in time or subject to review clauses. If this is not possible, because it is not feasible to foresee the time during which such conditions will be required to prevent a substantial lessening of competition, a periodic review may be established, *ex officio* and without necessarily waiting for the request of a party, with respect to the remedies that, in view of a change of circumstances, are no longer justified according to the purpose for which they have been imposed[497].

[496] CMA (2015), Updated guidance on 'sunset clauses' in market investigation remedies: CMA response to consultation submissions; CMA (2018), Merger Remedies, section 7.11.

[497] An interesting example is the case of the CMA, which reviews remedies generally ten years after their entry into force. This is more usual with respect to structural measures that establish ancillary behavioral measures, such as a prohibition on reacquisition of divested assets. CMA (2015), Updated guidance on 'sunset clauses' in market investigation remedies, section 1.11 and footnote 5.

IV. Conclusions

Seven years ago, Chile introduced an *ex-ante* mandatory merger control regime, aligned with best practices in the matter.

Despite certain voices that considered unnecessary to have a mandatory merger regime ——which could imply an obstacle to foreign investment—— as a public policy option, it was decided to reinforce the prevention of the consolidation of market structures that, without *ex ante* evaluation, could raise concerns for competition *ex post*. And, in the context of the same legal reform that strengthened the competition system in Chile, the creation of a merger control system was prioritized in the same vein as cartel prosecution.

For a small economy such as Chile's, with smaller markets and naturally more concentrated than those jurisdictions that are usually considered as a reference, being part of the countries that preventively evaluate the risks of greater concentration in their markets is a challenge and, at the same time, a responsibility.

A challenge; because any system in the making requires a foundation on which to build the structures on which it will operate. And in the face of a naturally concise competition law, it has probably been the FNE's advocacy activity ——in terms of guidelines, instructions and orientations—— together with the detailed standards provided by the TDLC during these years (on the occasion of the judicial review activated by the users of the regime) that have shaped the edges of the merger control system in Chile.

A responsibility; because assuming the task of managing a system implies applying it with seriousness, technical rigor and openness to dialogue; with the decision to fill in the natural gaps and questions left by the regulation and minimize the spaces of discretion that it confers; aspiring to consistency in criteria and decisions; and to resolve with the speed required transactions harmless to competition, and with greater depth and attention those that, according to the technical analysis, require mitigation or greater intervention.

Placing both the evaluation of the impact of a transaction on competition, and its decision, in the FNE meant an alteration to the traditional institutional design, a bifurcated agency model, in which the FNE investigates and appeals to a specialized court, the TDLC, in search of a decision and/or sanction. Under the new system, the FNE along with its role as enforcer, had to assume adjudication functions.

This implied not only a different approach from the traditional one in merger investigations ——since merging is a lawful act that could only eventually cause future concerns—— but also required applying a practically judicial approach when evaluating the evidence gathered, with the neutrality required to weigh all the evidence in a file and be able to technically conclude, on balance, which is the most likely scenario.

Along this path, the FNE, the users of the regime and even third parties outside the transaction have raised several questions, and most of them have been addressed or oriented in the light of local criteria, the FNE's decisional practice or TDLC case law, as shown in this book.

Likewise, many of the answers have been found in comparative criteria ——predominantly from Anglo-Saxon and European jurisdictions—— which have been imported, applied and incorporated as our own and have served to illuminate the path to implement a new system. However, the Chilean regime is not a faithful reflection of any foreign system, but has been shaped and has developed its own identity. During these years, foreign parameters have been assembled with domestic criteria, without losing sight of the size and depth of the economy and local markets.

In the exercise of contrasting, where relevant, the approach that other competition agencies in the region have had with respect to some questions, it is interesting to confirm the gradual convergence in the criteria of analysis in Latin America, and the global diffusion that comparative standards have had in the region. A certain symmetry can be observed not only in the substantive analysis of mergers, but also in the enforcement of the system, the application of the sanctioning regime, and in the administrative procedures. This convergence facilitates understanding not only among competition agencies, but also among the parties to a transaction with multi-jurisdictional effects, which aims to reduce barriers to transnational investment in the region.

There is no doubt that the institutional design has an impact on a country's regulatory certainty, which in turn affects its ability to attract private investment and, therefore, its economic growth. Consistently, the system has aspired to be coherent, to provide clarity in the procedure, the applicable substantive standards, the time involved and to provide a certain predictability in decisions. All this provides regulatory certainty.

After a few years of the preventive merger control system in Chile, it can be concluded that its implementation has had many more lights than shadows, although there are evidently paths of constant improvement.

The challenges are focused on further reducing decision times in transactions with low impact on the markets, under a logic of proportionality, and on deepening the local identity of the regime, already endowed with criteria that need to decant over time and be evaluated with perspective. And in view of the need to resort to new comparative standards, to be able to distinguish the internationally established criteria ——which may be applicable to each specific case—— from transitory enforcement trends in force in other latitudes, which are not necessarily aligned with the structure of the markets, priorities or local context.

In short, the path undertaken seems to lead to the consolidation of a predictable and technical regime, effective in analyzing and intervening in depth in the face of problematic concentrations, and at the same time, capable of clearing, with the speed required by businesses, the transactions that are harmless to competition.

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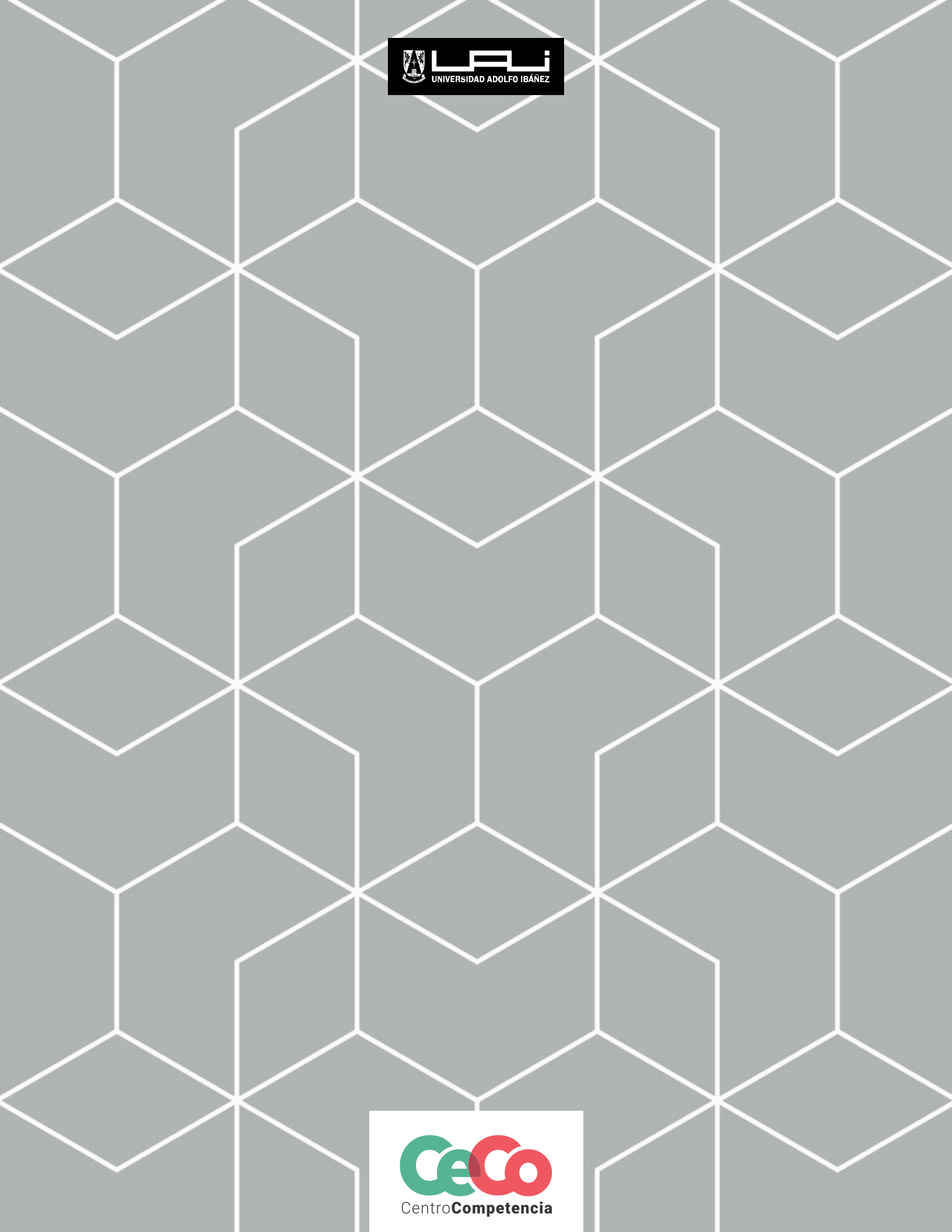
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