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DEAR READERS:

We are proud to share the Sixth Edition of the Chilean Legal Report for 2019. In this latest publication, members of Britcham's Legal Committee seek to keep its readers abreast with the latest developments in Chilean law, giving practical legal insights to face upcoming challenges. The publication is prepared by prestigious firms and renowned experts in each subject area. We are certain that these articles will prove useful contributions to all.

In addition to this publication, the Legal Committee organizes practical bimonthly lectures where its members can share best practices and business insights in line with legal developments.

We hope you enjoy this latest edition, and please, if you have any comments or ideas for future editions, please contact Ms. Isabel Juppet at isabel.juppet@britcham.cl.

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MERGER CONTROL IN CHILE: ASSESSMENT OF THE NEW MANDATORY NOTIFICATION REGIME

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A bit more than two years ago, on 1 June, 2017, a new, mandatory, premerger control regime entered into force in Chile, replacing the old voluntary filing system. The premerger control system makes it mandatory to notify any projected transaction to the National Economic Prosecutor's Office (FNE) when certain turnover thresholds are exceeded. The FNE will then examine whether the transaction substantially reduces competition in the market.

CHILEAN MERGER CONTROL REGIME

This new regime consists of two phases, both of which take place before the FNE. Phase I lasts up to 30 days, in which period the FNE must assess the operation and decide to:

- a) unconditionally approve it;
- b) approve it subject to the condition that all measures offered by the notifying party are complied with; or,
- c) extend the investigation for another 90 days to gather more background information.

If the FNE does not make a decision by the expiration of the 30-day period, the operation will be considered approved.

Phase II lasts up to an additional 90 days, with limited room for extensions. During this Phase, the FNE may:

- a) unconditionally approve the operation;
- b) approve the operation subject to the condition that all measures offered by the notifying party are complied with; or
- c) prohibit the operation.

The conditions for approval of mergers may only be those formally proposed by the applicant for merger clearance.

Only prohibition decisions by the FNE may be reviewed by the Competition Tribunal (TDLC). Any such recourse must be filed by the applicants within 10 days of the notification of the prohibition decision.

In such cases, the TDLC may approve the transaction without conditions or subject to the last remedies proposed by the applicants to the FNE. The TDLC may also approve the transaction under other conditions that it deems necessary. In the latter case, the Tribunal decision

may be appealed before the Supreme Court of Justice. Otherwise, there is no recourse available against the Tribunal decision.

When to notify

It is mandatory to notify any transaction that: (i) has an impact in Chile; and (ii) meets the two-pronged thresholds test. This test is based on turnover, not on market share: aggregate turnover of UF 2,500,000 (approx. US\$ 100 million) of the merging parties, on the one hand, and individual turnover of UF 450,000 (approx. 17.5 million) of at least two of the merging parties, on the other."The relevant turnover corresponds only to sales in Chile of the relevant entities.

In cases in which it is not mandatory to notify a transaction, the companies may voluntarily notify them to the FNE to apply for clearance, provided the transaction has not been completed by the time of the notification. In such



cases, the same rules as for mandatory notifications apply, though less onerous documentation/information will be required. If these transactions are not notified voluntarily, the FNE may still investigate them within one year as of their completion.

The merger control regime also provides for a simplified merger notification, including in cases where the projected operation does not produce vertical or horizontal overlaps. The simplified notification basically means that less information is required when notifying the operation.

It is important to note that a post-closing notification requirement exists when a 10% interest or more is acquired in a competitor.

Infringing a notification obligation; implementing a transaction during the suspension period; not complying with the conditions subject to which the operation was approved; implementing an operation that has been prohibited; and, notifying an operation supplying false information for its appraisal may result in the TDLC applying the same penalties as applicable to any other anticompetitive conduct.

What has happened so far?

Of the 71 merger investigations initiated by the FNE since 1 June 2017 (as at 31 October 2018), 50 transactions have been unconditionally approved, 9 have been approved with conditions and 2 have been blocked. Moreover, only 5 merger reviews have moved to Phase II, of which 1 was unconditionally cleared, 2 were blocked, while 2 are still under investigation.

The average length of the investigations initiated by the FNE has been the following:

- 18 days for transactions approved in Phase I without conditions or divestments required by the authority.
- 66 days for transactions approved in Phase I with conditions or divestments required by the authority.
- 97 days for transactions approved in Phase II, independently of any conditions or divestments.

How has the new premerger control regime fared so far?

The new merger control regime has undoubtedly brought about much needed legal certainty in the area of mergers, as under the previous

voluntary system, though no mandatory pre-merger filing was required, the competition authorities were nevertheless authorised to unwind already completed concentration operations found to be harmful to competition.

It is worth noting the efficiency with which the FNE has implemented the new regime. Among other measures it has issued a series of comprehensive guidelines and established a pre-notification consultation mechanism, designating a dedicated team with whom economic agents and their representatives may communicate prior to the filing of a merger notification. During this consultation, among other matters, it is possible to discuss the appropriate notification mechanism that should be used. It is also possible to file a request for an exemption from the obligation to provide certain documents during the notification process. This procedure does not set the clock running, is voluntary and may be initiated at any time once there is a genuine and serious intention to carry out a merger operation. It takes place prior to the actual notification.

The FNE has also made clear the importance of the premerger notification regime. The FNE is actively surveying markets, since the Bill that introduced the regime also created a market studies division. Such surveying includes the monitoring of international M&A activity that may have an impact on Chilean markets.

It should also be noted that in the case of a conciliatory agreement reached between the FNE and two companies it had sued for infringing the legal prohibition of closing a notified operation before receiving due authorisation, the National Economic Prosecutor declared that “companies have to respect the merger and acquisition control system. The FNE

will demand compliance with this system and will request penalties and measures whenever it becomes necessary, because gun jumping infractions are serious”. In this scenario, the enforcement risks for not notifying a transaction or infringing any other related provision seem rather high.

Despite the many improvements of the new system, as with any newly implemented regime, there is room for further improvement.

For instance, the simplified notification procedure currently requires the provision of what seems to be far too much information about the reportable markets, even when the projected

operation produces very few vertical or horizontal overlaps. In such cases, a combined market share threshold could be established (a sort of de minimis rule).

Another issue that should be considered is the exemption of certain foreign operations from the obligation to notify. In some cases, though the economic groups of the merging companies do have sales in Chile, the operation itself does not produce any effect in the country. In such instances, an exemption could be requested and the FNE could rapidly decide whether or not to investigate. This in turn would make the whole procedure more expeditious and efficient in cases when it is obvious that the operation does not raise competition concerns.



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