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Reference

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The purpose of a merger control regime is to assess, normally prospectively, the net competitive effects of a given transaction and to provide for remedies that preserve competition otherwise believed to be lost as a result of a given transaction. The fundamental merger control question across most jurisdictions is whether, as a result of a proposed transaction, competition will be lessened or distorted significantly enough to result in higher prices, lower quality or output, or reduced innovation. The stakes are high – strategic deals that could change the trajectory of a buyer for years to come can be blocked in their entirety. Lesser, but nonetheless significant, maladies are major delays to closing a transaction to comply with merger control requirements and conditions imposed on transaction parties, including divestitures. Merger control regimes also present an opportune platform for strategic mischief by complaining rivals. In short, merger control can be a snake pit for the unaware and unprepared.

Merger control led the wave of antitrust reforms seen in Latin America in the 1990s, when antitrust enforcement became more prominent in the context of economic liberalisation efforts throughout much of the region. In those early days, the greatest challenge for national antitrust authorities was developing an awareness for antitrust rules, or "antitrust culture", where none previously existed. More than two decades later, and after considerable success making antitrust relevant, the region is well into a new wave of antitrust development, this time towards international enforcement convergence, with merger control in the region becoming more sophisticated and aligned with international practice.

Against this background, since 2011 many countries have revised their merger control legislation, generally with the objective of improving effectiveness and predictability; this review process remains ongoing also in the form of secondary legislation and soft law. In Brazil, the merger regime was heavily modified in mid-2012 to, among other changes, require pre-merger notifications with suspensory effect, establish higher filing thresholds and restructure the merger review process. Since then, CADE has issued secondary legislation on many topics – most recently, in 2016 CADE published English version of its guidelines on gun jumping, issued guidelines on the review of horizontal agreements and on compliance programmes, defined new rules for the mandatory filing of collaborative agreements and formally set a soft deadline for the review of cases under fast-track procedure; in 2017, CADE published an internal best practices manual for the review of ordinary merger cases and is expected to publish guidelines on merger remedies in 2018. In Mexico, legislative reforms implemented in 2013 and 2014 streamlined the merger review process, created two authorities responsible for antitrust enforcement (one exclusively for the telecommunication sector) and created specialised competition courts; a new federal competition law was enacted, introducing mostly procedural changes to the Mexican merger review. Continuing this process, in 2015 COFECE issued merger review guidelines and updated them in 2017 to insert provisions on the interpretation and analysis of non-compete clauses and shareholder agreements. In Colombia, in 2015 the SIC issued a resolution to clarify, among other aspects, the application of turnover thresholds, the time frame for merger review, as well as the possibility to carve out or hold separate assets or businesses that might affect competition in Colombia until review is complete, while closing the transaction abroad in international deals. In 2016, Chile approved significant changes to its (previously voluntary) merger control regime – notably to introduce a mandatory pre-closing notification obligation as of June 2017, prohibit interlocking directorates between competitors and require post-closing notification of acquisitions of 10 per cent or more shareholdings in competitors. In 2017, the FNE issued guidelines fixing notification thresholds, published standardised merger notification forms, added resources to its merger division team, created a market studies division and issued guidelines on merger remedies. Costa Rica reformed its previously voluntary merger control regime to become mandatory as of 2013. Ecuador and Paraguay enacted merger control legislation for the first time, respectively, in 2011 and in 2013; they issued corresponding implementing legislation, respectively, in 2012 and in 2014.

Changes to merger control laws and regulations are being discussed in Argentina, El Salvador and Peru. In Argentina, the new government has put competition enforcement back on the map, announcing a number of initiatives that include restructuring the competition authority, training personnel, reviewing internal procedures to expedite decision-making, increase cooperation with other antitrust authorities, carrying on market studies to identify possible competition concerns in various market segments, and amending the current antitrust law to include a

premerger notification regime to replace the post-closing one it has in effect today. In El Salvador, reforms are being discussed in relation to merger notification thresholds and to clarify the scope of economic efficiencies, among other issues. In Peru, the Congress is considering a bill that will introduce a mandatory merger control regime.

Overall, most economies in Latin America today have a merger control regime in place, and most of these prohibit closing pending a review. Brazil, Chile, Colombia, Ecuador, El Salvador, Honduras, Mexico, Nicaragua and Uruguay are among the jurisdictions now with pre-merger notification obligations. One notable exception is Argentina, where post-closing notification remains the norm, although, as mentioned, reforms are being discussed to implement a pre-merger regime. In Costa Rica it is also possible to file post-closing and a bill of law is currently being discussed to eliminate such post-filing alternative. In Panama and Venezuela notification is voluntary, but the enforcement authority can investigate and modify a transaction post-closing if it is found to violate national competition law. Bolivia and Peru require previous authorisation for mergers in certain regulated sectors or industries, such as utilities and banking (Bolivia) and electricity (Peru).

In 2017, the social-political and economic challenges affecting different countries in America continued to have an impact on the region's M&A. Notably, the "Lava-Jato" corruption investigation in Brazil continues active and its findings have prompted a wave of anti-corruption investigations across the region, in countries where the Brazilian companies involved in corruption scandals also operated (such as Argentina, Colombia, Dominican Republic, Ecuador, Guatemala, Panama, Peru, Mexico). The upcoming elections in several countries in the region between the end of 2017 and 2018 (including Brazil, Chile, Colombia, Costa Rica, Honduras, Paraguay, Mexico and possibly Venezuela) contribute to add uncertainty to the deal environment. That said, in 2017 commodity prices have shown signs of recovery and exchange rates have been more stable, reflecting some degree of economic recovery in the region, compared to previous years. Moreover, the region's current distress created interesting investment opportunities as the dollar-value of assets decreases and distressed companies sell their businesses. For instance, the latest events in Lava-Jato caused many investigated companies, such as Petrobras and the JBS group, to sell billions of dollars in assets as a result of divestiture programmes. Recent regulatory reforms, particularly in Mexico, have helped to foster dealmaking and the region's long-term growth potential, due in part to growing middle classes in certain countries, continues to attract investors. Overall, although the outbound expansion of Latin American companies may have stalled, inbound investment in the region has gained further traction, in particular with private equity investment on energy and infrastructure assets. Expectations are that both local and international companies will continue to build businesses across borders in Latin America.

Noteworthy examples of intra-regional deals in 2016 include Mexico-based Femsa, the largest bottler of Coca-Cola in Latin America, acquiring Brazilian bottler Vonpar for US$1.9 billion. In Brazil, stock exchange and futures market operator BM&FBovespa SA agreed to acquire Cetip SA for US$2.6 billion. Argentina's Pampa Energia SA acquired a majority stake in Petrobras Argentina SA for US$1.2 billion. Mexican Grupo Lamosa acquired Ceramica San Lorenzo, with activities in Chile, Peru, Colombia and Argentina, for US$ 230 million. Chilean port operator SAAM SA acquired a majority stake in Costa Rica's Puerto Caldera for US$ 48.5 million. In 2017, Mexican Asur acquired a majority stake in two Colombian airport groups for US$262 million. Mexican Group Lala SAB acquired Brazilian dairy company Vigor Alimentos from J&F (the controller of JBS) for US$1.3 billion. In Brazil, Cambuhy Investimentos and Itausa Investimentos acquired Alpargatas SA from J&F for US$1.3 billion. Brazilian Minerva SA bought JBS's South American assets in Argentina, Paraguay and Uruguay for US$300 million. Also in Brazil, Vale SA absorbed its holding company Valepar in a corporate restructuring worth US$1.8 billion; and Itau Unibanco acquired a 49 per cent participation in XP Holding Investimentos for US$1.9 billion. In Colombia, Consorcio Prestasalud, formed by local hospitals and health institutions, acquired healthcare provider Esimed and health insurer Cafesalud for US$500 million.

Examples of deals involving Latin American targets in 2016 include French Vinci's acquisition of Peruvian toll road operator Lamsac for US$1.6 billion; Canadian Brookfield Asset Management's acquisition of a majority stake in the Colombian power generator Isagen SA for US$2 billion; China-based CMOC's acquisition of the Niobium and Phosphates' Brazilian businesses of Anglo American plc for US$1.5 billion; Norwegian Statoil acquisition of a majority interest in an offshore oilfield from Petrobras for US$2.5 billion; French Total's proposed acquisition of upstream and downstream Petrobras assets for US$2.2 billion. Relevant examples in 2017 include Sompo Japan Nipponkoa's acquisition of Bermuda-based Endurance Speciality active in the insurance segment for US$6.3 billion. A consortium led by Canadian Brookfield Infrastructure acquired Nova Transportadora do Sudeste, a gas pipeline business from Petrobras, for US$5.2 billion. Netherlands-based Paper Excellence agreed to buy Eldorado Brasil Celulose from JBS for US$4.7 billion. Another Dutch investor, Refresco Group, agreed to buy Cott Embotelladores de Mexico for US$1.2 million. Spanish Telefonica increased their participation in Colombia Telecomunicaciones in US$1.6 billion. US Mosaic Company acquired Brazilian Vale Fertilizantes for US$2.5 billion. Chinese State Grid increased its participation in Brazilian CPFL Energia for US$3.6 billion.

Merger control enforcement in the region has continued to be brisk, with antitrust authorities actively blocking or imposing conditions to clear concentrations, as well as investigating gun-jumping cases. For example, in 2016 COFECE imposed conditions to approve a joint venture between Delta Airlines and Aeromexico to operate flights between Mexico and the US, ordering the airlines to divest landing and take-off slots at Mexico City's international airport and to eliminate duplicities in routes where they both operated. COFECE also imposed conditions to the asset swap involving the acquisition, by Sanofi, of Boehringer's consumer health unit (COFECE prohibited Sanofi from acquiring three brands of caught medicine sold by Boehringer in Mexico), and the acquisition, by Boehringer, of Sanofi 's animal health business (each Sanofi and Boehringer had to divest certain vaccines to third parties). COFECE also approved the US$130 billion global transaction between DuPont and Down, under the condition that the parties would sell certain crop protection products and other assets. In 2017, COFECE imposed gun jumping fines of US$800, thousand on Panasonic for failure to notify the indirect acquisition of more than 35 per cent of the assets of Ficosa Mexico in 2015. It also imposed gun-jumping fines on a few financial institutions (Mexico Multifamily Fund VIII, Invex, CIbanco, HSBC and

Monex, each fined in €18,000) and on a public notary (fined in €420,000) for the early implementation of a merger that involved the acquisition of six real estate properties in investment trusts managed by HSBC.

In Brazil, transactions approved with structural and behavioural remedies in 2017 included Itaú/Citibank, BM&F Bovespa/CETIP, AT&T/Time Warner, TAM/Iberia/BA and Dow/DuPont. In its merger review analysis, CADE has expressed greater concerns about coordinated effects and regarding the effectiveness of remedies proposed by the parties (more specifically, the feasibility of their implementation), showing preference for upfront buyer or fix-it-first solutions. In 2017 alone, these concerns resulted in CADE blocking three high-profile mergers: Kroton/Estácio in the education sector; Ipiranga/Alesat in the fuel distribution sector; and Mataboi/JBJ in the meat retail market. Kroton and Estácio are the two largest private higher education institutions in Brazil; CADE considered that the deal would increase Kroton's dominant position and eliminate its closest competitor, and that the parties offered insufficient remedies. In Ipiranga's proposed acquisition of Alesat, CADE considered that the deal would eliminate a maverick (Alesat), new entrants would not be able to effectively compete, the transaction would create conditions for collusion post-deal, and the remedies offered by the parties should have addressed competition concerns in both distribution and resale markets. In the case of JBJ's proposed acquisition of Mataboi, CADE found vertical and horizontal concerns that would have resulted in increased market concentration and market power; CADE also considered a possible coordination between JBJ and JBS, because of the family ties between the owners of both companies. Further to these cases, CADE's General Superitendence issued opinions objecting to the acquisition, by Ultragaz, of Liquigas in the market for distribution of GLP, and the acquisition, by AcelorMittal, of Votorantim Siderurgia in the long steel market. CADE's Tribunal is expected to rule on these two cases by March 2018. As for gun jumping, in 2016 alone CADE imposed fines ranging between US$200,000 to US$8.5 million in at least six cases. CADE imposed the record fine of US$8.5 million in relation to Technicolor's acquisition of a Cisco Systems' subsidiary because the parties announced the completion of the deal while CADE's review was still pending and CADE rejected the effectiveness of the carve-out agreement the parties signed to shelter Brazilian assets.

In Colombia, between 2015 and 2016 the SIC imposed remedies to clear the mergers between Grupo Argos and Grupo Odinsa in the infrastructure sector, as well as between Pepsi and Postobon and between AB Inbev and SabMiller in the beverages sector. More recently, in 2017, the SIC imposed remedies to authorise the purchase, by fuel distributor Terpel, of ExxonMobil Colombia; Terpel had to divest a production plant and two lubricant brands in order to avoid an excessive installed capacity after the transaction. In 2015, the SIC had already blocked two deals involving Terpel: the proposed acquisition of retail aircraft fuel distributor Aviacom, because the SIC found that Terpel would both increase its dominance in the upstream market and consolidated its monopoly position in the retail market; and Terpel's application to become the exclusive operator of the fuel network in one of Colombia's airport, finding that the fuel network is an essential facility and Terpel would have a significant competitive advantage if it acquired such network

In Chile, in May 2017 the FNE imposed structural and behavioural remedies to approve the acquisition, by Hormigones Bicentenario SA, of the controlling interest held by HolChile SA in Polpaico SA. The target and the acquirer were the first and fourth largest companies active in the cements and concrete segment in Chile. In order to meet FNE's concerns, the parties agreed to divest seven concrete plants, to be sold as a package to enable in the short term the entry of a new competitor with sufficient scale. The TDLC approved the remedies in this case in June 2017. In September 2017, the FNE approved AT&T's acquisition of Time Warner with behavioural conditions to address specific competition issues. AT&T agreed to grant non-discriminatory access to competitors, establishing an independent arbitration service to solve disputes between TV content providers and pay-TV distributors, and restricting access to information within the combined group.

In Ecuador, the SCPM imposed structural remedies on each of Halliburton and Baker Hughes, to clear their merger in the end of 2015. In 2017, AB InBev divested a production plant and a portfolio of brands in Ecuador as part of a remedy package imposed by the SCPM to clear its merger with SABMiller. Also in 2017, Ecuador imposed behavioural remedies to approve the transaction between Bayer AG and Monsanto, with the declared purpose to protect Ecuador's genetic patrimony; the remedies consisted in a prohibition to produce and sell transgenic seeds and apply experimental biotechnologies.

The combination of M&A activity and the labyrinth of different merger control rules (with different and increasingly powerful antitrust authorities actively enforcing such rules) can result in a complicated and difficult situation for dealmakers and their counsel. Developing a coherent regulatory approval strategy in advance of any significant investment – particularly where the target operates in more than one Latin American jurisdiction – is critical.

This reference section aims at offering a quick, practical and yet comprehensive view of the merger control rules in force in different Latin American jurisdictions so as to allow an assessment as close to reality as possible concerning the requirements, delays and risks involved in the notification process. For this purpose, this section describes the procedural aspects and substantive tests applied in each jurisdiction, as well as covering the latest enforcement trends and the most relevant precedents in the appreciation of merger cases by local authorities. This section further attempts to offer a view on practical aspects such as the risk of prohibition and imposition of remedies in each country, which have proved to be material in many jurisdictions.

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Michael Egge is managing partner of Latham's Washington DC office and a leader in Latham's global antitrust and competition practice group, having served as its co-chair for eight years. He specialises in all manner of competition law matters in the US and elsewhere, including merger control, cartel defence, counselling and litigation. Recent global transaction successes this last year include the defence of Siemens acquisition of Dresser Industries and Avago's acquisition of Broadcom.

Mr Egge is a leader in handling multi-jurisdictional competition law matters in Latin America and elsewhere. He has 25 years' experience defending mergers and business practices in Chile, Brazil, Mexico, Venezuela, Argentina, and Costa Rica and counselling compliance in several others. Mr Egge is fluent in Spanish and has served in various capacities within the leadership of the ABA's antitrust section and is a regular speaker at the ABA's Antitrust in the Americas conference.

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Rita Motta is a Counsel in the Brussels office of Latham & Watkins and a member of the firm's Global Antitrust and Competition Practice. Her practice focuses on a wide range of issues under competition law, including merger control, cartel investigations, abuse of dominance and state aid. She also regularly advises clients on the implementation of antitrust compliance programmes.

Ms Motta has vast experience in representing clients in complex multijurisdictional merger filings and antitrust investigations. In particular, Ms Motta's practice covers merger control and antitrust investigations Europe and in Latin American countries.

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