

# Mergers and acquisitions in Chile, Colombia, Mexico and Peru: key points to consider

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In current M&A practice, when talking about transactions of a certain size, it is important to take economic competition factors into account, and a preliminary and important element that especially needs to be considered is what the merger control rules are. The timing for making a filing or a notification to obtain approval from the competition authority, and the timing for receiving a reply from that authority are, together with other regulatory clearance which may vary depending on the type of transaction or industry concerned, a crucial element for negotiating the conditions that will need to be fulfilled before closing a merger.

The process becomes more interesting and a greater challenge where transactions involve more than one jurisdiction. In that case an understanding is needed of which tests determine that a notification or filing is required with respect to the companies or assets located

in the countries concerned, whether those tests only include quantitative requirements or qualitative requirements also, and whether the economic figures to be reviewed relate in each case to the country being analyzed or the aggregate amount involved in the transaction. It is also important to study the parameters in the various countries' legislations that will help clients gain an understanding of the potential risks if clearance is not obtained at the same time. Examples include prior approval requirements or penalties.

This document contains an analysis of the Latin American countries where Garrigues is present.

Click on each section to learn more about how it affects each country





## Chile



A merger or acquisition transaction is any event, act or agreement, or any combination of these, which has the effect that two or more business players which are not part of the same business group and which are previously independent from each other, cease to be independent in any area of their activities through any of the following mechanisms:

- a) By merging, whatever the legal form of the companies that are merged or of the post-merger company.
- b) By one or more of them, directly or indirectly, acquiring rights that will allow them, acting individually or together, to have a decisive influence over the management of another.
- c) By joining forces with each other under any mechanism to form an independent business player that is separate from them and carries on its activities on a permanent basis.
- d) By one or more of them acquiring control over the assets of the other by any means.

## Colombia



As defined in Law 1390 of 2009, and by the Industry and Trade Authority (SIC - *Superintendencia de Industria y Comercio*) in its Guide to Analysis of Mergers and Acquisitions, a merger or acquisition, for the purposes of the applicable legislation, is the “legal mechanism or vehicle through which a change in the control of one or more companies, lines of business and/or assets occurs”.

A merger or acquisition may arise through any legal transaction including a share purchase, asset purchase, merger transaction, spin-off, creation of a company, business alliances, franchising agreements, among others”.

### Key elements:

- the ability to influence directly or indirectly the company’s policy,
- or commencement or termination of the company’s activities,
- a change to the company’s activities or a transfer of the assets or rights that are needed to carry on the company’s activities”.

### Types of control:

Direct or indirect  
 Joint or individual  
 Positive or negative

## Mexico



“A merger, acquisition of control or any transaction resulting in the combining of companies, partnerships, shares, ownership interests, trusts or assets generally that is performed between competitors, suppliers, clients or any other business players<sup>1</sup>.

The Commission will not authorize or if applicable will review and levy fines on any mergers or acquisitions that have the purpose or effect of decreasing, harming or obstructing full and open competition with respect to goods and services that are the same, similar or materially related.”<sup>2</sup>

## Peru



It is any act or transaction that involves a transfer or change in the control of a company or part of a company.

A merger or acquisition may occur as a result of the following transactions:

- a) A merger of two or more business players, which were independent before the transaction, whatever the legal form of the entities that are merged or of the post-merger entity.
- b) An acquisition by one or more business players, directly or indirectly, of rights that allow the person acquiring them, individually or jointly, to exercise control over all or part of one or more business players.
- c) The formation by two or more independent business players among each other of a joint enterprise (“associative” agreements), joint venture or any other similar type of contract which involves the acquiring of control over one or more business players, resulting in that business player carrying out the functions of an independent business entity.
- d) The acquisition by a business player of direct or indirect control, by any means, of the productive operational assets or another or other business player(s).

<sup>1</sup> The Guide to Merger Notifications, published on April 8, 2021 in the Peruvian Official Federal Gazette by the Plenary Meeting of the Federal Economic Competition Commission, explains in detail each of the elements that are treated as a “concentration”. The Guide may be read [here](#).

<sup>2</sup> Article 61 of the Federal Economic Competition Law.



## Chile



Transaction test:

Under article 48 of DL 211, supplemented by “Exempt” Decision 157, 2019, for a transaction fulfilling the requirements mentioned in the preceding point to be required to be notified to the FNE, the following sales thresholds must be met:

“The sum of all sales in Chile by the business players planning to merge in the year before the notification is made must be equal to or higher than [UF 2,500,000 or €80.5 million in 2020]”.

“At least two of the business players that are to merge must, in Chile separately, and in the year immediately before the year in which the notification is made, have generated sales equal to or higher than [UF 450,000 or €14.5 million in 2020]”.

## Colombia



Parties and transaction test:

- (i) **Parties test:** purchaser must carry on, directly or indirectly through affiliates, the same economic activity as the target in Colombia; or purchaser and target are in the same value chain in Colombia.
- (ii) **Transaction test:** purchaser and target must have in the previous year, jointly or individually, assets or operating revenues higher than the amount determined annually by the authority (for 2021, ~ €12 million).

This figure is calculated by reference to aggregate assets and operating revenues or those located in the country, for both the participating companies, and for any related companies which are controlled by the participating companies.

## Mexico



- a) **Based on transaction value.** Where the transaction, no matter where it is concluded, amounts in Mexico, directly or indirectly, to more than ~ €68 million euros; or
- b) **Based on sales in Mexico.** Where the transaction involves the accumulation of 35% or more of a business player’s assets or shares, if the business player’s annual sales originated in Mexico or assets in Mexico amount to more than ~ €68 million; or
- c) **Based on accumulated assets.** Where the transaction implies an accumulation in Mexico of assets or share capital above ~ €31.8 million and two or more of the business players participating in the merger of acquisition have annual sales originated in Mexico or assets in Mexico which, jointly or separately, amount to more than ~ €181 million.

All thresholds must be calculated by reference to the agreed aggregate sum, including tax.

## Peru



There are two types of thresholds that must be met simultaneously for it to be **mandatory to notify the merger or acquisition to Indecopi:**

- (i) **Individually:** if, individually, **at least two** of the economic agents involved in the transaction go above 18,000 UIT (tax units)<sup>3</sup> (approximately €16 million) in gross annual revenues or sales or, value of assets in the country, in the fiscal year immediately before the year in which they intend to notify the transaction.
- (ii) **Jointly:** if the sum of the value of gross annual revenues or sales, or value of assets in the country **of all the economic agents** involved in the merger is equal to or higher than 118,000 UIT (approximately €106 million).

Notably, gross revenues and sales, as well as assets in Peru, are not calculated by reference only to the companies involved in the merger, depending on the type of merger:

<sup>3</sup>For 2021; 1 UIT is equal to S/ 4.400 (approximately 900 euros).



- a) In cases involving mergers and “associative” agreements, the calculation is made by reference to gross revenues or sales or value of assets in Peru of the companies involved and of their business groups.
- b) In cases involving an acquisition of rights, gross revenues or sales or value of assets in Peru are calculated by reference to the acquiring player and its business group, as well as to the acquired player and the players over which it exercises control.
- c) In cases involving an acquisition of productive operational assets, gross revenues or sales or value of assets in Peru are calculated by

reference to the acquiring player and its business group, as well as to the gross revenues or sales obtained from the acquired productive assets or their carrying amount.

Without limitation to the comments outlined in this section, where the transaction does not exceed the thresholds, but there are “special circumstances” (e.g. a horizontal merger in an already concentrated market, for example) which are “reasonable indications” for considering that the merger or acquisition transaction may create a dominant position or affect effective competition in the relevant market, it needs to be considered whether to make a **voluntary** notification to Indecopi.



## Chile



The notification is mandatory if the described thresholds are exceeded.

Below these thresholds, and if it is a notifiable transaction (any of those mentioned on page 2) it may be notified voluntarily to the FNE (Chilean mergers and competition authority).

In both cases, the FNE will start a Phase I review and may extend the review to Phase II, in a founded decision, if it considers that the notified transaction, should it be completed purely and simply in its current form or subject to the measures offered by the notifying party, if any, may materially reduce competition.

## Colombia



There are two types of procedures for reporting a merger: (i) notification; and (ii) application for pre-assessment.

- (i) Transactions must be reported using the **notification procedure**, if the participating players meet:
  - The transaction test
  - The parties test
  - Jointly they have **a share below 20% of the relevant market**, in which case the transaction will be considered to be authorized.
- (ii) The transaction must go through the **pre-assessment procedure**, if the participating companies meet:
  - The transaction test
  - The parties test
  - Jointly, they have **a share higher than 20% in the market**.

The pre-assessment procedure could comprise two phases:

**Phase I:** is completed within thirty (30) business days running from when the application for

pre-assessment is filed with the complete information (in other words, when the authority is not allowed to make any further requests for information), and

**Phase II:** if the competition authority considers that it needs to perform an in-depth study on the transaction, then it will initiate this phase, which is completed within three (3) calendar months, running from when the participating companies supply the information requested for this phase.

## Mexico



There are two mechanisms for notifying a merger or acquisition:

- a) **Ordinary procedure.** Applies where the Commission requests an analysis, even if only to a minimum extent, of the potential effects of the merger or acquisition on the markets.

In this case, the players must submit information enabling the Commission to assess its potential effects, including information for determining the product's uses and characteristics, the geographic size of the market or the competitors' market shares, among others.

This will all depend on a case-by-case analysis. In this procedure the Commission is allowed to request more detailed information from the parties involved, from other business players or from authorities, to determine the repercussions the potential merger or acquisition may have on full and open competition.

- b) **“Common knowledge” procedure.** Applies where it is common knowledge that the transaction does not have the purpose or effect of reducing, harming or obstructing free competition and economic competition.

This type of procedure needs to be expressly requested by private parties which have to produce the elements evidencing common knowledge.

## Peru



There are two types of procedures for reporting a merger or acquisition: (i) prior request, (ii) ordinary application; and, (iii) simplified application

- (i) **Prior request:** before the potential commencement of a prior control procedure, business players may make a prior request on a non-binding basis and individually or jointly, to be able to determine whether or not the transaction falls within the scope of application of the law or what information is required for the prior control process, among other elements.
- (ii) **Ordinary application:** if the transaction meets the conditions for a mandatory notification, then an ordinary application for clearance is filed before Indecopi, and all the requirements have to be fulfilled.



**(iii) Simplified application:** a simplified application may be filed, which will involve submitting less information to Indecopi where:

a) The business players participating in the transaction or their respective business groups do not carry on economic activities in the same product market and in the same geographic

market; or do not participate in the same productive or value chain; or,

b) The transaction results in a business player acquiring exclusive control over another business player over which it already has joint control.



## Chile



All the business players that have taken part in the merger or acquisition (jointly).

## Mexico



As a general rule, the notification must be filed jointly by the business players participating directly in the transaction.

As an exception, the notification may be filed by only one of the business players involved, if:

- a) it provides proof that the other business player(s) involved in the transaction are legally or effectively prevented from filing the notification; or
- b) in common knowledge procedures it may only be filed by the merging company or the buyer.

## Colombia



Buyer and seller.

Either company may fulfill the duty to report the transaction for the obligation to be deemed satisfied.

## Peru



If the transaction is a merger or an acquisition of joint control, application for clearance is filed jointly by the business players participating in the transaction.

In all other cases, application is filed by the business player that acquires control of all or part of one or more business players or of the productive operational assets.



### Chile



Before completion of the merger or acquisition transaction and from when there is background information that shows a real and serious intention to carry it out.

### Mexico



Before any of the following events occurs:

- a) The transaction is completed or, if applicable, the condition precedent to which it is subject is fulfilled;
- b) Control is acquired or exercised effectively or legally over another business player, or the following are acquired legally or effectively: assets, ownership interests or shares, or interests in fiduciary arrangements from another business player;
- c) A merger agreement is signed between the business players involved; or
- d) In cases involving a succession of transactions, the last of them is completed, and results in the thresholds being exceeded.

In cases involving transactions conducted outside Mexico, these transactions must be notified before they take effect in Mexico.

### Colombia



Before completion of the transaction.

### Peru



Before completion of the transaction.





## Chile



The notified transaction may not be completed until clearance is obtained from the authority.

## Mexico



The transaction may not be carried out until it is authorized by the Commission.

Any transactions that have to be notified and are not previously notified to the Commission will not have any legal effect, which does not preclude the administrative, civil or criminal liability of the business players or of the persons who ordered or assisted with their performance, and also of any public authenticating officials who provided their services in them.

Any transactions relating to a merger or acquisition cannot be recorded in the company's books of account, recorded in a public instrument or entered at the Public Registry of Commerce until clearance is obtained from the Commission or the Plenary Meeting has not delivered a decision within the period for approval by silence.

## Colombia



**Notification:** the planned transaction is deemed authorized automatically (the authority will issue an acknowledgment of receipt within the following 10 business days).

It does not involve any suspensive effect on the planned transaction. The authority may, however, initiate a pre-assessment process.

**Pre-assessment:** the planned transaction cannot be completed until the competition authority's approval is obtained.

## Peru



The merger or acquisition cannot be completed until the competition authority's approval is obtained.

## Chile



The legal time period for each procedure is as follows:

**Notification:** 10 business days to report the notification completely, after the written notification has been filed by the parties. It is extended as many times as the FNE finds that the notification is incomplete.

**Phase I:** its term is 30 business days, from when the notification is declared complete. It may be extended by mutual agreement between the parties and the FNE and once only for up to 30 business days. Each filing of mitigation measures will trigger an automatic extension for 10 business days.

**Phase II:** its term is 90 business days, from when a decision initiating Phase II is delivered. It may be extended by mutual agreement between the parties and FNE and once only, for up to 60 business days. Each filing of mitigation measures will trigger an automatic extension for 15 business days.

**business days**, running from the delivery date of the last set of additional documents requested. If the Commission does not deliver a decision in that period, it will be deemed that the Commission has no objection to the notified merger or acquisition (approval by silence).

A favorable decision by the Commission will be valid for 6 months, which may be extended once only for justifiable reasons.

- b) **“Common knowledge” procedure.** After an initial notification has been filed expressly requesting this type of procedure, the Commission has **5 business days** to allow or deny this type of procedure. If it allows the procedure, the Commission has **15 business days** running from the decision allowing the procedure, in which to issue its decision.

If the Commission considers that the merger or acquisition does not fulfill the requirements for the procedure, it will be conducted as an ordinary procedure.

## Colombia



The legal time period for each of the procedures is as follows:

- (i) **Notification:** 10 business days for acknowledging receipt, after the notification document is filed by the parties.

- (ii) **Pre-assessment application (4 months):**

**Phase I:** its term is thirty (30) business days, from the filing date of the pre-assessment application with the complete information.

**Phase II:** its term is three (3) calendar months, running from delivery of the information required for this Phase by the participating companies.

The pre-assessment procedure may therefore last up to 4 and a half months.

## Peru



The legal time period for each procedure is as follows:

- (i) **Prior request:** no time limit is specified, although the Competition Authority has said that they are currently taking approximately 15 days to reply to prior requests. This period might be longer depending on the complexity of the transaction.

- (ii) **Ordinary and simplified application:**

**Phase one:** starts with admission of the application. Ends after 30 business days if the eligible transaction does not pose significant restrictions to competition.

**Phase two:** if the Competition Authority finds that the transaction poses a significant restriction to competition, phase two will start after 30 business days. It cannot exceed 90 business days, and may be extended for up to 30 days.

The time periods for both phases may be extended depending on whether Indecopi requests further information, makes requests to third parties, calls hearings, negotiates commitments, etc., and there are legal time periods for each additional step. However, approval by silence applies if Indecopi does not deliver a decision within the legal time period, in which case the transaction will be deemed to be approved with no conditions.

## Mexico



- a) **Ordinary procedure.** After the initial notification has been filed, the Commission has **10 business days** to request any missing information. After receiving the complete set of documents and information, the Commission has **15 business days** to request further information. The Commission has to issue its decision in **60**



## Chile



Under the applicable legislation, the measures under article 26 may apply, as well as any necessary preventive, corrective or prohibitive measures, to anyone who:

- a) Fails to fulfill the duty to notify.
- b) Breaches the duty not to complete a merger or acquisition notified to the Competition and Mergers Authority and which is suspended under article 49.
- c) Fails to comply with any measures with which a merger or acquisition has been approved, under article 31 bis, article 54 or article 57, as applicable.
- d) Completes a merger or acquisition in breach of the determinations in a decision or judgment that prohibited the transaction, under article 31 bis or article 57, as applicable.
- e) Notifies a merger or acquisition under Title IV, by reporting false information.

The penalties set out in article 26 are as follows:

- a) Amend or bring to an end any transactions, contracts, covenants, systems or agreements that are counter to the provisions in DL 211;
- b) Order modifications to or the winding up of any companies, corporations and other legal entities under private law that participated in the transactions, contracts, covenants, systems or agreements mentioned in the preceding letter;
- c) Levy fines on tax relief in an amount up to a sum equal to thirty percent of the sales of the infringing party relating to the line of products or services associated with the infringement over the period in which it lasted or up to twice the economic profit reported as a result of the infringement;
- d) In the event of failure to fulfill the duty to notify a merger or acquisition, a fine on tax relief may also be levied equal to up to twenty annual tax units for each day of delay running from completion of the merger or acquisition transaction.

## Colombia



Before the relevant review, SIC will render a merger or acquisition void where it was not reported or was performed before the end of the period allowed for SIC to deliver a decision.

Additionally, in respect of each infringement and on each infringing party, SIC may impose fines of up to a sum equal to 100,000 minimum monthly wages in force (~ €20.8 million for 2021) or, if greater, up to 150% of the profit that the infringing party obtained as a result of their conduct.

## Mexico



The Commission may apply the following enforcement steps and penalties:

- a) Order correction or removal of the unlawful monopolistic practice, or merger or acquisition, concerned;
- b) Order the undoing of all or part of the merger or acquisition as determined in the Law; the termination of control or elimination of the transactions, as applicable, which does not preclude the fine required in each case;
- c) Fine amounting to up to ~ **€676,800**, for having misreported or delivered false information to the Commission, which is separate from any criminal liability that may be incurred;
- d) Fine equal to up to **8% of the revenues** of the business player, due to having engaged in an unlawful merger or acquisition as determined in the Law, which is separate from any civil liability that may be incurred;
- e) Fine amounting to ~ **€19,400** and up to **5% of the revenues** of the business player, due to not having notified the merger or acquisition when it was legally required to do so;
- f) **Disqualification** for serving as director, manager, executive officer, manager, executive, agent, representative or attorney-in-fact at any legal entity for **up to five years** and fines up to ~ **€772,670**, for anyone participating directly or indirectly in monopolistic practices or unlawful mergers or acquisitions, for or on behalf of or under the orders of legal entities;
- g) Fines amounting to up to ~ **€695,500**, for anyone who assisted with, prompted or induced monopolistic practices, unlawful mergers or

acquisitions or other restrictions preventing the markets from functioning efficiently as determined in the Law; and

- h) Fines equal to up to ~ **€695,500** for any public authenticating officials taking part in acts relating to a merger or acquisition where it has not been authorized by the Commission.

For repeated infringements, a fine equal to up to twice the amount that would have been determined by the Commission may be imposed.

\* Fines expressed in dollars at the exchange rate of EUR 1 for every MXN 23.84, on the basis of the value of the UMA (measurement and updating unit) in effect in 2021.

## Peru



Law 31112 imposes minor, serious and very serious penalties:

### 1. Minor

- a) Not filing an application for clearance under the prior control procedure, as required in the law.
- b) Not supplying information requested by the competent authority within the stipulated time period.

**Penalty:** Fine amounting to up to 500 UIT (approximately €450 thousand), subject to a limit equal to 8% of gross revenues received in the previous year.

### 2. Serious:

- a) Performing a transaction before the prior control procedure has been conducted on it.
- b) Performing a transaction before the competent authority's decision is delivered.
- c) Performing a transaction before approval by silence has occurred.

**Penalty:** Fine amounting to up to 1,000 UIT (approximately €900 thousand), limit equal to 10% of gross revenues received in the previous year.

### 3. Very serious:

Failing to fulfill conditions, commitments or agreements set out in the clearance decision; performing a merger or acquisition after it had been denied; obstructing review work by the competent authority; refusing without justification to supply requested information or providing false information.

**Penalty:** Fine amounting to up to 1,000 UIT (approximately €900 thousand), limit equal to 12% of gross revenues received in the previous year.



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