

Assessment of Merger Control in Chile

A report by the OECD Secretariat

Antonio Capobianco
OECD Competition Division

Santiago, Chile - 11 November 2014

The Report



<http://www.oecd.org/daf/competition/chile-merger-control-2014.htm>

Main international sources

- OECD Framework for a Notification and Report Form for Concentrations (1999)
 - Chile - Peer Review of Competition Law and Policy (2004)
 - OECD Recommendation of the Council on Merger Review (2005)
 - Competition Law and Policy in Chile: Accession Review (2010)
 - OECD Roundtable Reports
-
- ICN Recommended Practices for Merger Analysis (2002)
 - ICN Recommended Practices for Merger Notification Procedures (2009)

OECD - Overview

	Merger control provisions		Merger notification systems			Enforcement systems for mergers		
	Yes	No	Mandatory	Hybrid	Voluntary	Administrative	Judicial	
							General court	Specialised court
Number of countries	32	2	19	10	4	25	3	5
Total	34		33*			25	8	
						33*		

* Luxembourg does not have a merger review system.

OECD - Overview

	Merger control provisions		Merger notification systems			Enforcement systems for mergers		
	Yes	No	Mandatory	Hybrid	Voluntary	Administrative	Judicial	
							General court	Specialised court
Number of countries	32	2	19	10	4	25	3	5
Total	34		33*			25	8	
						33*		

* Luxembourg does not have a merger review system.

OECD Report - Structure

Part I. Description of Chile's current merger control system

Part II. Key issues - Assessment and recommendations:

1. Legal basis and framework
2. Merger control jurisdiction
3. Merger control powers and procedures
4. Judicial review of merger decisions
5. Substantive test to assess mergers
6. Enforcement tools and sanctions

1. Merger control legal framework

Issue 1 – No merger control by law → legality and consistency issues, and risk of legal uncertainty

Recommendation – Establish formal merger control regime by law as integral part of Chile's competition law and policy

- Clear and precise legal framework but not excessively rigid
- Distinguish between rules to be established by law v. rules to be developed through soft law or practice
- Ensure consistency if dual-agency enforcement regime is retained

2. Merger control jurisdiction

Issue 2 – No merger definition, no merger notification mechanism (*de facto* semi-voluntary), no notification thresholds

Recommendation – Delineate Chile's merger control jurisdiction through 3 factors

- Definition of mergers: M&As, JVs, minority interests
- Notification mechanism: pre-merger mandatory or hybrid system with suspensory effect
- Notification thresholds: local nexus, thresholds equally applicable to all mergers

3. Merger control powers and procedures

Issue 3 – Use of diverse antitrust procedures not designed for merger control, and overlapping FNE and TDLC powers

Recommendation – Adopt a transparent, effective, timely and predictable system

- Establish merger-specific procedure in two phases:
 - Option 1: Phase I FNE and Phase II TDLC
 - Option 2: Phases I and II FNE, judicial review TDLC
- Allocate and streamline enforcement powers if dual-agency system is retained

4. Judicial review of merger decisions

Issue 4 – Unspecialised review on appeal, especially since broadest scope of review, adjudication without collaboration with FNE/TDLC/Parties, remedies anew.

Recommendation – Parties have the right to seek review by a separate adjudicative body of final adverse decision on merger legality

- Appellate body varies according to Option 1 (review by separate court) or Option 2 (review by TDLC)
- Establish specialised appellate body and/or limit scope of review?
- Hear the parties & the enforcer on its final decision under review

5. Substantive test to assess mergers

Issue 5 – Competition Act is silent on the test under which anticompetitive effects of mergers should be established

Recommendation – Establish substantive test for merger assessment

- Set the test by law
- Provide relevant qualitative and quantitative factors
- Set substantive thresholds/safe harbours

6. Enforcement tools and sanctions

Issue 6 – Lack of powers or sanction to ensure effectiveness and efficacy of merger control *process*

Recommendation – Ensure enforceability of merger control rules through adequate enforcement tools and sanctions against:

- Failure to notify
- Gun jumping
- Inaccurate/incomplete information
- Non-compliance with remedies

Thank you for your attention!

Q&As



Assessment of Merger Control in Chile

A report by the OECD Secretariat

Antonio Capobianco
OECD Competition Division

Santiago, Chile - 11 November 2014