MERGER CONTROL SURVEY 2014

Guest edited by Nicole Kar

Linklaters
Americas: risk rating map

**Key**
- Green indicates a regime in which regulation is predictable and light touch.
- Orange indicates a regime in which regulation is generally predictable or moderately intrusive.
- Red indicates a regime in which regulation is unpredictable or highly intrusive.
- File Filing
- $ Penalties
- ✔️ Clearance

*Please note that responses to section 1 and section 2.5 are not rated.*
ARGENTINA

Section 1: REGULATORY FRAMEWORK

1.1 What is the applicable legislation and who enforces it?
Antitrust Law 25,156 (the Antitrust Law) is the principal legislation covering Argentine merger control. Other important regulations are Presidential Decree 89/2001 and Secretary of Competition and Consumer Welfare Resolutions 40/2001 and 164/2001.

Pending the creation of a National Tribunal for the Defence of Competition within the scope of the Ministry of Economy, the National Commission for the Defence of Competition will perform a technical review on mergers, issuing recommendations to the Secretary of Domestic Trade of the Ministry of Economy, which will ultimately decide upon antitrust matters. For the purposes of this article, this dual-tier regulator structure will be referred to as the Antitrust Commission.

1.2 What types of transactions are caught?
Under the Antitrust Law, transactions are deemed to be economic concentrations when they result in the assumption of control of one or more companies by means of: merger; transfer of businesses; acquisition of shares or equity interests, convertible debt securities or securities that grant the acquirer control of, or a substantial influence over, the issuer; and any other agreement or act through which assets of a company are transferred to a person or economic group, or which gives decision-making control over the ordinary or extraordinary management decisions of a company.

Section 2. FILING

2.1 What are the thresholds for notification?
Economic concentrations require approval by the Commission if the aggregate volume of business generated in Argentina exceeds Ps200 million ($25.6 million). Such volume is defined as the combined gross sales of products or services during the preceding fiscal year, net of discount sales, value added tax and other taxes directly related to the volume of business. In order to calculate the volume of business, the turnover generated in Argentina by the acquiring group and the target company should be taken into account.

Certain concentrations are exempt from mandatory-notification, including the acquisition of: companies in which the purchaser already holds more than 50% of the shares; bonds, debentures, non-voting shares or debt securities; and, wound-up and liquidated companies.

2.2 How clear are the filing requirements?
The transaction must be notified before the Antitrust Commission either before or within seven days of closing. When carrying out a multi-jurisdictional analysis regarding Argentina, it is important to verify the currency exchange rate, given how quickly it fluctuates.

2.3 Does the merger regime extend to transactions taking place outside your jurisdiction and if so to what extent does there need to be local effect?
According to section three of the Antitrust Law, merger control applies to “all persons or companies, either public or private, that carry out economic activities, either with or without the purpose of obtaining a profit, in all or part of the national territory and those that carry out economic activities outside the country, as long as their acts, activities or agreements may generate effects in the national market”.

However, under an Antitrust Commission test, the effects in the local market of a foreign-to-foreign transaction must be substantial, normal and regular for the previous antitrust clearance to apply. Yet there is no precise rule to determine when the effects can be considered substantial, normal and regular. The matter must be analysed on a case-by-case basis.

2.4 How onerous are the filing requirements?
There are no fast track procedures in Argentina; all transactions must be carried out by completing a full notification form with a thorough analysis on the market, even if the resulting entity has low market shares.

2.5 On whom does the burden to file fall and are there filing fees?
Both parties to the transaction must carry out a joint filing. While they have been set out by the Antitrust Law, in practice there are as of yet no filing fees.

Section 3. PENALTIES

3.1 At what level does your authority have jurisdiction to review and impose penalties for failure to notify deals?
The Antitrust Law states that if the parties do not carry out the notification, they will be subject to a fine of up to Ps1 million for each day they fail to comply. The Antitrust Commission is carrying out an intensive investigation in order to identify non-notified transactions. In order to do so, it has initiated a non-regulated procedure called a Preliminary Diligence in order to build a case against non-notifying parties.
Section 4. CLEARANCE

4.1 How advanced is the test for clearance

Notification is carried out by means of an F-1 notification form. The Antitrust Commission may then request more information through an F-2 notification form, and even a tailor-made F-3 notification form.

According to section 13 of the Antitrust Law, once the relevant transaction is notified, the Commission, within 45 business days, must decide whether to approve the transaction, approve the transaction subject to certain remedies or reject the transaction. However, the Commission is currently enforcing a stop-the-clock interpretation, where the first request for information stops the term of 45 business days, which will not start to run again until the necessary information for the issuance of the final resolution has been obtained. As such, current time frames for analysis average at 24 months.

4.2 What level of opportunity exists for the decision to be appealed?

The final resolution on the matter can be appealed by the notifying parties in the event of the imposition of conditions or the rejection of the transaction. No third parties can file an appeal regarding a merger control resolution.

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Bolivia

Mauricio Costa du Rels and Thais Baldivieso Albuquerque, Würth Kim & Costa du Rels

Section 1: REGULATORY FRAMEWORK

1.1 What is the applicable legislation and who enforces it?
The applicable legislation is enshrined within articles 405 to 412 of the Bolivian Commerce Code. This establishes the main restrictions and rules for mergers under Bolivian Law.

Article 69 of the Commerce Code also refers to unfair competition. However, it doesn't specifically mention the control over merger transactions.

The authority in charge of controlling general transactions, activities of companies and defence of competition in the Bolivian market is the Authority of Supervision and Social Control of Companies (AEMP).

1.2 What types of transaction are caught?
The AEMP throughout the application of the Bolivian Commerce Code captures a wide variety of transactions, which intentionally affect the commercial market.

Section 2: FILING

2.1 What are the thresholds for notification?
There is no specific law that requires a previous notification. A merger will only be investigated if there was a violation and the company caused real damage to the Bolivian market.

However, all merger transactions must be filed to the Commercial Registry (Fundempresa) to seek approval and further registration and will be effective once registered.

2.2 How clear are the filing requirements?
There are no mandatory or voluntary notification requirements. The only requirement is to enroll the merger in the Registry of Commerce and to avoid any damage to the partners and third parties.

2.3 Does the merger regime extend to transactions taking place outside your jurisdiction and if so to what extent does there need to be local effect?
The merger regime does not apply to transactions taking place outside Bolivian jurisdiction.

2.4 How onerous are the filing requirements?
The filing requirements are onerous when they are made due to the general filing requirements at the Commercial Registry. However, if the requirements are not complied with, the company will have to pay a fine depending on its net capital.

2.5 On whom does the burden to file fall, are there filing fees?
The burden to file falls upon the acquirer. Filing fees take the form of an administrative registration fee that does not exceed $100.

Section 3: PENALTIES

3.1 At what level does your authority have jurisdiction to review and impose penalties for failure to notify deals?
As there is no mandatory obligation to notify deals, there are no penalties for failure of notification. However, penalties may apply if the merger did not follow registration requirements. Only the AEMP can apply or determine the amount of the penalty according to the fault.

Section 4: CLEARANCE

4.1 How advanced is the test for clearance?
There is no test for clearance, only mandatory registration of the merger that can be audited by the authority in charge (AEMP).

4.2 What level of opportunity exists for the decision to be appealed?
If there is a judgment that confirms the presence of irregularities, an appeal could be launched to change the AEMP’s decision, through an administrative process.
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Section 1: REGULATORY FRAMEWORK

1.1 What is the applicable legislation and who enforces it?
The Brazilian statute which governs competition matters is Law 12,591 of November 30, 2011 (the Brazilian Competition Law). It applies to all acts and transactions that have actual or potential adverse effects on the Brazilian market.

The competition agency responsible for investigations and enforcement of anti-competitive practices and for the final review and judgment of merger cases is the Administrative Council for Economic Defense (CADE), an autonomous federal agency under the Ministry of Justice.

1.2 What types of transaction are caught?
A concentration includes transactions other than typical mergers and acquisitions, irrespective of the existence of any overlap or vertical relation between the activities of the parties involved. The Brazilian Competition Law deems a concentration to be:
- the merger between two or more previously independent firms;
- the acquisition of direct or indirect control of parts, whether through the acquisition of shares, assets, convertible securities, via contractual instruments or by any other means; or
- the execution of associative agreements, consortia and joint ventures (except if created for the purpose of participating in a tender process launched by a public administration).

Minority stake acquisitions are reportable when equal to or above 20% (and multiples) of the voting or total capital stock, whenever the parties are not horizontally or vertically related. Acquisitions of minority stakes in companies active in the same market or vertically related markets are reportable when equal to or above five percent (and multiples) of the voting or total capital stock.

Section 2: FILING

2.1 What are the thresholds for notification?
For the purpose of merger control in Brazil, a transaction must be submitted for review when: (i) it generates effects in Brazil; and (ii) the following thresholds are met (in the latest fiscal year):
- one of the economic groups of the parties to the transaction had a gross turnover or volume of business in Brazil in excess of R$750 million; and
- any other economic group of a party involved in the transaction had a gross turnover or volume of business in Brazil in excess of R$75 million.

2.2 How clear are the filing requirements? Please also note whether filing is mandatory or voluntary
Filing is mandatory, provided that the thresholds are met. Filing requirements are generally clear, except for some specific situations which are yet to be regulated or clarified by case law, such as the concept of associative agreements.

2.3 Does the merger regime extend to transactions taking place outside your jurisdiction and if so to what extent does there need to be local effect?
Acquisitions involving non-Brazilian entities must be notified for clearance whenever they might have an effect on Brazilian territory. Usually this is deemed to happen when the parties have assets or sales in Brazil.

2.4 How onerous are the filing requirements?
Filing requirements are moderately onerous.

2.5 On whom does the burden to file fall, and are there filing fees?
All parties (the purchaser, the seller and the target company) are equally responsible for filing the transaction. However, any one party may file alone provided that all necessary information is supplied to the authorities by the applicant.

All parties in the filing are responsible for the payment of the fee of R$45,000, which must be paid on the date of filing.

Section 3: PENALTIES

3.1 At what level does your authority have jurisdiction to review and impose penalties for failure to notify deals?
The Brazilian Competition Law does not establish penalties for failure to notify deals. However, since antitrust clearance is a condition to closing, if the parties fail to notify a deal that required clearance, CADE has the authority to impose penalties ranging from R$60,000 to R$60 million, and acts performed in order to consummate the transaction can be declared null and void.
Section 4: CLEARANCE

4.1 How advanced is the test for clearance?

The basic substantive test to assess and clear mergers is the absence of negative net effects on competition. CADE should not clear transactions that result in competition elimination in a substantial part of the relevant market, that raise or increase a dominant position, or that can result in the domination of a relevant market. Guidelines define the following steps for a substantive analysis:

- relevant market definition;
- determination of the parties’ market share;
- analysis of the probability of the exercise of market power;
- analysis of efficiencies; and
- evaluation of net effects on total economic and consumer welfare, weighing economic efficiencies against losses originated by the market power.

As a rule, finding an appreciable effect on competition is presumed to be unlikely (but not impossible) if the company’s market share is below 20%, as companies that hold more than 20% of a relevant market could be considered to have enough market power to negatively impact competition through their behaviour.

4.2 What level of opportunity exists for the decision to be appealed?

An approval decision by the General Superintendent may be appealed to the Tribunal. The General Superintendent does not have powers to block or impose restrictions on a merger, but can recommend blocking or restrictions to the Tribunal, which is empowered to render such a restrictive decision. A final decision issued by the Tribunal subject only to judicial review. Decisions in merger control will not be submitted or analysed again by any other governmental entity or instance.

About the author
Paola Pugliese has advised on antitrust and competition law matters for 13 years, with a particular focus on cross border, local mergers, and high profile cartel and anti-competitive behaviour investigations. She has experience in several sectors of the Brazilian economy, including mining, aviation, pharmaceutical, medical devices, transportation, oil and gas, food and beverages, retail, meatpacking, and jet fuel. She also assists companies in designing and implementing compliance programmes.

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Section 1: REGULATORY FRAMEWORK

1.1 What is the applicable legislation and who enforces it?
The principal statutes relating to US merger control are Section 7 of the Clayton Act, which applies to the competitive effects of mergers and acquisitions, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act), and its implementing rules, which set out pre-notification requirements for mergers and acquisitions.

1.2 What types of transaction are caught?
The HSR Act applies to acquisitions of voting securities, non-corporate interests and assets (which can include entering into certain licences). Section 7 of the Clayton Act has a broader reach than the HSR Act, also covering transactions that do not trigger the reporting requirements of the HSR Act (including other types of transactions or agreements such as acquisitions of debt securities).

Section 2: FILING

2.1 What are the thresholds for notification?
The pre-merger notification requirements of the HSR Act are triggered if:

(a) as a result of the transaction, the acquiring person will hold an aggregate total amount of voting securities, non-corporate interests and assets with a value in excess of $50 million but less than $200 million of: (i) an acquired person engaged in manufacturing which has annual global net sales or total assets of at least $10 million, where the acquiring person has annual global net sales or total assets of at least $100 million; or (ii) an acquired person not engaged in manufacturing which has total assets of at least $10 million, where the acquiring person has annual global net sales or total assets of at least $100 million; or (iii) an acquired person which has annual global net sales or total assets of at least $100 million, where the acquiring person has annual global net sales or total assets of at least $10 million

Or:

(b) as a result of the transaction, the acquiring person will hold an aggregate total amount of voting securities, non-corporate interests and assets of the acquired person with a value in excess of $200 million.

The thresholds are adjusted annually to reflect the percentage change in US gross national product.

2.2 How clear are the filing requirements? Please also note whether filing is mandatory or voluntary

Notification is mandatory if the reporting requirements of the HSR Act are triggered. However, a transaction that meets the test set out in the HSR Act may qualify for one of the many exemptions contained in the HSR Act or the implementing rules.

2.3 Does the merger regime extend to transactions taking place outside your jurisdiction and if so to what extent does there need to be local effect?
The HSR Act applies to acquisitions of non-US assets to which sales in or into the US in the last fiscal year in excess of $50 million can be attributed, and of voting securities or non-corporate interests of targets that had sales in or into the US in their last fiscal year in excess of $50 million, or have US assets (other than investment assets, voting or non-voting securities of another person and, in the case of joint venture corporations, any amount of credit extended or obligations guaranteed by any of the parents) with a fair market value in excess of $50 million. There is an alternative test for transactions where both the acquiring and acquired persons are non-US entities and the transaction is valued at less than $200 million. In addition, acquisitions of minority stakes in non-US targets by non-US persons are exempt.

The thresholds are adjusted annually to reflect the percentage change in US gross national product.

Section 3: PENALTIES

3.1 At what level does your authority have jurisdiction to review and impose penalties for failure to notify deals?
The penalty for a violation of the HSR Act is up to $16,000 per day for each day of non-compliance. The antitrust authorities have jurisdiction to review and prosecute non-compliance with the HSR Act, although penalties can only be imposed by a federal court. The Federal Trade Commission administers the pre-notification programme, and so is generally the agency that investigates compliance with the HSR Act.
Section 4: CLEARANCE

4.1 How advanced is the test for clearance?

Transactions violate Section 7 of the Clayton Act if they substantially lessen competition or tend to create a monopoly. The Federal Trade Commission and Antitrust Division of the US Department of Justice have published Horizontal Merger Guidelines that describe the main factors they consider when investigating transactions between competitors.

4.2 What level of opportunity exists for the decision to be appealed?

The antitrust authorities do not have the ability to unilaterally prevent consummation of mergers or acquisitions; they must apply to a federal district court for a preliminary injunction. In the case of an already-consummated transaction, remedies may only be ordered by a federal court or, for challenges by the Federal Trade Commission, by an administrative law judge.

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