

## **South American Regional Webinar Merger Control in Times of Crisis**

### **1. Overview**

The ICN Merger Working Group under the leadership of the Administrative Council for Economic Defense – CADE organized a series of regional webinars to promote discussions on the impacts of the COVID-19 pandemic on the merger review process.

CADE hosted the South American Regional Webinar on 6<sup>th</sup> November 2020, from 9:00 to 10:30 am (Brasília time). The event was transmitted through the video conference platform Zoom and gathered a global audience of 55 participants, including NGAs and NCAs from a wide range of ICN jurisdictions.

Aiming at promoting a dynamic discussion, the webinar was organized in a format that allowed the speakers to answer questions from the moderator and interact with each other on substantive topics involving the analysis of mergers and acquisitions during the COVID-19 crisis. Topics discussed encompassed practical aspects of merger assessment, substantive merger assessment, failing firm defense and remedies.

#### **1.1 Panelists**

**Moderator:** Ms. Patrícia Morita Sakowski, CADE's Deputy Superintendent

**Speakers:**

Mr. Paulo Burnier, Senior Competition Expert at the Organization for Economic Cooperation and Development

Ms. Francisca Levin, Head of Mergers at *Fiscalía Nacional Económica* (Chilean Competition Agency)

Mr. Bernardo Gouthier Macedo, Head of Competition Economics at LCA (Brazil)

Ms. Elizabeth Farina, CEO of Tendencias (Brazil)

### **2. Summary of the discussion**

#### **2.1 Practical Aspects of Merger Assessment**

- *Recognizing the major role of international organizations, such as the ICN and the OECD, in promoting the sharing of experiences on how agencies can better*

*deal with the challenges brought up by the pandemic, the moderator asked Mr. Paulo Burnier to present the OECD's COVID-19 recommendations on merger Control, focusing on practical aspects of merger analysis.*

In early March 2020, the OECD established a COVID-19 task force within different divisions. The Competition Division's task force identified three main areas that would require immediate guidance: excessive prices; collaboration between competitors; and mergers. Then, the division produced a set of notes tackling these issues.<sup>1</sup>

Since merger review operates under tight deadlines, OECD noticed that many agencies around the world experienced operational and practical challenges in several dimensions, e.g. the lack of an electronic filing system for mergers or inability to conduct face-to-face meetings due to lockdowns. In that regard, the OECD note explored both challenges and solutions based on comparative experiences.

One of the recommendations encompassed on the note was that agencies would adopt procedural flexibility whenever possible and permitted by their legal framework, e.g.: derogations to the standstill obligation. In addition, some jurisdictions would encourage companies to postpone the notification, where possible, by means of advocacy efforts. This recommendation proved particularly relevant especially at the beginning of the pandemic, considering the asymmetry of information due to rapid market changes.

*- Commenting on Mr. Burnier's presentation, Ms. Elizabeth Farina referenced the 1993 Nobel Laureate Douglas North on the relevance of institutions for the promotion of a fair economy. Institutions are the rules of the game and should be stable and predictable. Ms. Farina asked Mr. Burnier about his evaluation on flexibility in competition enforcement considering the Douglas North's perspective on institutions.*

Mr. Burnier emphasized that North's perspectives on institutions, transaction costs and economic development are very much aligned with the OECD's mandate "*Better policies for better lives*". In that scenario, the message conveyed by the OECD

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<sup>1</sup>All the notes published by the OECD focusing on competition are available at: <https://www.oecd.org/fr/concurrence/competition-policy-responses-to-covid-19.htm>

recommends agencies to not relax with the enforcement of competition law, but make good use of the windows allowed by their legal framework, on a case-by-case evaluation, to accommodate procedural flexibility, whenever possible. Thus, this would ensure legal certainty and the promotion of security standards.

## **2.2 Substantive Merger Assessment**

*- The moderator invited Ms. Francisca Levin to share practical experiences regarding substantive merger analysis in the context of the current crisis.*

The Fiscalía Nacional Económica (FNE)/Chile recently analyzed a multijurisdictional merger concerning the acquisition of Cornershop by Uber. Cornershop is a local startup which leads Chilean online grocery delivery market. Uber is the leader on the ridesharing market and is present in food delivering – as Uber Eats. The transaction was notified to FNE in October 2019. Since the case raised preliminary antitrust concerns the investigation went to phase II – Chile adopts a two phases merger control regime-. When the COVID-19 crisis spread all over the world the investigation was in phase II and a great deal of the competitive assessment had already occurred, but the FNE concluded that they could not overlook the impacts of the pandemic. Despite the mandatory lockdown in Chile, FNE did not stop the investigation and assessed two main theories of harm, whether the main actors in each segment of the transaction could raise conglomerate concerns and, most importantly if the acquisition could lead to the elimination of Uber as a potential entrant in the grocery delivery market. Some of the key factors analyzed by the FNE were whether in the absence of Uber’s entry, the remaining competitors could exert competitive constraints on Cornershop in the online grocery delivery markets and how COVID-19 could affect the entry and expansion plans of other firms.

FNE found that the grocery delivery market was fast growing even pre-pandemic for the past two years. FNE assessed the impact of COVID-19 lockdowns as a “natural experiment” and noticed a sudden positive shock of demand for grocery delivery from the beginning of the lockdown, considering that consumers refrained from brick and mortars stores. Echoing OECD guidelines, FNE stated that relying on precedents and historical data could be challenging and authorities need to gather

information on recent and sometimes ongoing developments to better understand market developments in the context of the pandemic. In that sense, FNE assessed historical data and compared it to new information requested from third parties, while also relying on public information. By means of consumer surveys, specific questions were added regarding COVID-19, which also provided valuable information regarding demand elasticity and switching costs in the industry. The information collected supported FNE's conclusion that supermarkets were Cornershop's closest competitors. Then, FNE assessed the COVID-19 impacts on supermarkets and their projections to expand online sales and potential entry of new rivals in the market.

In that scenario, FNE requested additional information from third parties. The information gathered was quite illustrative: in response to the increase in consumer demand for online delivery services, different market participants, either pure delivery platforms or supermarket platforms, reacted to the pandemic by actively accelerating investment plans or making new investments to become market players or increase their positions. Counterfactual analysis demonstrated that entry plans were projected pre pandemic and speeded up in the context of the market changes triggered by COVID-19. In May 2020, the merger was cleared unconditionally considering the low barriers to expansion and entry. FNE concluded that competing platforms could exert sufficient competitive constraints over the merging parties and since then has been observing the plans of Cornershop being implemented.

*- Mr. Paulo Burnier mentioned that the case brought up by Ms. Francisca Levin is a great case study, which highlights the importance of identifying specific markets and sectors that are mostly affected by the COVID-19 crisis. There are specific markets, such as multisided digital platforms presented by Francisca, that are deeply transformed considering the way business models are done. It is possible to also mention e-commerce, e-learning, etc. It is important that competition agencies can differentiate markets that are more affected and markets that less affected – such as heavy industries less likely to be transformed.*

*- In addition, Ms. Patricia Sakowski highlighted some difficulties associated with relying on historical data due to structural changes in consumer's behavior and asked about the surveys conducted by FNE.*

*- Ms. Francisca Levin informed that FNE conducted an online consumer's survey based on the Competition and Markets Authority (UK CMA) guidelines on surveys. The survey had a 30 per cent response rate and information obtained was highly valuable.*

### **2.3 Failing Firm Defense**

*- Considering that the pandemic caused substantive changes to economic circumstances, the moderator asked Mr. Bernardo Macedo to share insights from the private bar and a broad economic perspective on potential claims for failing firm defense.*

Mr. Bernardo Macedo explained that failing firm defense is an issue that generally appears in a context of crisis but rapidly fades away as soon as the crisis is ended. In any event, it is an interesting issue to tackle and permits touching upon the role of economics in merger review.

Merger assessment should be an informed and structured lens into an uncertain future. Over the years, an extensive and consolidated legal framework has been established around the world. In times of uncertainty, the great challenge concerns forecasting the future and building prospective scenarios based on past information. There are many aspects that should be considered to conduct such an analysis. For instance, counterfactuals are one of these important aspects. In Brazil, in general counterfactual is the last item tackled and commonly based on considerations about the impacts of the merger in terms of efficiencies. Building alternative scenarios and counterfactuals are not a simple task. For instance, answering the question "what if the transaction did not happen?" can be challenging. When assessing the failing firm defense claims, the analysis will explore a prospective scenario in which the merger did not occur and, for that reason, the firm failed and its assets are any longer available in the market, and there are not any other potential substitutes to the parties. The counterfactual is very strict considering that it is based on the premise that market will lose these assets, so it is better to approve the merger to preserve

the assets. First it is necessary to prove that there are not any other potential buyers, second that the firm is about to fail and third that the assets will be out of the market. On top of that, the parties must prove that these three steps will be presented soon, which is a heavy burden of proof. This is the reason why failing firm defense is not a practical issue most of the time.

Overall, parties will try to present a case that will contribute to better markets, fairer practices, efficiencies, innovation, etc. In that sense, we can try to make failing firm defense not so strict, but more generally as a weak rival case. Economists can explore the current crisis as an opportunity to balance the competitive scenario and identify weak rivals and stronger potential rivals, on a case by case basis.

In conclusion, it is possible to mention Padilla and Petit paper facing the European scenario. They understand the authorities had better take this opportunity to review the European market and make it more competitive. They recommended not to raise the bar of analysis and be more attentive about the possibility of the targets being weaker rivals, so the crisis could bring a possibility to build stronger players in some industries. OECD papers and Motta, on the other hand, stress the importance of sticking to the rules we already have in place. In sum, they recommend NCAs should be conservative and not allow mergers that after the crisis can lead to a market that is not competitive.

As a final remark, I'd say that authorities should conduct, as always, a case by case analysis, but be even more attentive to unstable market conditions. One more point: when we conclude a merger review it might end up in a structural remedy. The remedies imposed could make room for a stronger rival in the end, as Padilla and Petit argue. Thus, it would be interesting to be more attentive to the market dynamics and the crisis bring some field for it.

*- The moderator invited Ms. Francisca Levin to share a recent experience from FNE/Chile in the analysis of a failing firm defense case.*

In June 2020, FNE analyzed its first fully fledged failing firm defense case. The case involved the acquisition of a regional gas station by the dominant conglomerate in Chile. The transaction raised several antitrust concerns. The target was one of the

few independent gas stations in the relevant geographic area. The parties claimed that the target company financial situation was due to the COVID 19, but also due to causes that preceded the pandemic.

According to international understanding, the burden of proof relies on the merging parties. The information submitted in this case was a good preliminary base for proving the defense, but it was not sufficient for proving the three links that are foreseen in the horizontal merger guidelines. In that sense, considering that the parties lacked sufficient evidence, FNE could dismiss the defense at the very beginning of the assessment. However, considering the relevance of procedural flexibility during these times, FNE opted to use its investigative powers to request additional information from the parties, such as additional financial statements, the targets' accounts and books, information on taxes, among other information. FNE also asked for information from third parties on whether they had a negotiation with the target regarding the gas station assets. This data was crucial to complement the party's submission and prove the defense.

FNE assessed that although COVID-19 deepened the party's financial crisis, it was not the triggering event. In that regard, FNE adopted a more global approach, focusing not only on COVID-19, and confirming that the firm was already loss making. Observing the recommendations from OECD, the ICN and other international organizations, the agency was very cautious and did not relax the analysis. A long-term approach was adopted since relaxation would lead to clearing an anticompetitive merger and thus altering long term structures. FNE was very strict that the parties had to prove every single criterion of the Failing Firm Defense claim. Lastly, counterfactuals were analyzed to investigate the probable exit of the target from the market and concluded that consumers would be in a better position with the merger rather than without the transaction.

## **2.4 Remedies**

*The moderator remarked that current changes in market's dynamics requires special attention from the competition authorities when designing and implementing remedies. She asked Ms. Elizabeth Farina to share perspectives on remedies considering her vast experience in the public service and as an NGA.*

Ms. Farina reiterated that the outline for competition assessment for mergers has not been altered by the COVID-19 pandemic, but decision makers must ensure that merger review process should be timely and predictable as much as possible. Stakeholders and investors rely on a stable institutional environment to take investment decisions.

In these unusual times, economic analysis plays an important role to reduce uncertainty and to help better understand the competitive conditions at the time of a merger. Economic analysis can contribute to identify and bring objectivity into the evaluation of the theories of harm adopted. Thus, unveiling economic rationality and guiding the competition authority and the parties in the design of better remedies.

Merger Remedies represent an important enforcement tool to neutralize harmful effects to the competitive process. Therefore, structural or behavioral remedies must be well based on economic analysis in order to evaluate the outcome of the relevant market possibilities in terms of counterfactuals.

Structural remedies present lower monitoring costs, but there are challenges associated with possible deterioration of assets; difficulties in finding potential buyers of divested assets and ineffectiveness before rapidly changing markets. Regarding behavioral remedies, although they should be carefully thought upon due to their enforcement and supervision costs, these are more likely to be recommended. Also, remedies should be designed to adapt to current rapidly changing market circumstances and trigger mechanisms as OECD recommends. Although more flexible for uncertain times, the effectiveness of behavioral remedies relies upon a good understanding of the market and sophistication in its design.

In that scenario, the design and implementation of effective remedies bring new and unpredictable difficulties. Some of the challenges concern the assessment of a suitable buyer due to the uncertainty as to the future of the market, the evaluation of the risks of non-implementation and coping with the potential need to reconsider the scope of the remedies already imposed due to significant changes to market circumstances. Finally, the analysis of efficiencies gains momentum during such periods, as reducing costs is of paramount importance during crises.. Identifying sustainable configurations of the industry becomes more and more important.

Although efficiencies are always present in all M&A analysis, they rarely are decisive for an approval. In that sense, merger analysis might grant more attention to the potential efficiencies of the merger that could lead to possible reduction or even to contribute to economic recovery of a market in the COVID-19 context.

As main takeaways, it was stated that the basis for merger control are still valid; Institutional stability is key as incentive to investment; Economic analysis is crucial to analyze the operation rationality and guide the design of remedies and implementation and; granting more attention to potential efficiencies can be very important to competition authorities that cannot relax the merger analysis standards.

- Mr. Bernardo Macedo added a few insights about remedies

Agreeing with Ms. Farina's analysis, Mr. Macedo added that we should be more willing to face a broader view and to add to the toolbox not only price tools, such as UPP and the like, but also nonstandard tools, such as consumer surveys. There are reasons to doubt the value of such surveys, but it is important to gather all the evidence that can contribute to a better understanding of a case. Recognizing the importance of analyzing efficiencies, he mentioned a paper from Commissioner Christine Wilson from the FTC that touches precisely upon asymmetries when tackling efficiencies.

### **3. Final remarks**

The moderator invited the panelists to share a takeaway on how merger control can be improved given the opportunities and challenges brought up by the crisis.

Mr. Burnier recognized the importance of strong policy for international cooperation by means of direct bilateral relations and international organizations such as the OECD and the ICN. From the standpoint of the OECD, the advantages of straight cooperation between competition authorities especially in times of crisis are clear. Since things are moving fast, agencies can benefit from sharing common challenges and solutions.

Ms. Elizabeth Farina highlighted the importance of competition advocacy and coordination with other policies. The crisis shows that at some point the government must be present and solve problems that are urgent and and politically unbearable, such as abusive prices and control of quantities. At this point, the role of competition advocacy is important in order to prevent these policies from harming competition.

Ms. Francisca Levin drew attention to the ability to be flexible, whenever possible by the legal framework, and the importance of flexibility from a procedural standpoint, being able to adapt, add new procedures and speed up processes when they are required, for instance in failing firm defense.

Mr. Bernardo Macedo stressed the importance of flexibility and seizing this moment as an opportunity for future improvement.

No further questions were presented by the participants.

The moderator recognized that the discussion was very fruitful, touching upon themes of great relevance such as international cooperation, the importance of legal certainty, how to be effective in the design of remedies, thinking about concerns regarding the risks of implementation and how competition policy should be viewed as part of other policies. With legal certainty, flexibility, and cooperation as principles, we can better face the challenges that we are currently facing.

#### **4. Speakers' short bio**

**Mr. Bernardo Gouthier Macedo** is Head of Competition Economics and founding partner at the Brazilian Economic Consultancy LCA. He Holds a PhD in Economics from University of Campinas.

**Ms. Elizabeth Farina** is CEO of the Economic Consulting Firm Tendências. Ms. Farina holds a B.A. degree in Economics from the University of São Paulo (FEA-USP) and a PhD in Economics from the same University. She was a professor and Head of the Department of Economics at FEA-USP from 2002 to 2004, former President at CADE from 2004 to 2008 and CEO at the Sugar Cane Industry Association (UNICA) from 2012 to 2019. Currently, Ms. Farina is part of the Deliberative Council of IBRAC

(Brazilian Institute for Studies in Competition, Consumer, and International Trade), Independent Board Member of of Bonsucro (Better Sugarcane Initiative) and of the Superior Council of Agribusiness (COSAG) of the Federation of Industries of the State of São Paulo (Fiesp).

**Ms. Francisca Levin** is the Head of Mergers at Fiscalía Nacional Económica (Chilean Competition Agency) since 2019. She is a lawyer from the Pontificia Universidad Católica of Chile and holds an LL.M in Competition Law from King's College London (2013) and a MSc in Regulation from the London School of Economics (2014). She has more than ten years of practice in competition law field, and previously worked as a senior associate in the antitrust practice at Carey, and as a case handler in the Mergers and Enforcement Division of the FNE.

**Mr. Paulo Burnier da Silveira** is a Senior Competition Expert at the OECD. He is also a former Commissioner at the Brazilian Competition Authority (CADE) and holds a PhD in Competition Law from the University of Paris.