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Merger Control in Dynamic Markets

- Contribution from Chile –

1. Introduction

1. Merger control entails an economic analysis of the likely effects of the transaction in a relevant market or segment, which is inherently prospective. Such assessment poses challenges to antitrust enforcers, in particular when the transaction is not *brick-and-mortar* but involves dynamic markets. In such cases, while the traditional tools and tests might serve as a useful first indicator of antitrust concerns, it is therefore necessary to rely on additional information on market conditions criteria –such as incentives to innovate and constraints posed by potential competition– in order to assess the real effects of the merger in evolving markets¹. Those challenges are particularly relevant when the merger involves a ‘small economy’², such as Chile³⁻⁴.

2. Chile has a mandatory merger control regime in force since July, 2017 whereby the merging parties must notify the concentration to the antitrust enforcer (*Fiscalía Nacional Económica* or “FNE”). A filing is mandatory if both the transaction is a ‘merger transaction’ (according to one of the hypotheses of cease of independence provided in the local competition law, Law Decree No. 211 or “DL 211”)⁵ and exceeds relevant turnover

¹ Gal, M. (2013), Merger Policy for Small and Micro Jurisdictions, More Pros and Cons of Merger Policy, Swedish Competition Authority, p. 84. “[...] When current market shares are high, as is the case in many mergers in small economies, such indicators might easily lead to a preliminary conclusion that the merger would be harmful to the economy. Yet, especially in small economies a dynamic analysis of relevant markets and especially of potential competition is needed in order to realize the real effects of the merger on one's domestic markets”. Available at: <http://www.konkurrensverket.se/globalassets/english/research/more-pros-and-cons-of-merger-control.pdf>

² Either due to the location of parties to the transaction or to the place where the merger poses its effects, due to the ‘effects doctrine’.

³ See Bauducco, S & Caprioli, F. (2011), Optimal Fiscal Policy in a Small Open Economy with Limited Commitment, Central Bank of Chile Working Papers N° 644, available at: <http://www.bcentral.cl/web/guest/-/optimal-fiscal-policy-in-a-small-open-economy-with-limited-commitme-2>; Cerda, R., Silva-Uribe, A. & Valente, J.T. (2016) Economic Uncertainty Impact in a Small Open Economy: The Case of Chile (No.25, pp. 1-28), Clapes UC. Available at https://clapesuc.cl/assets/uploads/2016/10/15-02-17-iec-eu_chile_paper_edited281116.pdf.

⁴ From a competition policy perspective, Chile can be qualified as a small economy, since it generally shares its main elements being an independent economy, with small and concentrated markets. Following Michael S. Gal, a small economy can be defined by “the dispersion of its population over a comparatively large geographic area [...]; monopolistic or oligopolistic structures in most of their industries” and “high entry barriers and below-MES (minimum efficient scale) levels of production.”, in Gal, M. (2003), Competition Policy for small market economies. Harvard University Press, p.2, 14.

⁵ Chile’s competition rules are set out in Statutory Decree (Decreto con Fuerza de Ley) No.1 laying down the consolidated, co-ordinated and standardized text of Decree Law (Decreto Ley) No. 211 of 1973, published in the Official Gazette of 7 March 2005, amended by Law No. 20.945 of 30 August

thresholds⁶. The FNE can decide whether to clear the merger without remedies, accept commitments from the parties, or also to prohibit transactions that are able to ‘substantially lessen competition’, which is the legal test included in the law⁷.

3. Within this new mandatory merger control regime, the FNE has faced relevant challenges reviewing concentrations with effects in Chile involving dynamic markets, either local or global. First, from a procedural standpoint, regarding the possibility to review mergers and acquisitions in which the target does not surpass relevant turnover thresholds. Second, from a substantive perspective, concerning the relevant time frame of intervention, considering when –and whether– to intervene in evolving markets through merger remedies or prohibitions, and applying the relevant criteria to better assess the likely effects of a merger and flexibility in the applicable tools. Third, regarding multijurisdictional transactions, challenges have been raised considering that reviewing jurisdictions may reach opposite rulings bearing the local context and the assessment of global dynamic considerations and tools.

2. Main challenges faced by FNE in the assessment of mergers in dynamic markets.

2.1. Possibility to review transactions below relevant turnover thresholds.

4. It is discussed elsewhere that one of the main challenges of merger control in dynamic markets –for instance, cases involving the acquisition of start-ups, new platforms or apps– is that antitrust authorities, which jurisdiction is triggered according to the parties’ turnover, may hardly have the chance to review such transactions, despite they may raise antitrust concerns. The above, since in these types of markets it is usual that acquisitions involve low-turnover targets which revenues do not surpass relevant thresholds, falling outside of the agency’s scope of review⁸.

2016. Article 47° of DL 211 provides four hypotheses of cease of independence: “Any fact, act or convention, or a set of them, through which two or more undertakings that are not part of the same business group and being previously independent from each other, cease their independence in any scope of their activities, through any of the following means: a) Merging, regardless the corporate organization of the merging entities or of the merged entity; b) The direct or indirect acquisition of rights that allow to individually or jointly exert a decisive influence or control over other party’s management; c) Through the association under any manner to establish an independent undertaking, different from them, that carries out its duties in a lasting basis; and d) The acquisition, by one or more and under any title, of the control over the other party’s assets”.

⁶ The thresholds are provided in Exempted Resolution (Resolución Exenta) No. 157, dated 25 March, 2019, issued by the FNE.

⁷ Such assessment is executed in accordance to the following procedure: (i) Once the notification is complete, the FNE opens a thirty-days investigation (Phase I) to assess the transaction, in which the FNE can clear the merger without conditions, approve it subject to the commitments offered by the parties or extend the investigation for a ninety-days period (Phase II). After that period, the FNE can approve the merger, with or without commitments or, it can block the transaction if it substantially lessens competition. If the merger is blocked, the parties can appeal the decision to the Competition Tribunal (Tribunal de Defensa de la Libre Competencia or “TDLC”).

⁸ Ocello E., Sjödin C. y Subočs A. (2015), What's Up with Merger Control in the Digital Sector? Lessons from the Facebook / WhatsApp EU merger case, European Commission, Competition merger brief 1/2015 – Article 1. Available at: https://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf and European

5. For example, the merger could involve a company that offer zero price products, either generating little or no revenues whatsoever⁹, or involve a two-sided market monetising the free services through advertising¹⁰. Likewise, the transaction could consist on an early elimination of a potential rival which strengthens the dominance of the acquirer, being the target a low-revenue product or service, in an initial stage, yet holding a significant market potential (or a so-called *killer acquisition*¹¹). In some jurisdictions, such scenarios have put into question the usefulness of turnover-based thresholds as a relevant measure of a company's competitive importance, mostly in transactions involving dynamic markets, particularly in the digital sector¹².

6. However, Chilean merger control regime does not face such jurisdictional challenges. The DL 211 provides two rules –introduced in the 2016's legal reform– that enable the FNE to assess mergers and acquisitions despite one or both parties to such transactions falls short to meet relevant turnover thresholds.

7. On the one hand, the law provides the possibility for merging parties to voluntarily notify to the FNE transactions not meeting or surpassing mandatory filing thresholds¹³. Such review is executed by the FNE, following the same procedure, stages and deadlines applicable for mandatory filings. Indeed, in *Walmart/Cornershop*¹⁴, the parties voluntarily filed to the FNE the proposed acquisition by Walmart, one of the largest worldwide retailers with operations in Chile, of full control of Cornershop, an app that provides same-day grocery delivery and pick up services in Chile and Mexico¹⁵. In such transaction, Cornershop was an app created in 2015 in Chile, which was in a starting stage of development, not meeting the applicable thresholds for triggering a mandatory filing. However, the parties decided to notify the transaction to FNE on a voluntary basis¹⁶, and also notified in Mexico (though on a mandatory basis)¹⁷.

8. On the other hand, said voluntary notification rule is reinforced by the FNE's power to review mergers that were not voluntarily notified to the FNE, until one year after the parties closed the deal¹⁸. Such faculty allows the FNE to perform an *ex-post* assessment of

Commission (2019), Competition Policy in the digital era, A Report by J. Crémer, Y. de Montjoye & H. Schweitzer, p. 110. Available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

⁹ As the case of WhatsApp, in the Facebook-Whatsapp merger. Ocello et. al., op cit.

¹⁰ As it was the case for Skype, as assessed in Case M.6281 – Microsoft/Skype, 7 October 2011, European Commission.

¹¹ European Commission (2019), op cit.

¹² Ocello et. al (2015), op cit., p. 2 and European Commission (2019), op. cit., p. 111.

¹³ Provided in article 48, subsection eight.

¹⁴ “Adquisición de control sobre Delivery Technologies SpA por parte de Walmart Chile” [Walmart Chile acquisition of Delivery Technologies SpA], Case N° FNE F161-2018. Available at: <https://www.fne.gob.cl/biblioteca/actuaciones-de-la-fne/investigaciones-de-la-fne-2/>

¹⁵ By the time of the notification. To date, Cornershop is also present in Peru and Canada.

¹⁶ Such type of filings has not only been executed regarding digital platforms but also in other markets, for example, in mergers involving gasoline stations and hospitals.

¹⁷ Decision of COFECE Walmart Acquisition of Cornershop, file No. CNT-161-2018, p.14.

¹⁸ Also provided in article 48 of the DL 211, subsection nine.

transactions that were originally outside its jurisdiction for an *ex-ante* review. However, due to the possibility to voluntarily file a transaction, parties are encouraged to perform a self-assessment and notify to the FNE transactions that the agency may thereafter investigate *ex-post* (i.e. due to its relevance, preliminary antitrust concerns, etc.).

2.2. When (and whether) to intervene in mergers involving dynamic markets.

9. One of the main discussions that follow from the different views about competition and innovation –which influences merger control policy– is whether and to what extent competition authorities may intervene regarding dynamic markets, and if so, which is the relevant timeframe. In this regard, for small economies –which are not usually innovation clusters– the somewhat traditional dichotomy between the U.S. and the European’s views on the topic, results illustrative¹⁹.

10. Within the global discussion, the FNE has assessed with caution mergers on dynamic markets, applying a case by case analysis, always aiming at the protection of competition and in preserving innovation constraints. This facts-based approach has led the agency to engage in different types of interventions, either outright prohibitions, unconditional clearances or subject to remedies.

11. The case of *Servipag/Santander*²⁰ involved Servipag, a digital payment platform that intermediates between different billers and their customers, which was owned by two of the main local banks (*Banco de Chile* and *Banco de Crédito e Inversiones*, BCI). The transaction consisted in the partial acquisition of Servipag by a third bank, Banco Santander’s Chilean branch. The investigation considered that in the digital payment platform market, a key input for entering the market were payment buttons²¹, because they give access to the payment method of the final user. The two main players of this market were Servipag and Transbank –a joint venture of different banks, in which the parties (Banco de Chile, BCI and Santander) had controlling stakes²²–.

¹⁹ On the one hand, the U.S. - until recently - had been generally reluctant to intervene in dynamic markets trying to avoid interference that could hinder innovation (see Hovenkamp, H. (2005), *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, p. 15). On the other hand, the European Commission had focus on investigating digital markets, especially in abuse of dominant cases, while supporting new theories of harm in merger control, such as the ‘risk of a significant impediment to effective innovation competition’ held in *Dow/DuPont* merger (Case COMP/M.7932, March 23rd, 2017). See, Petit, N. (2018), *Innovation competition and merger policy: New? Not sure. Robust? Not quite!*, May 2018, *Concurrences Review* N° 2-2018, Art. N° 86623, pp. 1-4.

²⁰ “Operación de Concentración entre Banco Santander – Chile y Sociedad de Recaudación y Pagos de Servicios Limitada” [Concentration between Banco Santander – Chile and Sociedad de Recaudación y Pagos de Servicios Limited], Case N° FNE F101-2017.

²¹ A payment button is a hyperlink that intermediate between web pages and apps operated by the digital payment platforms. Payment buttons can give access to one or many payment methods.

²² Even though they did not have a pact to act together, the FNE analyzed the behavior as stakeholders of Transbank and concluded that the three banks had acted together and had decisive influence on the company, *Concentration between Banco Santander – Chile and Sociedad de Recaudación y Pagos de Servicios Limited*, op cit. p.54-57.

12. The fact that Servipag and Transbank were *gatekeepers* –and that the parties could influence both through their stock holdings and corporate rights– and were the main firms that offered payment buttons, was critical for the FNE’s decision to block the merger²³. The FNE’s analysis considered that digital payment platform’s potential entry and expansion, that could compete with Servipag would likely be reduced as a result of the merger²⁴. Although some innovative projects were at the time planning to enter the market –which could open the market’s gate to competitors–, the FNE considered that they were not sufficient and timely to offset the likely effects of the transaction on competition²⁵.

13. In contrast, a different approach was taken in *Walmart/Cornershop*²⁶. The FNE assessed the potential concerns raised by the horizontal overlap between Cornershop and Lider.cl (Walmart’s supermarket online delivery in Chile), as well as the transaction’s vertical dimension, since Walmart was one a retail shop that operated in Cornershop’s platform.

14. In this case the FNE held that the merger did not raised concerns that could substantially lessen competition. From a horizontal dimension, the FNE concluded that the parties were not a relevant competitive constraint to each other²⁷ and warned that if such assessment were to be executed based only on current market structure, it would result to be insufficient due to the dynamic nature of the grocery’s online sales market²⁸. The above, since in Chile such market was expanding and in an early stage²⁹. Indeed, the target’s fast-growing sales, the entry of new competitors and the expansions plans of incumbents (such as *brick-and-mortar* retailers who opened an online business as a ‘meeting competition’ strategy, and who held changing market shares) imposed a significant degree of uncertainty over Cornershop’s market position. The dynamic nature of the market revealed to be somewhat opposed to a pure static analysis of market conditions.

15. The vertical theories of harm analyzed by the FNE focused in (i) the potential vertical foreclosure from Walmart to competing supermarkets who sold through Cornershop; (ii) a client foreclosure strategy, since Walmart could decide not to participate in apps that competed with Cornershop; and (iii) the possible misuse of commercial sensitive information of Walmart’s competitors that operated in Cornershop’s platform.

16. However, the FNE’s investigation and evolving market structure discarded vertical concerns. A client foreclosure risk was unlikely since Walmart only offered its products in Cornershop so it would not have the ability to affect other competing apps³⁰. On the other

²³ Id., p. 52-64.

²⁴ Id., p. 62-64.

²⁵ Id., p. 51-52.

²⁶ Walmart Chile acquisition of Delivery Technologies SpA, op cit.

²⁷ Id., p. 16.

²⁸ Three factors were indicative of market being dynamic (i) important change_s in the value of grocery orders made online, nearly doubling in value from 2017 to 2018, (ii) the entry of three new competitors in the market, and (iii) significant changes in market shares in the Previous year, were all considered as market signs of the dynamic nature of the grocery delivery and pick up service market in Chile. Walmart Chile acquisition of Delivery Technologies SpA, op cit., p. 5.

²⁹ Walmart Chile acquisition of Delivery Technologies SpA, op cit., p. 15.

³⁰ In addition, Cornershop’s competitors stated that given the fact that other supermarket chains beside Walmart were available in the market, they could achieve a sufficient scale of operation. However, the FNE considered that the possibility of future integration strategies from relevant

hand, an input foreclosure strategy was discarded since, among other reasons³¹, the dynamic nature of the market would allow the entry and expansion of new players, which would offset such concern³². Further, the potential risk of use of sensitive information was also unfeasible since under current market conditions Walmart only acquired information about one competitor and this information would be insufficient to actually affect the competition in the market³³.

17. In any event, in this case the FNE warned about the importance to be aware of the digital platform's market rapid changes and how the difficulties of assessing the market's evolution had to be considered in the analysis³⁴. For instance, the FNE considered the fact that Walmart could access one close competitor's information may not be a problem considering the current stage and structure of the e-commerce market, it could trigger potential coordination effects depending on how the market developed (i.e. if the platform gathered more groceries retailers). The FNE concluded the need to monitor the market's evolution so as to avoid future concerns.

18. Lastly, in *AT&T/Time Warner*, a transnational merger between one of the main paid TV operators and a conglomerate of relevant TV channels, the FNE's main assessment focused on the transaction's vertical concerns, to which the parties offered remedies limited to a five-year period. The FNE considered that in light of the specific features of the markets involved, subject to technological evolution that could inherently generate the provision of new services or products, and changes in consumer preferences accordingly, the proposed length of the remedies submitted by the parties was considered sufficient and proportional to mitigate the concerns.

2.3. Adjustments to the tools and criteria to assess merger effects in dynamic markets

2.3.1. Potential competition

19. Dynamic markets can pose challenges to traditional merger assessment. Accordingly, relying on market shares may only serve as a first indicator of antitrust concerns, being thus necessary to rely on additional information on market conditions for assessing the counterfactual, and criteria such as incentives to innovate and constraints

players, would require a detailed analysis of these cases. Walmart Chile acquisition of Delivery Technologies SpA, op cit., p. 16-17.

³¹ Another reason was that in the groceries segment, there was only one supermarket different from Walmart that sold its products through Cornershop. The sales of this store represented only a small percentage of all the sales of the grocery category in the app. In addition to that, Walmart had a privileged position on Cornershop due to a contract between the parties. Those facts lead the FNE to decide that the transaction would not change greatly the premerger conditions, and a substantial lessening of competition was not expected to occur. Walmart Chile acquisition of Delivery Technologies SpA, op cit., p. 17-18.

³² On 2018, three relevant food delivery players entered the market: Glovo, Rappi and Pedidos Ya. Moreover, some existing players like Jumbo (a supermarket chain such as Walmart) were preparing to implement their own fast delivery system. Walmart Chile acquisition of Delivery Technologies SpA, op cit., p. 13, 18.

³³ Walmart Chile acquisition of Delivery Technologies SpA, op cit., p. 18-20.

³⁴ Walmart Chile acquisition of Delivery Technologies SpA, op cit., p. 20-21.

posed by potential competition in order to evaluate the real effects of the merger in the market³⁵.

20. These considerations have not been novel in Chile. The TDLC, on its first merger case in 2004, already considered the paid TV market's dynamism as a relevant criterion for approving the merger conditioned to remedies. In *VTR/Metropolis*³⁶ the two main cable TV companies existing at the moment proposed to merge and filed a consultation to the TDLC³⁷. The TDLC held that satellite TV was still very expensive and not massive, while the paid TV market had high entry barriers. However, it assessed the dynamics of the market, considering the future growth of satellite TV and the pro-competitive effects that the merger would generate in some related markets, such as fixed telephony and internet, clearing the transaction subject to conditions aimed at controlling the monopoly position of the merged entity, which should be constrained by the market's evolution³⁸.

21. A similar approach was recently taken by the FNE in *AT&T/Time Warner*³⁹ and *Disney/21CF*⁴⁰ approval decisions. In *AT&T/Time Warner*, involving the markets of paid TV and TV content, the FNE analyzed mainly the transaction's vertical concerns. In particular, the FNE assessed potential competition by over-the-top ("OTT") platforms (such as Netflix), bearing that technologic dynamism and innovation were key elements in the industry. Even though the FNE considered that paid TV and OTT platforms were complementary and not necessary substitutes, the FNE warned that market evolution could eventually lead to a substitution relationship in the future⁴¹.

22. Furthermore, in *Disney/21Channel Fox*, the FNE cleared the transaction highlighting the dynamism of the TV market and the extent to which OTT platforms could become a close substitute for paid TV channels. However, it held that since the market was still in a developing stage in Chile, and such process was being carried at a different pace compared to other countries like the United States, the FNE could not anticipate the evolution of the market⁴².

³⁵ Gal, M. (2013), op. cit, p.84: "When current market shares are high, as is the case in many mergers in small economies, such indicators might easily lead to a preliminary conclusion that the merger would be harmful to the economy. Yet, especially in small economies a dynamic analysis of relevant markets and especially of potential competition is needed in order to realize the real effects of the merger on one's domestic markets."

³⁶ Decision No. 1 TDLC "Consulta sobre Fusión Metropolis Intercom S.A. y VTR S.A" [Consultation about merger between Metropolis Intercom and VTR], October 25th, 2004, p. 44-45.

³⁷ By then, Chile lacked a mandatory merger control regime and concentrations were reviewed by the TDLC through a non-adversarial proceeding, which ended in unconditional clearances or imposition of remedies.

³⁸ VTR recently requested the TDLC to waive the conditions applied alleging change in circumstances and remedies obsolescence. This case is currently being reviewed by the TDLC.

³⁹ "Notificación de Operación de Concentración entre Time Warner Inc. y AT&T Inc." [Concentration between Time Warner and AT&T Inc.], Case N° FNE F81-17.

⁴⁰ "Adquisición de 21CF por parte de Disney" [Acquisition of 21CF by Disney], Case N° FNE F155-2018.

⁴¹ Concentration between Time Warner and AT&T Inc., op cit., p.7.

⁴² Acquisition of 21CF by Disney, op cit., p.9.

2.3.2. Merger analytical tools

23. In some of the most relevant cases involving dynamic markets reviewed by the FNE so far, the particular features of said markets, such as zero price for services, two-sided markets and network effects, among others, have posed challenges to the traditional merger analysis.

24. First, the FNE commonly uses the *significant but small increase in price test* (“SSNIP_test”) for market definition and the upward pressure pricing index (“UPP”), as an alternative for market definition, to evaluate unilateral effects in horizontal mergers with differentiated products⁴³. However, the FNE’s assessment of mergers in evolving markets revealed that such tests may be harder to apply due to the particular features of such markets.

25. In two side markets, for example, their application could be difficult due to the existence of indirect network effects⁴⁴. To face this issue, the FNE has taken a more flexible approach, adjusting the tools in order to address these concerns, when possible. For instance, in *Servipag*, a modified UPP for two side markets proposed by Filistrucchi⁴⁵ was applied.

26. In markets with zero price services, market definition and risks evaluation can raise additional difficulties. While the usual SSNIP test could only serve as a first indicator – since any price increase may be infinite– the assessment of the merger’s likely effects can be challenging since revenues may not be available, and consumers may not be affected through price increases but through restrictions to other competition parameters such as data, privacy and quality measures⁴⁶. Therefore, usual tools as the UPP test, to identify price increase incentives, although useful, require a careful approach, and thus other sources of evidence must be considered to assess potential risks. The FNE dealt with this issue in the case of *Servipag* for assessing horizontal risks in payment buttons, in which a modified UPP had to be implemented, combined with an analysis of market shares and relevant qualitative evidence.

27. Second, one of the main difficulties in the evaluation of mergers is identifying the right counterfactual for the transaction⁴⁷. In most cases, the reasonable counterfactual is to assume that the competitive conditions of the market prior the merger would prevail. However, in dynamic markets this approach may lead to an inaccurate counterfactual, since the comparative competitive conditions would likely change. As abovementioned, the FNE

⁴³ Farrell, J., & Shapiro, C., *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition* (Working Paper, Feb. 15, 2010), available at <http://faculty.haas.berkeley.edu/shapiro/alternative.pdf>.

⁴⁴ For the SSNIP test a hypothetical increase in price of 5% not only affects the side in which is applied, but also the other interrelated market, so the conclusions must be taken with care, a regular UPP may imply that a price increase is profitable, but it must be taken into account the effect on the other side of the market.

⁴⁵ Affeldt, P., Filistrucchi, L., & Klein, T. J. (2013), *Upward Pricing Pressure in Two-sided Markets*, *The Economic Journal*, 123(572).

⁴⁶ Mancini, J. & Volpin, C. (2018), *Quality considerations in digital zero-price markets*, *Organisation of Economic Co-Operation and Development*.

⁴⁷ As stated in the FNE’s *Horizontal Merger Guidelines* (2012) [Guía para el análisis de operaciones de concentración], in order to evaluate the merger, the agency conducts a counterfactual analysis. Available at: <https://www.fne.gob.cl/wp-content/uploads/2012/10/Guia-Fusiones.pdf>

faced this dilemma in *Walmart/Cornershop*, in which since the FNE concludes that the market was dynamic, a static analysis of market shares, market concentration and other competitive conditions would be inadequate⁴⁸.

2.4. Challenges regarding multijurisdictional mergers.

28. Chile, due to the ‘effects doctrine’, have acted as reviewing jurisdictions of relevant transnational mergers that involved dynamic markets, such as *Bayer/Monsanto*⁴⁹ and *Dow/DuPont*⁵⁰. However, in such cases the FNE was not able to assess the transaction’s effects on innovation given that the innovation centres and the decisions on that matters were taken elsewhere, considering the companies’ global results and regardless local context⁵¹.

29. In both cases, the FNE cleared the mergers subject to the same conditions submitted as commitments before the European Commission, which solved the antitrust concerns at both sides. In *Dow/DuPont*, the FNE considered that the divestiture of the R&D division of DuPont, offered by the parties to the European Commission was effective to mitigate local concerns, provided that there was not a specific local context that would alter the competition analysis executed by foreign merger control jurisdictions⁵².

30. The same standard was applied in *Bayer/Monsanto*, regarding the divestiture of the ammonium glufosinate and vegetable seeds businesses, offered as a commitment to the European Commission. In any event, in both cases, the FNE executed an assessment of the purchaser’s suitability.

31. Although it only had effects in Chile and Mexico, *Walmart/Cornershop* was also a transnational merger. Even though the company is based in Chile, since both parties also operate in Mexico, the Mexican antitrust agency (“COFECE”) reviewed the merger concurrently with the FNE. While the FNE’s assessment concluded that the transaction did not raised antitrust concerns that could substantially lessen competition in Chile, the COFECE arrived an opposite conclusion, blocking the merger⁵³. Since merger control is essentially a case by case analysis, reviewing competition authorities could certainly reach opposite decisions in light of each market’s particular context and market structure, foremost if markets are geographically local or national.

⁴⁸ “(...) it is necessary to consider that a horizontal risk analysis from the actual market structure would not reflect adequately the future competitive condition, as it was mentioned, this is essentially a dynamic market in which changes in the players market shares occurs. Then, a static vision of an essentially dynamic market would imply an inadequate analysis of the possible effects of the merger. In fact, online sales are an incipient mean of commercialization in Chile, in which at the time it represents less than 5% of supermarket sales.” *Walmart Chile acquisition of Delivery Technologies SpA.*, op cit, p. 15-16.

⁴⁹ “Notificación de la Operación de Concentración entre Bayer AG y Monsanto Company” [Concentration between Bayer AG and Monsanto Company], Case N° FNE F97-2017.

⁵⁰ “Notificación de Operación de Concentración entre Dow Chemical Co. y DuPont Co.” [Concentration between Dow Chemical Co. and DuPont Co.], Case N° FNE F80-2017.

⁵¹ Concentration between Dow Chemical Co. and DuPont Co., op cit., p.8 and Concentration between Bayer AG and Monsanto Company., op cit., p.5.

⁵² Concentration between Dow Chemical Co. and DuPont Co, op. cit., p.25

⁵³ Decision of COFECE, Walmart Acquisition of Cornershop, file No. CNT-161-2018.

3. Conclusions

32. As presented, dynamic markets and especially those involving platforms present challenges to competition authorities. Further, considering Chile is a small economy, some additional hurdles arise, mostly regarding multijurisdictional mergers. Nevertheless, provided the recent legal reform which introduced a mandatory merger regime, the FNE is empowered with the adequate tools to overcome procedural challenges. However, relevant substantive challenges remain. In any event, due to globalization and technological developments, local economies are not isolated, being these challenges also faced by most of competition authorities around the globe.

33. When to intervene, what tools to apply or whether or not to adjust traditional merger analysis, as well as the timeframe of merger review, are some of the key queries and challenges that the FNE has faced when reviewing mergers with dynamic considerations. In the meantime, the FNE has undertaken a case by case analysis and a facts-based approach, using all the available tools to review transactions in rapidly evolving markets, though being open to new methodologies and tools to better assess the merger's likely effects on the competitive process, and to intervene when necessary, without compromising innovation constraints.