Recent Challenges to Merger Control and Anticompetitive Conducts Proceedings in order to Protect the Competition Process

APEC Competition Policy and Law Group

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Economic Cooperation

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1. Executive Summary

The workshop “Recent Challenges to Merger Control and Anticompetitive Conducts Proceedings in order to Protect the Competition Process” has been co-sponsored by Canada; Mexico; Papua New Guinea; Singapore; and Viet Nam and has been held during two working days.

It is important to recognize the great participation of the speakers Diogo Thomson, Commissioner at the Administrative Council for Economic Defense – CADE; Alejandro Dominic, Deputy Chief of the Antitrust Division at the Fiscalía Nacional Económica – FNE; Brenda López, Abuse of Dominance Executive Director at the Mexican Federal Economic Competition Commission – COFECE; Chia-Ming Tsou, International Affairs Section, Department of Planning Fair Trade Commission – Chinese Taipei; Leah McCoy, International Counsel at the Department of Justice; Alejandra Guillén, Expert case handler at INDECOPI; Alden Caribé, General Coordinator-Brazilian Antitrust Analysis Unit at CADE; Vicente Lagos, Head of Merger Division at Fiscalía Nacional Económica – FNE; Lizeth Martínez, Executive Director of Mergers at the Mexican Federal Economic Competition Commission – COFECE; Steven Collin, Director-Economic Committee Consumer and Competition Commission of Papua New Guinea; Timothy Hughes, Counsel for International Technical Assistance at the Federal Trade Commission; and, Andrés Valdivia, Expert case handler at INDECOPI.

The workshop was an opportunity for APEC member economies to exchange information and experience on controversial topics. For example, during the first day, the speakers shared with the audience their valuable experience about the measures imposed in anticompetitive procedures, and the criteria of applying corrective remedies and cases developed by the agencies in the application of the Competition law in their respective economies.

Regarding the second day of this workshop, it was very enlightening to listen to the main challenges and elements to consider when applying structural remedies, behavioral remedies or a combination of them. In addition, the specific cases enriched the conversation and perspective on the application of merger remedies.

In conclusion, this workshop shone a light on the main challenges regarding remedies, as well as the different perspectives and valuable experiences shared during this two-day event.

2. Introduction/Background

Anticompetitive conducts harm society by making output lower, prices higher, discouraging innovation and generating inequality, which can decrease the benefits of a competitive market, such as productivity and growth-all of which create wealth, reduce poverty and income inequality.

In this context, corrective measures, which aim primarily to restore the competitive process in markets affected by anticompetitive behaviors, work as tools that could help to reduce their effects, restoring the competitive process and creating open and transparent markets.

On the other hand, during Pre-Merger Notification proceedings, authorities often contemplate different scenarios where a merger could impact the competition process. Therefore, if remedies are deemed as appropriate for a specific scenario, it is important to evaluate which of them fit better, so that investments are not discouraged and take into consideration the theories of harm identified in the analysis of the merger. In addition, it will be relevant to carry out a discussion about the design and mechanisms used by competition authorities to supervise the parties´ compliance with the remedies.

As companies could adopt new ways to avoid the application of competition laws, it is important competition agencies stay prepared to face this situation by aligning the criteria on how to identify, determine and sanction, if it is the case.
The problems to be discussed in this workshop are focused on reinforcing the tools for combating anticompetitive practices and mergers that effects cross-border and affects more than one economy.

This workshop was an opportunity for APEC member economies and experts from relevant international organizations to exchange information and experience on controversial topics proposed assisting economies in building economics policies in benefit to all citizens.

A total of 67 officials from 16 APEC economies attended the workshop and exchanged their experiences. In terms of participation by gender, 46% of those attending the workshop were female officials, exceeding the target of 30% in our Concept Note. During the workshop the participant economies demonstrated their interest in the topic and their willingness to apply the best practices in their economies.

3. Pre-working Survey

As part of the activities of the workshop “Recent Challenges to Merger Control and Anticompetitive Conducts Proceedings in order to Protect the Competition Process”, a pre-working survey was conducted to the economies. The results of ten economies are following:

Question 1: Does your economy have a Merger Control Regime?

All of them answer “Yes”

Question 2: How many mergers does your antitrust agency review per year? (Leave blank if your economy does not have a Merger Control Regime)

- One economy marked 0-5
- One economy marked 6-15
- One economy marked16-50
- One economy marked 51-100
- Six economies marked 101 or more

Question 3: Please mark with “X” the quantitative techniques that your agency has used in the last 3 years assessing merger control analysis.

Quantitative analysis	**Mark with an “X”**
Herfindahl Hirschman Index (HHI)	**X**
Market surveys	**X**
Upward pricing pressure index (UPP)	**X**
Gross upward pricing pressure index (GUPPI)	**X**
Merger simulations	**X**
Vertical gross upward pricing pressure (vGUPPI)	**X**
Vertical arithmetic	**X**

Question 4: Please rank from 1 to 6 the following potential topics to be treated at the seminar according to your economy’s antitrust agency interests, where 1 is the most interesting topic for your agency and 6 is the least interesting topic for your agency.

Topics	Ranking
Assessment of non-compete agreements in Pre-Merger notification	6
Assessment of non-compete agreements in anticompetitive conducts	4
Market definition techniques	5
Remedies in mergers	1
Forensic tools	3
Corrective measures	2
Class action	7

Question 5: Briefly comment on your expectations regarding this seminar or relevant topics

We received the following answers:

a) The mentioned topics are crucial and hopefully can explore emerging trends, real-life case studies, and practical strategies. It would be fascinating if the seminar integrated and expounded upon the intricacies of cross-border transactions, network effects, and innovation concerns as well, particularly within the technological landscape.
b) The proceedings of merger control and anticompetitive conducts are different in jurisdictions, and the challenges are becoming more complex. The JFTC expects that this workshop will contribute to the improvement of the competition regimes in APEC economies, including Japan, by exchanging experiences and sharing views and information about remedies and corrective measures in investigation of anticompetitive conducts as well as in merger control review.
c) We would like to know practical cases of challenges that competition agencies have faced and how they have solved them; Likewise, it would be interesting to hear some ideas on how to improve collaboration between competition agencies of APEC economies, regarding mergers with cross-border effects.
d) Control over economic concentration (merger control) is one of major areas of antimonopoly regulation along with investigating cases on violating the antimonopoly legislation and issuing warnings and admonitions by the antimonopoly authority. It is of great interest to learn practices of the APEC Economies to study the possibility of applying tools they use when evaluating the impact of transaction on competition to be used by the FAS Russia when considering applications.

Topics of interest are:

- Best practices from other merger control regimes would be advantageous, including overcoming common challenges related to stakeholder cooperation, the overall conduct of the merger review, and treatment of confidential information within the agency for purpose other than for what it was previously obtained.
- Experiences on merger control in a poly-crisis context (Covid-19 pandemic, Russia-Ukraine war, and competition of US and China, among other), including how to implement merger control amid global emergencies, and how competition law could respond to modern challenges.
- Reviewing mergers and acquisitions involving digital markets business models.

4. Summary of the workshop

In the following section, a summary of the most important points addressed during the sessions will be presented.

1) Diogo Thomson: Applying Corrective measures in anticompetitive procedures Unilateral Conduct cases

Mr. Thomson started his presentation by explaining the legal framework about measures in anticompetitive procedures[1]. Afterward, he talks about the tools for investigations (power request, inspection, interim measures – negotiate remedies - cease and desist agreements) and sanctions (fines, prohibitions, structural and behavioral remedies, divestment and any other measure needed to reestablish competition).

Then, he explained three cases about exclusionary practices. One of them, was about “IFOOD”, a food delivery platform with a dominant position, who had celebrated exclusive contracts with restaurants. Therefore, it concentrates a high volume of sales. In this regard, CADE order IFOOD to stop exclusive agreements that generated extraordinary difficulties for new marketplaces to enter the market.

[1] Legal Presumption of dominance: 20% of market share in the relevant market (just a presumption)

Exemplificative list – art 36, III a XIX of law 12.529/11 (Brazilian competition law).

2) Alejandro Domic: Unilateral Conduct cases

At first, Mr. Domic explained the institutional framework for unilateral conducts: domestic economic prosecutor (FNE), competition tribunal (TDLC) and Supreme Court of Chile. In second place, he described the conclusion ways of unilateral conduct investigations:

- **Investigation:** close without findings, close after change of conduct, out-of-court-settlement.
- **Court Proceedings:** Court resolution (non-punitive) Court settlement, Court ruling (punitive)

Afterwards, he developed the two types of corrective remedies for unilateral conducts:

1) **Structural**: divestment, asset caps, directors or executives' restrictions
2) **Behavioral**: voting rights, sales conditions, access conditions, information restrictions, etc.

Subsequently, he explained the criteria of measures:

- Effective: not only on paper.
- Viable: It can be implemented by the party that had the obligation to do so.
- Adequate: to the type or nature of conduct investigated.
- Proportional: the size of the measure is proportional to the conducts, not excessive to the parties.

Regarding the duration of the corrective measure, it must be as long as the anticompetitive risk persists and if the type of measures is not effective, viable, adequate, or proportional, the company can modify the measure, or the court can modify it to ensure their effectiveness.

It is important to mention that the FNE faces a challenge in issuing corrective measures promptly because measures if the measure don't get at the right time is not effective[2]. Likewise, he emphasizes that the negotiation cannot be

[2] Out of-court settlement: 2 months
Non punitive procedures: 1-2 years
Court Settlement: 1-2 years
Court Judgment: 3-5 years

prolonged for a long period, because if they don't reach an agreement, they go to court. In Chile, he emphasizes that most of the time negotiations are effective.

Finally, some cases about corrective measures on unilateral cases were briefly addressed:

- SQM and Rockwood Joint venture on magnesium chloride: both companies are part of a subsidiary to sell the product for dust control, soil stabilization and wind erosion mitigation. In this case, there was a voluntary divestment. Rockwood acquired full ownership of the subsidiary, and SQM opened an independent sales division. Investigation closed after change of conduct. They didn´t go to court.

- GASOLINE RETAILERS (case pending): Top 3 distributors of diesel and gas retailers (>90% market share) have a JV that controls mayor storage and import capacity, with no independent providers in north and south of Chile. FNE filed a non-punitive request in TDLC, asking for corrective measures to enhance competition at both wholesale and retail levels: (a) proposing to divest or passive ownership of infrastructure; and (b) proposing that independent operator of storage capacity would be a local non-contestable monopoly needing strict conduct measures to ensure no unfair pricing or discrimination to retailers.

- Wastewater trucks (case pending): there were complaints against water sanitation utilities for excessive prices and monopoly abuse for reception of wastewater trucks. FNE filed a non-punitive request in TDLC, asking to include several services that didn't face competition as regulated, with prices and commercial conditions set by sectorial public authority.

3) Brenda Daniela López Rincón: Corrective measures in anticompetitive proceedings

Ms López started her presentation explaining the legal framework about abuse of dominance and anticompetitive vertical agreement. Afterward, she explained the three criteria for an anticompetitive practice:

- Companies must have substantial market power (single or joint).
- A conduct must had been done in relevant market where they have substantial market power.
- Exclusionary effect of foreclosing competitors, restricting substantially their access or create exclusive advantages (in the relevant market or a related market).

If there is a finding of anticompetitive conduct, the Investigative Authority (AI) issues a Statement of Objections (SO) with the following decisions:

- Order to cease-desist anticompetitive conduct.
- Impose remedies.
- Fine to defendant: up to 8% of their revenue.

She emphasized that during the investigation, before issuing a Statement of Objections, the defendant can request an "Exemption and Reduction of Fine" from the Investigative Authority. In other words, the companies propose commitments to end anticompetitive conduct and restore competition. This results in two scenarios: (i)it could lead to no infringement imposed or (ii) it reduces or eliminates fines. For the corrective measures to be accepted, companies must:Eliminate (avoid) abuse of dominance.

- Stop, suppress, amend or remedy the practice.
- Restore competitive process.
- Be legally and economically viable.

The corrective measures will be implemented within a period of 5 to 10 years. Additionally, a plan must be developed to implement the commitments, and at the end it’s necessary to issue a compliance report to COFECE. In order to verify or enforce compliance, the Mexican authority can carry out on-site inspections, requesting information and imposing fines (8% of revenue).

Finally, she presented all abuse of dominance cases with corrective measures that have been behavioral between 2014-2022. Furthermore, she highlights limitations in the legal framework, including: (a) the inability to conduct market tests; (b) short decision-making timeframes; (c) uncertainty for defendants regarding actual anticompetitive behavior and harm theory; and (d) the absence of ex-post evaluation of corrective measures.

4) Chia-Ming Tsou: Issues First Fines For Merger

Mr. Chia-Ming Tsou explained a case involving two local media companies that violated merger commitments agreed upon in 2010 by failing to keep some aspects of their combined business separate.

Therefore, the competition authorities (TFTC) imposed the maximum statutory fine of NTD50 million (USD1.59 million) on Dafu Media, Kbro, and 12 cable TV systems operators each in January 2024.

The TFTC found that the merged entity had been abusing its market power by increasing the operating costs for rivals and forcing channel distributors to accept unfavorable licensing conditions.

5) Leah McCoy: Corrective Measures in Anti-Competitive Proceedings

Ms. McCoy began by pointing out that the DOJ does not have the authority to impose corrective measures. They must instead file a legal action in court to seek relief.

Also, she emphasized that courts are the ultimate decision-makers, and the DOJ can negotiate settlements, but the court must approve them.

Regarding injunctive relief, the courts have broad power to craft appropriate remedies. Among the typical remedies are cease and desist provisions and conduct prohibitions.

In criminal cartels, she explained the pecuniary penalties imposed on companies that infringe: fines and jail time. Additionally, she explained the monetary restitution procedure for victims affected by the cartel and the cases in which compliance programs were implemented.

6) Alejandra Guillén: Corrective measures in anticompetitive procedures

Ms. Guillén explained the legal framework regarding corrective measures, which is found in Article 46 of the Competition Act. Afterwards, she discussed three cases in which Indecopi imposed corrective measures:

- **Pharmaceutical Industry:** The pharmaceutical companies Arcangel, Fasa, Inkafarma, Mifarma, and Felicidad agreed on increasing the prices of 36 pharmaceutical and nutritional products between 2008 and 2009. The Commission ordered the implementation of a compliance program for 3 years.

- **Toilet paper and tissues:** Kimberly and Protisa fixed prices and commercial conditions in Peru since 2005 until 2014. The Commission ordered the implementation of a compliance program for 5 years.

- **No poach agreement in the construction sector:** Six companies in the construction sector entered into a no-poach agreement to refrain from contacting or hiring personnel who maintained any employment relationship with another company in the cartel. Some of the corrective measures include hiring a compliance officer approved by the agency and implementing annual training on competition rules fin the company or at least 20 hours.

At last, she explained the essential requirements of Compliance Programs as outlined in the Guidelines on Competition Compliance Programs:

- Real commitment to comply from the Senior Management (tone at the top)
- Identification and management of current and potential risks
- Internal procedures and protocols
- Training employees on competition law
- Constant update and monitoring of the compliance program
- Procedures for consultations and complaints
- Designation of a Compliance Officer or Compliance Committee

7) Alden Caribé de Sousa: Brazilian experience in applying remedies in merger proceedings

Mr. Caribé de Sousa started his presentation mentioning that CADE has merger control law since 30 years. The CADE has the General Superintendence that carries out the market Case. He mentioned that the golden standard for remedies is:

a) A well-defined relevant market,
b) Trustful market data,
c) High concentration,
d) Few rivals,
e) No imports and high barriers to entry.

According to his presentation, the main target of the remedy must be to reduce concentration and reduce barriers to entry. And Mr Caribé de Sousa shared the following cases:

- In the Case Arcelormittal that bought Votorantim Siderugia (2017): The relevant markets were steel for construction drawn wire, drawn, rebars, annealed wire. It was analyzed at a domestic level. In this case, there was a significant overlap. They imposed a structural remedy. It was a divestment of physical assets (two plants to a qualified player approved by CADE). They also imposed a behavioral remedy (the same market supply for up to 2 years).

- In case of Creation of Consortium Blue and Super golden (2023): The leader's responsibility was to receipt the liquified petroleum gas (LPG). The remedy imposed was the limitation of the term period (reduction from 35 years to 13 years). Also, it included the following actions: i) any new renewal of the Consortia must be submitted to CADE, ii) extinction of preferable consortium clause for Investments, iii) open doors policy towards the competition authority; and iv) granting access to the Units to other actors.

- In Case Lactalis buys DPA Brazil: There were significant horizontal overlaps in fermented milk, yogurt, petit Suisse, dairy desserts, among others. In this case, there were no imports in Brazil. There not were technological barriers to entry. The remedy was a compulsory trademark licensing. They licensed the brands Batavo and Batavinho in the markets of fermented milk and petit Suisse for Tirol.

- In case Disney buys Fox: There were 7 horizontal relevant markets in media content (audiovisual content, audiovisual distribution, licensing rights, music, editorial activity, electronic games, among others. The estimated combined market share was between 30% to 40%. The HHI was 648. There were significant barriers to entry. The transaction was imposed with a remedy. The first agreement was structural remedies (The agreement established the divestment of the "set of assets necessary for Fox Sports operations in Brazil related to the production and licensing activities of basic linear sports channels for pay TV in Brazil. What went wrong? The sale was not completed within the stipulated timeframe. The operation returned to the Cade Court for the review. A second agreement was imposed.

8) Vicente Lagos: Chilean experience in applying remedies in merger proceedings

Mr. Lagos started his presentation mentioning that it is possible the parties can offer remedies in Phase I and Phase II.

In addition, he mentioned some legal standards: Substantial Lessening of Competition. It depends on a case-by-case assessment. (similar to the European Commission and the CMA).

Following with his presentation, Mr. Lagos provided statistical information about the number of merger transactions received and reviewed in Phase 1 and 2 during the 2019-2023 period. He pointed out that the behavioral remedies are recommended as a complement to the structural remedies. And he shared some cases with the audience:

- Case: ONNET/ENTEL: Acquisition of Entel´s FTTH network by OnNet. After the transaction, OnNet would be the exclusive wholesale supplier of Entel for a period of 15 years. There were important overlaps. Entel and OnNet were very close competitors. There were rounds of different remedies proposals (i) Provision of wholesale access for retail operators (clients), and (ii) Possibility for competitors at the wholesale level to act as resellers of access to OnNet´s network (under retail prices and conditions pre-established by OnNet).

  Finally, divestiture of Entel´s FTTH deployed a network in 8 municipalities. The buyer will get Entel as a client in these municipalities. The divestiture to a suitable buyer (approved by the FNE) will occur within a fixed time-limit. Entel commits to provide certain services that are required by the suitable buyer to operate the divested network. Modification of vertical restrains: Exclusivity clause reduction from 15 to 5 years. Reduction of the non-compete clause from 15 years to 2 years.

- Case: EssilorLuxottica/Grandvision: Multijurisdictional transaction: 3 to 2 player merger in Chile. In Phase 2, the FNE concluded the transaction could raise competition concerns. The transaction was cleared in Phase two with the condition of divestiture of Rotter & krauss (Optical Chain). In practice, the structural remedy excluded the main horizontal overlap of the global merger implied in Chile. There were additional behavioral remedies (such us non-exclusive supply agreements).

- Case: Oxxo/ Ok market: Local acquisition of 126 convenience stores of a local competitor (Ok market by Oxxo). The transaction raised competition concerns: merging parties were the closest competitors; and the FNE

concluded the transaction would imply incentives and ability to raise prices, and reduction of the dynamic competition. In the end, the parties offered a divestiture of a package of assets comprised of 16 convenience stores of both brands (mix and match) to a suitable buyer. The remedy involved a pre identified buyer divestiture.

5. Recommendations and Conclusions

As part of the conclusions, we can see the result of the workshop survey on Recent Challenges to Merger Control and Anticompetitive Conducts Proceedings in order to Protect the Competition Process was answered by 21 participants. In the following charts, we can see the results which demonstrate this activity reached out its objectives:

Chart 1

Speaker	Score	Degree
Diogo Thomson	4.71	Very good
Alejandro Domic	4.81	Very good
Brenda López	4.71	Good
Alden Caribé de Sousa	4.81	Very good
Vicente Lagos	4.76	Very good
Lizeth Martínez	4.70	Very good

To sum up, we can mention that APEC economies have shown a commitment to implement best practices in competition policies and regulations in their respective economies. The exchange of experiences between participating economies has demonstrated the need for ex-ante regulation to prevent anti-competitive practices and protect consumers. It is important to mention that sharing participant experiences was relevant not only to update the knowledge but also to clarify some topics in merger control and anticompetitive conducts proceedings to protect the competition process.

Another important conclusion is that, according to the survey, participants suggested six main topics for the next workshops: Free competition; consumer protection and unfair competition; and, bureaucratic barriers, bankruptcy procedure, and electronic signature. So, we consider that the workshop on Recent Challenges to Merger Control and Anticompetitive Conducts Proceedings

in order to Protect the Competition Process was the first step for contributing capacity building to the APEC economies.

Finally, because of the workshop, the economies increased willingness to implement best practices in order to protect the competition process across the APEC region; and increased capacity to address anticompetitive conducts through competition policy. Thus, we encourage support events co-sponsoring them, not only to provide better tools to the agencies to face anticompetitive conducts, but also to establish new cooperation links between the agencies to protect the competition process in our economies.