Guidelines on Jurisdiction

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OVERVIEW

Recently, through the amendment introduced by the law number 20,945, the Chilean Competition Act -Law Decree No. 211 issued in 1973 ("**DL 211**")- incorporated the new Title IV: "On the Control of Concentrations". This title sets the provisions for the assessment by the Fiscalía Nacional Económica FNE (the "**Chilean Competition Agency**" or "**FNE**") of concentrations between undertakings with effects in Chile.

Unlike cartels and unilateral conducts, concentrations are licit; however, through the substantial changes that they might bring in some markets, they could distort effective competition. The preceding justifies the necessity to identify which of the various facts, acts or conventions taking place in the marketplace may qualify as concentrations that will require the preventive control under the Competition Act.

The new procedure incorporated in the DL 211 applies to facts, acts or conventions qualifying as concentrations according to Article 47 of the DL 211. Such qualification determines the FNE's jurisdiction to assess the notified circumstance, act or convention under the Title IV of the DL 211. Conversely, the facts, acts or conventions which do not qualify as concentrations will not be assessed by the FNE pursuant to Title IV of the DL 211, but will be governed by the general provisions of it, such as for example, collaboration agreements between competitors or the acquisition of minority shareholdings that do not confer control.

Accordingly, determining when we are facing a concentration is of the utmost significance for the operativity of the preventive control system.

The Guidelines for the Determination of the FNE's Jurisdiction regarding Concentrations between Undertakings ("**Guidelines on Jurisdiction**") addresses this significant task and explains the criteria and guidelines the FNE will use to determine which are the facts, acts or conventions that qualify as concentrations pursuant to DL 211.

By elaborating these Guidelines on Jurisdiction, we aim to provide legal certainty to the notifying parties, limiting the scope of discretion afforded to the agency by the law.

Sincerely,
Felipe Irarrázabal Ph.
National Economic Prosecutor

I. PRELIMINARY CONSIDERATIONS

A. CONCENTRATIONS BETWEEN UNDERTAKINGS UNDER THE DL 211

1. Broadly speaking, the rules governing the protection of the competitive process are framed around two paradigms. On the one hand, there is an *ex ante* preventive control of concentrations; on the other hand, there is an *ex post* detection and punishment of any fact, act or convention preventing, restricting or hindering competition, or that tends to do so, such as *inter alia* agreements between competitors or abuse of a dominant position.

2. Unlike cartels and unilateral conducts, concentrations are licit; however, through the substantial changes that they might bring in some markets, they could distort effective competition. The preceding justifies the necessity to identify which of the various facts, acts or conventions taking place in the marketplace may qualify as concentrations that will require the preventive control under the Competition Act.

3. Those facts, acts or conventions, which do not qualify as concentrations are, nonetheless, subject to the application of the general rules of competition[1].

B. CONCENTRATIONS CONTROL IN CHILE

4. Title IV of the Law Decree N°211 of 1973 ("**DL 211**"), incorporated by law number 20,945, issued on August 30, 2016 ("Law 20,945"), regulates the preventive control of concentrations between undertakings with effects in Chile performed by the Fiscalía Nacional Económica (the "**Chilean Competition Agency**" or "**FNE**").

5. The control of the concentrations can be initiated through mandatory notification, voluntary notification, or *ex officio* by the FNE[2].

C. JURISDICTION ON THE CONTROL OF CONCENTRATIONS

6. The purpose of these Guidelines is to provide guidance regarding the criteria that the FNE shall use to determine which facts, acts or conventions will qualify as

[1] The reference to the application of the general rules on competition, must be understood regarding the remaining provisions of the DL 211, as, for example, those contained in Article 3 or Article 4 bis. Thereby, cases in which there is no concentration shall be analysed by the FNE so as to determine if the fact, act or convention constitutes and infringement to Article 3, first or second paragraphs,(including letters (a), (b), (c) and (d) within cartels, abuse of a dominant position, among others are included) of DL 211. Other example occurs in Article 4 bis on the duty to inform the acquisition of minority shareholding in a competitor may apply.

[2] The mandatory notification is established in the third paragraph of Article 48 of DL 211. The voluntary notification is established in the seventh paragraph of Article 48 of DL 211 and the *ex officio* control by the FNE is regulated in the eighth paragraph of Article 48 of DL 211. These last two may operate in the event that the thresholds established in Exempted Resolution No. 667, dated November 24, 2016, are not exceeded.

concentrations that must or could be subjected to its control in accordance with the provisions of DL 211.

7. Such qualification determines the FNE's jurisdiction to assess a fact, act or convention in accordance with the procedure set in Title IV of the DL 211. The jurisdictional scope considers three dimensions: (i) A substantial one, referred to the acts that qualify as concentrations subject to control; (ii) A geographical one, referred to how the transaction affects Chile; and (iii) A temporal one, referred to the moment as of which the FNE can be notified.

8. The criteria that determine the FNE's jurisdiction, developed in these Guidelines are different and independent from the thresholds established in the Exempted Resolution No. 667, issued on November 24, 2016 ("**Res. 667**"). By Res. 667 the concentrations that satisfy the set thresholds must be mandatorily[3] notified, while under the thresholds the notification will be voluntary. In any case, the FNE will be able to assess *ex officio* the concentrations that were not voluntarily notified, as provided by Article 48 of DL 211.[4]

D. STAGES THAT MUST BE CONSIDERED WITHIN THE CONTROL OF CONCENTRATIONS

9. This document provides the guidelines so that the undertakings may evaluate if specific facts, acts or conventions qualify as concentrations, thus they must be notified for the FNE's assessment. When concluded that the transaction is not a concentration, the general rules set in DL 211 are fully applicable. On the contrary, if the fact, act or convention is considered a concentration, the next step shall consist in determining if the thresholds established in Res. 667 are meet, which will determine the need to mandatorily notify the concentration to the FNE.

10. Once the fact, act or convention qualifies as a concentration and is notified to the FNE; the FNE will conduct the substantial assessment to determine whether the notified concentration is suitable of substantially lessening competition in the markets. This substantial assessment applies to all horizontal, vertical or conglomerate concentrations. Regarding horizontal concentrations, the assessment shall use the substantial criteria established in the Horizontal Concentrations' Guidelines[5] as a reference.

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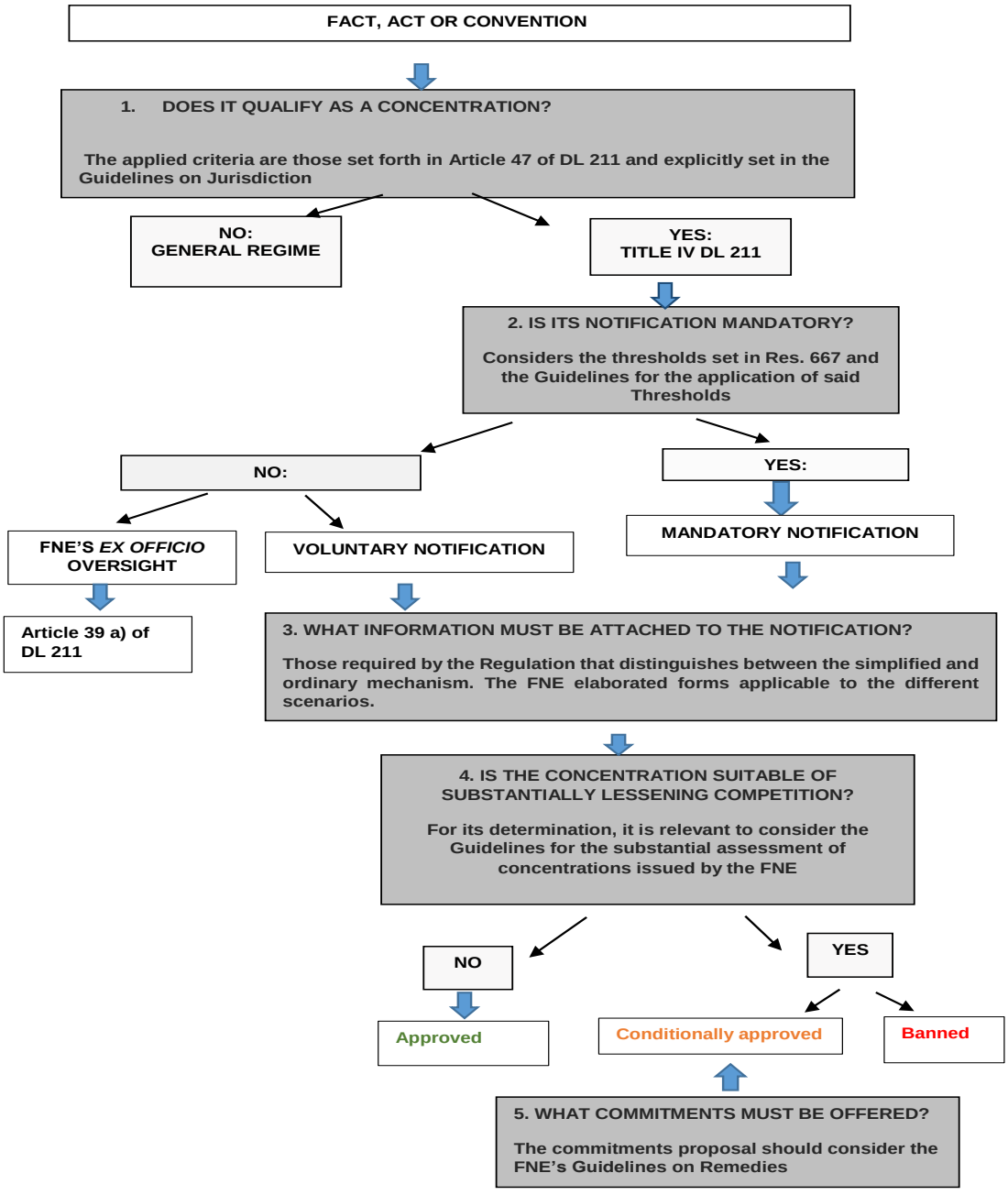
[3] The infringement of the obligation of notifying set in Article 48 of the DL 211 is contemplated in Article 3 bis of such normative body. To determine the foregoing, the FNE will instruct the investigations it deems necessary in accordance to its general attributions, such as those contained in Article 39 of the DL 211.

[4] Paragraph nine of Article 48 of the DL 211 provides that: "*When the concentrations referred by the previous paragraph [referring to voluntary notifications] are not voluntarily notified to the National Economic Prosecutor, he may, within the term of one year since the consummation of the concentration, instruct the investigations he esteems correspondent in accordance with Article 39 letter a)*."

[5] The substantial criteria referred are those established on the "Concentration analysis' Guidelines of October 2012". While the mentioned Guidelines will forfeit its enforceability from 1 June 2017, the

11. The following flow chart evidences these various stages and the respective documents that are relevant in the FNE's assessment.

Stages in the control of concentrations



FNE officials may keep considering, where appropriate, the aspects of the guide referred to the analytical framework of concentration analysis. This shall be maintained until the dictation of the new substantial Guidelines.

II. DEFINITION AND TYPES OF CONCENTRATIONS

A. DEFINITION

12. Article 47 of the DL 211 establishes the definition of a concentration ("**concentration**" or "**concentrations**"):

> "*Any fact, act or convention, or a set of them, that produces that two or more undertakings that are not part of the same business group and that were previously independent of each other, cease their independence in any scope of their activities, through any of the following:*
>
> *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 them to individually or jointly exert a decisive influence or control over the other's management.*
> *c) By association under any modality to establish an independent undertaking, different from them, that carries out its duties in a lasting basis.*
> d) *The acquisition, by one or more of them and under any title, of the control over the other's assets*".

13. The determination of whether a fact, act or convention constitutes a concentration shall be assessed on a case-by-case basis, applying a functional and teleological approach.

B. CORE ELEMENTS OF A CONCENTRATION

14. It is possible to extract the core elements of a concentration, from its legal definition.

(1) <u>The undertakings</u>: The relevant entities that can lose their independence and be part of a concentration (a matter addressed in Section III);

(2) <u>Facts, acts or conventions</u>: The instruments in which the concentration is featured are not relevant (a matter addressed in Section IV);

(3) <u>The loss of independence through a merger, acquisition of rights or assets, or joint venture</u>: The relevant effect (a matter addressed in Section V).

III. UNDERTAKING

15. The final paragraph of Article 47 of DL 211 defines an undertaking as "*any entity or part of an entity, regardless of its legal organization and even when it has none, which offers or demands goods or services in the market. The bundles of tangible or intangible assets or both which allows offering or demand goods or services, shall also be considered an undertaking*".

A. DEFINITION OF UNDERTAKING

16. The DL 211 defines broadly what an undertaking is. Indeed, the central criterion is the capacity of engaging in an economic activity, understood as the activity of offering or demanding goods or services. Additionally, it refers to "*any entity or part of an entity"*; thus, it does not limit the concept to a specific corporative structure, therefore including legal persons, natural persons and any other type of entity, even when such does not have a legal personality. It can also solely refer to assets, stripped of a corporate structure, but with the capability of offering and demanding goods or services, whether currently or in the future.

17. The qualification as an undertaking is regardless of its ownership (public, private, state-owned or other); nationality (Chilean or foreign); status (regulated or not, legally incorporated or not, profit-seeking or non-profit, among others); size; whether it has or not profit or income; or whether the capability of offering and demanding goods or services is actual or potential.

18. In stablishing the FNE's jurisdiction is irrelevant whether the undertakings are active in the same, related or different markets. The preceding will be relevant in the subsequent stage when the FNE conducts the substantive assessment that could address horizontal, vertical or conglomerate effects.

B. BUSINESS GROUP AFFILIATION

19. On assessing the effects of a concentration in the market, it is also relevant to establish the undertaking's affiliation to a specific business group ("**business group**" or "**business groups**"). A concentration implies one or more undertakings *"that are not part of the same business group and that were previously independent of each other*". In other words, a concentration can only take place if there are initially two or more different undertakings that belong to different business groups. The FNE shall consider as part of the same business group, a company or entity and its controller, as well as all the companies or entities having a common controller, along with the latter[6].

[6] To define which entities are part of a business group the criteria of Articles 96 *et seq.*, of Law N°18045, Stock Market Law (**"LMV"**), ought to be used, adapting that which resulted applicable to entities different from a corporation. The FNE understands the use of the LMV only with the

20. Therefore, the FNE's assessment shall not only consider the involved entities' activities, but also those performed by the undertakings that are a part of their respective business groups.

21. Consequently, the internal restructuring or transactions taking place within a business group will not be considered a concentration, because they do not give rise to a change in control or ownership of the undertaking of the said business group[7].

IV. FACT, ACT, CONVENTION OR A SET OF THEM

22. In accordance with the first paragraph of Article 47 of the DL 211, a concentration shall be defined as "*any fact, act or convention, or set of them, that produces the effect consisting in that two or more undertakings that are not part of the same business group and that were previously independent of each other, cease their independence in any scope of their activities …*", through any of the facts, acts or conventions listed in said Article 47.

23. Therefore, only facts, acts or conventions, or a set of them, that regardless the parties' intention have a specific and relevant effect for the competitive assessment in the markets, consisting in the ceasing of the independence of an undertaking with regards to another undertaking, can constitute a concentration.

24. The reference to a "*fact, act or convention, or a set of them*" is relevant regarding the three following aspects.

A. NON-FORMALIST APPROACH REGARDING A CONCENTRATION

25. The FNE assesses the effect that the concentration has in competition, regardless the form or specific instrument in which is featured. The preceding explains why the DL 211 includes facts, acts or conventions, or a set of them, indistinctively.

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purpose of determining which undertakings are part of a business group and the sales of these; it does not otherwise extent it to the cease in independence concept regulated in Article 47. Therefore, the matters of decisive influence and control set in Article 47 (b) and (d) of the DL 211 shall have only the scope that paragraph 52 *et seq.* of these Guidelines determined. In this regard, see footnote number 12.

[7] The undertakings, however, shall not be able to argue that their operation is internal if this last controller does not actually exert control, decision power, or implements strategic decisions over them, thus, said undertakings would therefore satisfy the criteria of independence or autonomy in accordance with Title IV of DL 211.

26. Indeed, a concentration does not need to fulfil any specific formality to take place. Thus, the FNE will need to assess in each case if the fact, act or convention, or the set of them, can be considered as a concentration.

27. A concentration and the involved undertakings can be directly as well as indirectly identified through facts, acts or conventions that involve intermediaries or other instruments.

B. DETERMINATION WHETHER VARIOUS TRANSACTIONS ("OR A SET OF THEM") CONSTITUTE A SINGLE CONCENTRATION

28. Any fact, act or convention, or a set of them, which qualifies as a concentration, is subject to the FNE's assessment. Sometimes, various transactions[8], which individually does not qualify as a concentration, when taken as a whole, do qualify as such and are subject to the FNE's control. The purpose of this is to prevent that undertakings evade the FNE's control by dividing or staggering the concentration in various transactions.

29. ***Interrelated transactions***: Those in which between each of the involved facts, acts or conventions exist a mutual conditionality and/or accessory relation, in such a manner that one of them could not take place without the other, whether at a factual, legal or economic rationality level.

30. The FNE shall consider various elements to determine whether the interrelation is sufficiently established, attending the transactions' purposes or effects or the intentions of those directly or indirectly taking part in them. These elements will include, among others, the legal links or cooperative agreements, the business reasons or intentions of the undertakings when evidenced. Interrelated transactions can qualify as a single concentration, provided that the same undertaking holds final control over them; regardless of the various undertakings participating in the different stages.

31. ***Successive transactions***: Those where two or more transactions involving the same parties take place within a period of two years, being reasonable to conclude that such tend towards a single concentration. Thus, for example, two or more independent acts, which individually considered does not grant an undertaking control over all or a relevant part of the assets of another, could grant said control if they are cumulatively considered and, in such case, should be assessed as a single concentration.

[8] For these purposes, the concept transaction shall be considered as a synonym for fact, act or convention.

C. TEMPORAL JURISDICTION

32. Considering that the concentration's assessment has a preventive purpose, it is essential to determine from which moment, before its consummation, the FNE can assess it. It shall suffice the parties' real and serious intention to conclude the concentration. Such intention can be expressed in any manner, as letters of intents, memorandums of understanding, the unequivocal draft of the document evidencing the transaction, or public announcements of the intention to make a public bid.

33. Interrelated transactions will be considered concentrations over which the FNE shall have control once the interrelation and the parties' real and serious intention of concluding the concentration are clear.

34. As to successive transactions between the same undertakings, they comprise a single concentration if there is clarity on the succession of facts, acts or conventions. Therefore, the concentration must be notified as soon as one of the transactions qualifies as a concentration, or as soon as some of them, cumulatively considered[9], constitute a concentration, independent of the number of transactions performed.

V. LOSS OF INDEPENDENCE THROUGH A MERGER, ACQUISITION OF RIGHTS OR ASSETS OR A JOINT VENTURE

35. In accordance with Article 47 of the DL 211, a concentration takes place when "*two or more undertakings […] cease to be independent*". Such can take place if two undertakings combine their activities or merge to establish a new single economic unit (*merger*); if one acquires rights that allow it to decisively influence the management of the other, or if it acquires control over its assets (*acquisition*); or if they associate under any modality to create a new undertaking (*joint venture*). Each of these types of concentration shall be examined further into this document. Notwithstanding the foregoing, in the following paragraphs are set some common and relevant elements in the assessment.

A. COMMON ELEMENTS IN ALL CONCENTRATIONS

i) <u>Loss of independence.</u>

36. Competition in the market requires independent undertakings. The reduction or loss of such independence can prevent, restrict or hinder competition. Therefore, the control of concentrations focuses on the loss of independence or changes in the market's structure. Consequently, if the transaction does not imply a transfer or change leading to

[9] In such case, the Chilean Competition Authority shall require information on the transactions celebrated within the two years period, so as to assess them jointly.

the ceasing or losing of independence, it shall not be assessed under the merger control system.

ii) Durability.

37. The loss of independence must have a lasting character, enough in order to bring a structural change in the market able to substantially lessen competition. Therefore, the loss of independence that results from a merger, acquisition of rights or assets, or joint venture, must last during a sufficiently long period to have effects in the market.

38. The following criteria shall be applied by the FNE at assessing the lasting character of the loss of independence.

39. *Durability principle*. The FNE will focus on the concentration's effects at assessing the durability element. Thus, the assessment regarding the potentiality of changing the market's structure will be conducted on a case-by-case basis, without *ex-ante* generalizations. Such assessment shall include, among other elements, the transaction's characteristics, the market in which it is taking place[10], or the economic activity cycles. Therefore, even transactions with a specific timeline or which are short-term transactions could lead to a lasting change in the market's structure, attending its impact during the period for which they were envisaged or its own renewals.

40. *Temporality exception*. If the parties state that a transaction is not a concentration because its temporality, they will have the burden of proving that the transaction and its effects lack of durability.

41. *Transitory transactions*. When a transaction is only transitory (i) until another long-lasting transaction takes place, or (ii) because it is conditioned to the occurrence of a long-lasting and independent event, it is considered to be a concentration once the long-lasting transaction or the independent event or condition has taken place.

42. The interim period during which such transaction is considered as transitory should not be overly extended. When the long-lasting transaction, event or condition is remote or uncertain, the first transaction, firstly considered as transitory, could be considered as long-lasting and, therefore, be subjected to concentration control by the FNE.

43. In any case, any fact, act or convention, or set of them, that does not qualify as a concentration, could be evaluated by the FNE under the general rules, if it prevents, restricts or hinders competition or tends to produce such effects.

[10] Thus, for example, technology-related market shall tend to consider shorter periods as "long-lasting", due to their rapid development and evolution, while other markets, such as the pharmaceutical industry or heavy industries or infrastructure industry, shall tend to view said periods as more extensive.

B. MEANS OF CONCENTRATION

44. Article 47 of the DL 211 establishes diverse means through which the concentration may materialise. According to the text of the previously mentioned Article 47, these facts, acts or conventions are the following:

> 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 them to individually or jointly exert a decisive influence over the other's management.*
>
> c) *By association under any modality to establish an independent undertaking, different from them, that carries out its duties in a lasting basis.*
>
> d) *The acquisition, by one or more of them and under any title, of the control over the other's assets*".

45. The central elements for each of these cases are different. Indeed, regarding Article 47 letters (b) and (d), the determining factor is the notion of change over the decisive influence or control over a subsisting undertaking. The central element in Article 47 (a) is the complete disappearance of an undertaking; while in letter (c) cases it shall be the creation of a new joint entity that is independent from its parents.

46. The scope of each of these cases will be analysed in the following paragraphs.

i) "Merging, regardless the corporate organization of the merging entities or of the merged entity"

47. In accordance with the provisions of Article 47 (a) of DL 211, it shall be deemed that the merging undertakings are concentrating, regardless of the legal nature of the merging parties or that of the undertaking resulting from the merger.

48. The FNE considers that a merger includes all transactions in which the combination of two or more undertakings lead to the creation of a new single economic unit, or results in the subsistence of one of them with a single capital, concentrating all the assets and liabilities of the merging parties[11].

[11] Although the concept of merger is enshrined in Article 99 of Law No. 18,046 on Corporations ("*amalgamation of two or more companies into a single one that succeeds them in all its rights and obligations, and in which the capital and shares of the merged entities shall be included*"), it shall be considered in a broader way for the purposes of the FNE assessment.

49. Mergers also include the scenario in which the merged parties while retaining their independent legal personalities combine their economic activities, businesses or capital. Therefore, the scope of a merger will be determined by the direct or indirect loss of economic independence of the absorbed undertakings, regardless the legal structure implemented to comply with such goal[12].

50. Consequently, the following non-exhaustive list, comprehend, among others, what will be considered as mergers for the purposes of these guidelines:

- *Merger by creation/combination*, or merger *per se*, in which the merging undertakings cease to exist and contribute their capital to a new company that is incorporated for such purposes;

- *Merger by incorporation/absorption*, in which one (or more) of the merging undertakings are dissolved and absorbed by an already existing undertaking, the latter acquires all the formers' assets and liabilities;

- Where, in absence of a legal merger, the combination of economic activities of previously independent undertakings results in the creation of a single economic unit. For example, when two or more undertakings maintain their individual legal personalities but establish a common economic management.

51. Finally, notwithstanding the occurrence of the dissolution of one or more undertakings participating in the merger, such implies the existence of a legal successor of all the rights, obligations and economic activities of the merged undertakings. Thus, it is not necessary to proceed to the liquidation of the undertaking that ceased to exist in order to deem that the merger has effectively taken place.

ii) *"D*irect or indirect acquisition of rights that allow them to individually or jointly exert a decisive influence over the other's management*"*

52. An acquisition requires that previously independent undertakings, cease in their independent when one or more of them obtain control or the possibility of exercising decisive influence over the other, without creating new undertaking.

a. The concept of decisive influence or control

53. In accordance with Article 47 (b) of DL 211, a concentration comprises any fact, act or convention which grants an undertaking the possibility of decisively influencing or

[12] The foregoing can take place due to the combination of the activities of the undertakings that result in the *de facto* creation of a single economic unit. This situation could take place when two or more undertakings retain their legal personality but contractually establish a long-lasting single administration or joint management.

controlling[13], whether directly or indirectly, another undertaking that belongs to a different business group.

54. The FNE understands as control or decisive influence, the legal or *de facto* possibility of determining –or vetoing- the implementation of decisions regarding the competitive behaviour and strategy of an undertaking. Such control implies, among others, the decisive influence or control over its management's composition, veto rights, strategic or business decisions or, in general, in its competitive performance.

55. The mere possibility of exercising decisive influence or control the competitive behaviour of another undertaking suffices to fall within Article 47 (b) of DL 211. Thus, it is not necessary to determine if such decisive influence or control is or will be effectively exercised.

56. The possibility of exercising decisive influence or control over another undertaking shall be assessed by the FNE in a case-by-case basis, considering the effective relation between the respective undertakings.

b. Means and types of decisive influence and control included in Article 47 (b) of DL 211

57. Article 47 (b) of DL 211 establishes that the acquisition must refer to "*rights that individually or jointly allow them to […]"*. The foregoing can occur on a legal basis (for example, rights or contracts) or factual or economic basis. A right can grant a decisive influence or control directly or jointly considered with another type of rights or factual situations.

58. The FNE shall assess who, ultimately, has control or the possibility of exercising decisive influence.

[13] This FNE understands the concept of decisive influence and control included under Article 47 (b) and (d) of DL 211 as synonymous and shall be used indistinctly.

Moreover, as referred on footnote number 6, the definition of decisive influence or control included in this subsection of the Guidelines is specific to the competition analysis that is to be conducted in connection to the application of Article 47 (b) and (d) of the DL 211. Therefore, the concept of decisive influence or control enshrined in Article 47 (b) and (d) of the DL 211, does not necessarily coincide with, for example, the definition of control included in Articles 97 et seq. of Law No. 18,045 on the Securities Market. In corporate law, the concept of control is epitomised around the central idea of granting transparence to commercial relations, through the identification and individualization of the group with which business is being conducted, as well as to protect minority shareholders. On the other hand, in competition law, the concept of decisive influence or control seeks to determine the situations in which an entity can influence the competitive performance of another and, through it, potentially and substantially reduce competition within the markets.

59. Such rights can allow, for example, holding the majority of votes in the management bodies of the acquired undertaking or to influence in the determination of the business plans of the controlled undertaking; the budgets; the appointment of main executives or any other prerogative that relates to its competitive performance.

60. The assessment shall be qualitative, and will not be limited to the mere establishment of the shareholders' shares. An acquisition of a minority share can also allow the exercise of decisively influence, when, for example, such participation grants a veto right regarding strategic decisions, or there is a shareholders' agreement which allows vetoing such strategic decisions.

61. Depending on the held rights or shares, the decisive influence or control may be of various types: direct or indirect, sole or joint, positive or negative, *de jure* or *de facto*.

62. The rights or shares held will determine the nature, level, and type of decisive influence or control.

(1) *Direct or indirect control*

63. Direct control occurs when the undertaking that has the possibility of exercising decisive influence on another undertaking, is the same entity that holds the power to exert such decisive influence.

64. On the other hand, indirect control occurs when an undertaking uses a different undertaking, which may or may not be a part of its business group, to acquire control, and is the latter which has the possibility of exercising decisive influence, regardless it is acting in an instrumental manner or on behalf of the former. Such indirect control may be originated in its participation within the same business group, or in property or contractual relations, financial links, family relations, among others.

(2) *Sole or joint control*

65. Sole control takes place when a single undertaking has the possibility of exercise decisive influence on the competitive decisions of another undertaking, at its sole discretion and without requiring another party's consent, and no other undertaking may exert an influence over the latter. The sole control can take place in connection to positive or negative rights, as explained under the title *positive or negative control*.

66. Joint control exists when two or more undertakings have the possibility of exercising decisive influence over another undertaking. In these cases, the implementation of decisions on the strategy and competitive behaviour of the undertaking will necessarily require the consent – whether through legal or *de facto* means– of all controller undertakings. Joint control is generally configured in a negative basis, as illustrated in the following section (*positive or negative control*).

(3) *Positive or negative Control*

67. Positive control occurs when the controller undertaking enjoys the power of deciding the strategy and competitive behaviour of the other undertaking. In most cases, this type of positive control is achieved by acquiring shares in the ownership of the acquired undertaking. In particular, by the acquisition of the majority voting rights in such company. Alternatively, it can acquire positive control by acquiring the right to manage the activities and determine the commercial policy of the undertaking. This occurs, for example, when the acquiring party holds the majority of the votes in the shareholders' meetings and may appoint the majority of directors, in the case of corporations; or, in case of other types of companies, when the acquirer holds the majority of votes in the members' meetings and may appoint the administrator or legal representative or the majority of them. Another example occurs when the acquirer who holds preferential shares and who, despite not holding the majority of the voting shares, still holds exclusive discretion to exercise the powers indicated above, as a result of holding such preferential shares.

68. In turn, negative control occurs when the controller undertaking has the power to veto or block decisions regarding the strategy and competitive behaviour of the controlled undertaking. For instance: vetoing decisions regarding the entry to new markets, business plans, budget, appointment of administrators and key executives, and authorization to carry out certain investments. Another example of this would be the case of holding preferential shares that grant exclusive discretional powers allowing for the veto of such decisions.

69. The preceding is regardless of the controlled undertaking's ownership structure, because it is possible for a minority shareholder, based on the existence of acts or agreements in regard of the controlled undertaking, or otherwise as per the faculties it holds under the bylaws, to have the possibility of exercising a decisive influence[14].

70. Joint negative control can be based on the equality of political rights[15], on joint-voting agreements[16], or on the existence of veto rights over strategic or essential decisions regarding the competitive performance of the undertaking.

[14] In those cases when the minority stakes do not grant the possibility of decisively influencing the management of another undertaking, the respective party shall not be considered within the hypothesis set forth by Article 47 (b) of the DL 211. This is notwithstanding the application of the provisions of Article 4 bis of DL 211, regarding the acquisition of stakes in competing firms.

[15] Namely, when two or more undertakings distribute amongst themselves, on equal proportions, the political rights in the controlled undertaking or when they have the right to appoint the same number of members on said agent's board of directors.

[16] This refers to those cases when the holders of political rights, which individually represent percentages below the absolute majority of the same, enter into an agreement or arrangement under which joint voting is agreed regarding decisions adopted in the controlled undertaking.

(4) *De jure or de facto control*

71. Control *de jure* is derived from the acts or conventions that grant positive or negative control that have been explained above.

72. In turn, control *de facto* exists when the acquisition of certain rights grants, in practice and based on factual situations, control over the strategy and competitive behaviour of the undertaking. In order to determine the foregoing, the FNE may assess the behaviour over time, including the shareholders' meetings patterns of attendance during previous years. Other additional factors may also be reviewed, such as, *inter alia*, dispersion of the ownership in the controlled undertaking, the existence of other relevant shareholders who have structural, economic, or affinity links with another relevant minority shareholder (it is likely that they vote will aligned, thus causing the combined percentage to exceed the threshold required for a majority); or any other situation that allows the exercise of decisive influence over an undertaking.

c. Decisive change in the quality or structure of control

73. The notion of control does not only apply regarding concentrations that bring about a change in the identity of the controller of an undertaking, but also, as expressed by the legislator in Articles 47 (b) and (d) of the DL 211, to an essential change on the quality or structure of the aforesaid control.[17]

74. When changes occur in the quality or structure of control, in such terms as to modify the manner in which the undertaking can exercise its decisive influence over the controlled undertaking, it will be considered as a new concentration. As example, when individual control turns into joint control, or vice-versa, or when the number of controlling shareholders increases.

75. The foregoing is regardless of whether or not this FNE has previously assessed and approved the acquisition of such decisive influence, through a proceeding conducted pursuant the terms of Title IV of the DL 211.

76. Nevertheless, the changes in the level of the shares of the same shareholders who hold control, without any changes in the powers that arise from those shares, nor in the composition of the company's control structure, do not constitute a change in the quality of control and, thus, are not considered as a concentration.

[17] Article 47 (b): "*Acquiring **one or more** of them […] rights that allow them to individually or jointly influence decisively the administration of another*"; Article 47 (d): "*Acquiring, **one or more of them, the control** over the assets of another under any legal form*."

iii) "By association under any modality to establish an independent undertaking, different from them, that carries out its duties in a lasting basis"

77. Article 47 (c) of the DL 211 provides that a concentration shall exist when two or more undertakings (the "**parent companies**" or "**parents**") proceed to associate with each other through any fact, act, or agreement that creates an independent undertaking, separate from its parent companies, in a lasting basis. This new entity or association shall be referred to as a *joint venture.*[18]

78. The DL 211 does not consider that decisive influence or control is relevant for the purposes of qualifying an association as one of those set Article 47 (c). The relevant element in this matter is that the new independent undertaking may perform all its functions in a lasting basis; in other words, it must fulfil the full functionality criterion, regardless the legal or economic organisation that it may take.

79. Without the following being an exhaustive list, a *joint venture* can take the form of a company agreement, or a different organisational structure, with or without legal personality, such as co-ownerships, associations, *de facto* companies, joint partnership accounts, among others. As explained above, what is relevant is whether or not the created *joint venture* can be an independent undertaking, either *de jure* or *de facto.*

80. Thus, an association or *joint venture* entered by the parent companies, which does not create a new independent economic entity performing in a lasting basis, shall not be qualified as a concentration and, consequently, will not be assessed by the FNE under the procedure of Title IV of the DL 211. Notwithstanding the preceding, such collaborations or coordination between competitors could still be investigated by the FNE pursuant to the general rules and, eventually, submitted for judgment to the Competition Tribunal ("**TDLC**" or "**Tribunal de Defensa de la Libre Competencia**").

81. In the following paragraphs, the conditions set in Article 47 (c) of the DL 211, to consider a *joint venture* as a concentration, will be assessed: (i) creation of a new economic entity; and (ii) the full-functionality criterion.

a. Creation of a new economic entity.

82. The creation and entry into the market of a new undertaking, different from its parent companies is needed. It is the creation of a new undertaking that generates a lasting change in the market's structure and which justifies the control that the FNE shall carry out, as per Title IV of the DL 211.

[18] The concept of *joint venture* is used in these Guidelines as comprehended in Article 47 (c), this is, as referred to every association. Nonetheless, a briefer definition was chosen to facilitate future references that shall be made regarding this concentration track.

83. The created undertaking, though, can be totally new or also arise from previously owned activities or assets, contributed by the parent companies with such purposes.

84. The parent companies may or may not control the *joint venture.* In the event that there are two parent companies, they will generally have the individual or joint control; if there are three or more parents, the *joint venture* can exist without none of its parent companies holding control.

b. Operational autonomy (independence)

85. Article 47 (c) of the DL 211 requires an independent undertaking, which carries out all its functions in a lasting basis. That is to say, the *joint venture* must be completely autonomous from a functional and operational viewpoint and have the possibility of performing full functions in the market.

86. The *joint venture's* operational autonomy has a normative and an economic dimension:

- Normatively, such functionality derives from considering the *joint venture* as a legally sovereign undertaking, with its own assets and capacity of assuming obligations and acting autonomously from a legal standpoint.

- Economically, the functionality refers to the possibility of the new economic entity to conduct its business activities with sufficient resources to perform in the market autonomously from its parent companies. Consequently, it must be able of performing all the functions that are normally carried out by companies operating in the same market. The foregoing entails having access to sufficient staff, operational, and financial resources to conduct the economic activity autonomously and in a lasting basis.

- Conversely, if the new economic entity only assumes one function within the parent companies' business activities, without its own access to or direct presence on the market, it shall be deemed that it is not autonomous. This would be the case, for instance, of an association that carries out an ancillary activity to the main activity of its parent companies, such as research and development (*R&D*), production or manufacturing to support affiliate companies.

87. The aforesaid legal and economic autonomy does not necessarily entail that the new economic entity cannot be controlled by its parent companies in its strategic decisions. What is relevant is that the *joint venture* is autonomous in an operational respect.

88. Even when the *joint venture* can perform its own economic activity, for the purposes of determining its autonomy, the relation existing with its parent companies must be taken into consideration. Particularly, the presence of the parent companies in the upstream or downstream market is a significant element in determining whether the *joint venture* will perform autonomously.

89. The fact that the *joint venture*, during its initial start-up period, relies almost exclusively on sales or services provided to its parent companies, or to some entity that belongs to the same business group, does not affects its autonomy. Regardless the market-to-market assessment, the FNE will consider as a reasonable start-up period, three years counted from the relevant association (emancipation period), unless it exist evidence that for a specific market a longer or shorter term would be adequate for the purposes of qualifying said dependence as temporary.

90. Engaging in economic relations (current or potential) with undertakings other than its parent companies can be a relevant factor when determining its autonomy. In this respect, the proportion of sales made to its parent companies compared with the total production of the *joint venture,* will be a relevant factor*.* The fact that the *joint venture* achieves more than 50% of its turnover from third parties can be an indication of its autonomy. Below this level, a case-by-case analysis must be carried out, taking into consideration, among other factors, the relation between the new economic entity and its parent companies. This relation shall be at arm's length on the basis of normal market conditions. When the *joint venture* purchases from its parent companies but adds too little value to the products or services, its autonomy will be put into question. Finally, the FNE may also consider if the parent companies are active in the same market or in other related ones, as well as the fact that such presence could reduce the *joint venture's* ability of being fully autonomous and long-lasting.

c. Changes to the new entity

91. Any change in the *joint venture*'s control can constitute a new concentration under the provisions set in Article 47 (a), (b) and (d) of the DL 211. Among others, when changes from sole to joint control, or vice versa; when transfers strategic assets previously held by the *joint venture*; when the economic activity performed by the *joint venture* is divided or transferred to one or more of its parents or third parties; when the *joint venture* itself acquires or merges with another undertaking, or acquires or transfers strategic rights or assets of its parents or third parties. Moreover, attending Article 47 (c) it will also constitute a new concentration the transfer of significant additional rights or assets from the parent companies to the joint venture, which extends its activities into other markets, not object of the original *joint venture*, as long as such activities may be carried in full-function basis.

d. Exceptions

92. Any associations or *joint ventures* which do not have operational autonomy, or which are not long-lasting, cannot be qualified as concentrations[19].

93. Thereby, for example, temporary associations or consortiums, established specifically to participate in public or private tenders, are excluded from the control set out under Title IV of the DL 211, notwithstanding the other general provisions of the DL 211 may apply. Nevertheless, once the decision regarding the *joint venture* at issue is made, the durability criteria is reputed fulfilled and could eventually constitute a concentration, as long as the rest of the criteria mentioned on these Guidelines are satisfied, for which a case-by-case analysis shall be made.

94. When the *joint venture* is created for a brief and determined period of time, it will not be considered to function on a lasting basis. Such is the case of *joint ventures* created for a concrete project and which, once created, shall not interfere in the project's operation[20].

iv) "The acquisition, by one or more of them and under any title, of the control over the other's assets"

95. Article 47 (d) of the DL 211 provides that the acquisition of control under any title by an undertaking over the assets of another belonging to a different business group, shall constitute a concentration.

96. Article 47 (d) of the DL 211 can be considered as a specification of the scenario contained in literal (b) of the same provision. Indeed, Article 47 (d) expressly sets out that the acquisition of a decisive influence over an undertaking that gives rise to a concentration, can also occur through an asset acquisition. Therefore, the concepts and conditions described in these Guidelines regarding Article 47 (b) shall apply – where pertinent – to literal (d) of the same article, such as the definition of decisive influence or control; the means of exercising such control, as well as the rights themselves, and the types of control that could arise from the same (sole or joint control, *de jure* or *de facto*, etc.).

97. Thus, this Section will focus on those particular elements of Article 47 (d) of the DL 211, principally in determining the relevant assets whose independence ceasing may enable the acquisition to be qualified as a concentration when the remaining requirements are fulfilled. In general terms, relevant assets shall be those which are appropriate for

[19] Such associations shall be analysed under the general rules of the DL 211, especially if they restrict competition.
[20] For instance, building a determined infrastructure for which's operation the undertaking will not participate.

changing the competitive structure or dynamics of the markets; non-relevant assets, in turn, shall be those that do not hold competitive relevance.

98. Control over assets can be acquired in a *de facto* or *de jure* basis, such as, for instance, real or personal rights granting ownership, possession, or mere possession, use or enjoyment, or any other type of rights that enable a decisive influence in the exploitation of the assets.

99. In the following paragraphs are listed the elements that must be taken into consideration when determining which assets qualify as assets of an economic entity that falls within Article 47 (d) of the DL 211.

a. Relevant assets under Article 47 (d) of the DL 211.

100. The change of control over the assets can only be considered as a concentration if such assets are relevant and significant enough to result in a lasting change in the market and competition. At the same time, the acquired assets must allow the conduction of the economic activity on an ongoing basis.

101. The assets will be considered relevant when they grant: *(i)* the ability to perform the economic activity in a lasting basis (in the market of goods or services), regardless the absence of a business or corporate organization or any structure regarding those assets; *(ii)* the ability to result in changes in the market and competition, particularly when such assets create or strengthen the acquirer's market power.

102. The aforementioned effect on competition is easy to establish when all of the assets of an undertaking are acquired, while a case-by-case analysis will be necessary in the event of acquisitions over only a portion of such assets, or regarding assets that are no longer or will be no longer economically operational.

103. The notion of *assets* is broad including tangible and intangible assets. Within the concept of assets, among others, is possible to mention: production or manufacturing facilities, factories, offices, transportation networks, research and development laboratories, personnel, goodwill, data bases, intellectual or industrial property rights[21], information technology platforms[22], client lists, algorithms, formulas.

104. In any case, the economic and competitive relevance of the assets will be determined on a concrete basis. The analysis will be based on the specific market, its competitive features, as well as on the fact of which are its critical or key assets.

[21] In general terms, an exclusive industrial or intellectual property right will be more likely to have effects on competition than a non-exclusive right, except if the latter were combined with other elements, as could be relevant assets, among them, goodwill or *know-how.*

[22] As per the customary terminology, information technology or IT.

105. The fact that the assets are not being used or will no longer be used, at the time of the acquisition, or the circumstance that the seller has ceased performing his economic activities, shall not be decisive in determining the relevance of such assets for competition. However, the longer the time elapsed between the termination of the economic activities and the acquisition of control over the assets, the higher the likelihood that the operation will be deemed to be a mere acquisition of assets and thus not a concentration.[23] The suitability of such assets to continue exercising the economic activity must remain in place or be at least possible during a reasonable period of time.

106. The fact that the assets can generate income, or that such income can be attributed to the assets, may be an indication of the relevance of those assets for competition and for that market; however, this is not an essential requirement. Assets that do not generate income or profits can also be relevant, particularly if those assets are highly valued by the acquiring party[24].

VI. TRANSACTIONS NOT CONSIDERED AS CONCENTRATIONS.

107. The temporary acquisition of securities by natural or legal persons who, within their ordinary course of business and in a regular manner, exclusively engage in performing financial investments with their resources or on behalf of third parties, for the resale of the financial assets, will not be deemed to be a concentration, provided the acquiring party fulfils the following copulative requirements:

a) The acquiring party is a securities broker, as per the provisions of article 24 of Law No. 18,045 on the Securities Market, such as stock brokers, securities agents, or a banking institution or financial firm. In addition, the party may be an institutional investor, as per the terms of Article 4 bis (e) of the same statute, such as insurance companies, domestic reinsurance entities, and the fund administrators authorized by the law;

b) The acquiring party must not directly or indirectly engage in the ordinary course of business of the entities whose securities titles are acquired;

[23] The mere fact that the assets have not been effectively used as of the time of their acquisition, does not constitute sufficient grounds to consider that the operation is beyond the control set out in Title IV of the DL 211.

[24] Turnover is relevant on determining the thresholds set forth by Res. 667. In turn, the value of the assets is relevant in establishing the jurisdiction of the FNE's and the possibility of subjection a concentration to the control set out in Title IV of the DL 211, which exceeds the determination of whether or not certain transactions must be mandatorily notified.

c) The acquiring party does not exercise the voting rights with the purpose of determining the competitive behaviour of the respective undertaking, or only exercises such right with the purpose of preparing the partial or total transfer of such undertaking, its assets, or their stakes;

d) The acquiring party must transfer its shares within a term of one year as from the date of acquisition; in other words, the shares must be reduced within the previously mentioned timeframe, to a level that does not grant control over the undertaking.

108. Nevertheless, the preceding may change if any information exists evidencing that the assets allow an undertaking to acquire the possibility of decisively influencing another economic agent, in which case the concentration shall be assessed under Title IV of the DL 211[25].

109. The aforementioned exception shall not apply regarding concentrations performed directly by investment funds, or by entities controlled by the same, or through agents, insofar as a decisive influence over an undertaking occurs, for example, via the appointment of the members of the respective monitoring and/or administrative bodies of the entities.

VII. GEOGRAPHIC JURISDICTION

110. The FNE shall exercise its jurisdiction whenever it is probable that a concentration will affect the market and competition in Chile. In order for such effect to occur, the concentration must have a geographical link with Chile.

111. The geographic link of the concentration with the country is established through the notification thresholds, which take into account the sales consummated in Chile. Thus, Title IV of the DL 211 provides that notification to the FNE will be mandatory regarding all concentrations that cause effects in Chile and equal or exceed the turnover thresholds in Chile set in Article 48 of the DL 211.

112. Such provision refers to the concentrations whose notification is mandatory. Regarding transactions that do not fulfil such requirements, the possibility always exists that the merging parties may voluntarily notify it. Also, the FNE's holds the power of initiating *ex-officio* investigations within one year following the transaction's materialization, provided that an appropriate link with Chile exists, including sales or

[25] Likewise, the acquisitions of minority stakes must comply with the provisions of Article 4 bis of the DL 211, where appropriate and applicable to them, regardless of the provisions of these Guidelines.

presence (for example, activities or assets) and/or customers or consumers within the Chilean territory.

VIII. TEMPORAL JURISDICTION

113. Regarding the moment starting from which the FNE has the competent jurisdiction to initiate the proceedings of Title IV of the DL 211, the real and serious intention of the merging parties to conclude the transaction is deemed sufficient.

114. Mandatory and voluntary notification set in Article 48 of the DL 211, will be admissible from the existence of a real and serious intention of the notifying parties to consummate it and until prior to its materialization.

115. Regarding the *ex officio* investigations set in paragraph 9 Article 48 of the DL 211, the FNE may open the investigation once materialised the concentration that regardless being able to be notified it was not, and up to 1 year since its materialisation.

IX. CHANGES OF TRANSACTIONS

A. SUBSTANTIAL AMENDMENTS

116. Any substantial amendments on the concentration could affect the FNE's past or eventual assessment. For these purposes, amendments related to the type of concentration (means of the concentration), its duration, and/or its geographic links are particularly relevant.

117. If the substantial amendment occurs prior to its notification to the FNE, the submission must integrally reflect the concentration whose consummation is sought, as of the date of said submission.

118. If the substantial amendment occurs once the evaluation set in Title IV of the DL 211 has already begun, the amendment must be immediately informed to the FNE, which will assess if it will continue the analysis within the same procedure or otherwise consider that a new concentration is in place, in which case it should initiate a new procedure under Article 48 of the DL 211.

119. If the substantial amendment occurs after the concentration has been approved by the FNE, either with or without commitments, the parties must immediately inform the FNE of the amendment. The FNE shall assess whether with the amendment the concentration can be considered the same and if such amendment alters the commitments' compliance

and implementation, if any exist, to determine whether it is necessary to initiate a new procedure on the terms of Title IV of the DL 211.

B. ABANDONMENT

120. In the event a concentration is abandoned, such circumstance must be notified to the FNE submitting all the relevant information evidencing such decision, in order to be certain that the projected concentration will not be materialised.

X. CONCLUSIONS

121. These Guidelines establish the criteria that will be generally used by the FNE in determining whether a given transaction qualifies as a concentration. These criteria are consistent with international practices and their purpose is to provide clarity and certainty in the analyses that must be carried out during the negotiations and decision-making processes, within various businesses.

122. Particularly, these Guidelines seek to assist the parties who require assessing whether a specific transaction may be subject to control. In any event, the FNE shall have the ultimate faculty on determining if a transaction is a concentration, thus whomever has doubts in this regard can approach the FNE for clarification and more detailed guidance in cases that justify it. The interested parties will also be able to justify their position of not being engaged in a concentration by presenting information regarding the specific case.

123. In its assessment under Title IV of the DL 211, the FNE shall adopt a broad approach, including legal, factual, and economic aspects.

124. If it is concluded that there is a concentration after applying the provisions of the DL 211, as well as the guidelines contained in this document, it will be necessary to review the thresholds set in Res. 667 to determine whether the transaction must be mandatorily notified. If that is not the case, the parties can always voluntarily notify the transaction before the FNE. Moreover, the FNE may *ex officio* initiate investigations, within a maximum term of one year as from the transaction's materialisation.

125. In this regard, it is necessary to take into consideration the sanctions in the event of breaching the provisions regarding concentration control, set in Article 3 bis of the DL 211.

126. Where there is no concentration, the transaction cannot be assessed under Title IV of the DL 211. The above does not preclude the application of the general competition rules, such as, for example, those contained in Article 3 and Article 39 of the DL 211.

127. Finally, the provisions of Title IV of the DL 211 shall apply in a non-discriminatory basis to all undertakings, regardless of their status, legal organization, nationality, ownership structure, their public or private nature, among others. The purpose of preventive control is to assess the qualitative impact of a given concentration in the market's structure and in the competitive dynamics, in order to prevent any competitive restraint, promote economic activity, and foster the consumers' welfare.

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