Guidelines on Remedies

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INTRODUCTION

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 (the "**Chilean Competition Agency**" or "**FNE**") of concentrations between undertakings with effects in Chile.

Pursuant to Title IV of DL 211, the notifying parties will have the right to propose the commitments deemed capable to mitigate the competition concerns raised by the notified transaction, to the National Economic Prosecutor.

The FNE has to assess the proposed commitments within a brief period of time in order to determine whether the proposed concentration, as modified by such commitments, is capable of substantially lessening competition. If the concentration remains capable of substantially lessening competition, the FNE will forbid the operation; if it is no longer capable, the FNE will approve it bounded to the proposed commitments.

The central elements in the FNE's assessment of the mitigating commitments, will be the commitments' effectiveness on solving the competition concerns, the feasibility of its implementation, execution and monitoring, and its proportionality.

These Guidelines discuss these elements along with other relevant matters, such as the preferred mitigating commitments, best practices on implementing divestitures, among other topics. Its content is based on the relevant experience in the comparative law, as well as the experience acquired by the FNE in its domestic practice.

The intention of the Guidelines on Remedies is to clarify and guide the notifying parties regarding the FNE's assessment of the proposed mitigating commitments and the general principles that the commitments need to accomplish to be considered in the FNE's decision-making process.

By elaborating these Guidelines on Remedies, 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 FNE

I. PRELIMINARY CONSIDERATIONS

1. These Guidelines set the Fiscalía Nacional Económica's ("**Chilean Competition Agency**" or "**FNE**") view concerning the best practices in the field of mitigating commitments for concentrations (hereinafter, indistinctively, "**mitigating commitments**", "**remedies**", or "**commitments**"). Their basis are founded in the Guidelines issued by the main comparative jurisdictions, as well as in the experience acquired by the FNE both in the negotiation and subsequent enforcement of extrajudicial agreements between the FNE and the merging parties, and in the enforcement of conditions established in decisions issued by the Honorable Competition Court ("**H. TDLC**").

2. The guidelines contained in this document under no circumstances replace the FNE's specific assessment regarding the sufficiency of the commitments proposed by the parties in each particular case. Moreover, these guidelines may even be disregarded where the specific conditions of the case under evaluation indicate so.

3. These Guidelines will be applied and further developed by the FNE's practical assessment of the cases, notwithstanding the case law that may be issued by the H. TDLC and the Supreme Court.

4. This document will be subject to regular revision, to adjust it to the best international practices and the practical experience that the FNE will acquire regarding the effectiveness of remedies.

II. REMEDIES AS A MERGER CONTROL TOOL

5. Pursuant new Article 57 (c) of the Competition Act ("**DL 211**"), the FNE will forbid the notified concentrations in which it concludes that they are able to substantially lessen competition. It is the FNE's responsibility to prove that a concentration will substantially lessen competition.

6. According to paragraph 3 of Article 53 of the DL 211, the notifying parties will always have the right to propose the commitments deemed capable to mitigate the competition concerns raised by the notified transaction, to the National Economic Prosecutor.

7. Thus, the FNE shall approve a concentration conditionally to the implementation of the commitments proposed by the notifying parties if it finds that, following their implementation, the concentration is no longer able of substantially lessening competition. On the contrary, the FNE shall prohibit a concentration when, after assessing the proposed commitments, it concludes that the modified concentration is still capable of substantially lessening competition.

A. BASIC REQUIREMENTS FOR ACCEPTABLE REMEDIES.

8. Firstly, the mitigating commitments must be effective in preventing the concentration's ability of substantially lessening competition, once modified accordingly.[1] Such effectiveness will depend on the type of commitment, as will be explained on Section III.

9. Furthermore, the FNE during the assessment of the remedies offered will examine its suitability, with a sufficient degree of certainty, to prevent the substantially lessen of competition during the entire projected length of the concentration. Therefore, the FNE will prefer remedies that deal with the detected concerns within a short period of time, and it will not accept transitory remedies unless it believes that the anticompetitive effects will not outlast them.

10. Secondly, the FNE will assess whether the proposed commitments, in addition to being effective, are feasible to implement, execute and monitor.

11. The feasibility of the implementation and execution requires the appraisal of different situations. It should consider, for instance: the existence of potential purchasers that do not raise additional competitive concerns and the possibility of the degradation of the assets before the divestiture – what could occur, for example, if it is separated from another unit that provides the necessary inputs for its operability–. It should also evaluate the infringement of third parties' rights; the timeframe for the remedies' effective implementation and whether this would imply a risk in the affected market during the interim period.

12. Additionally, the FNE's impossibility of effectively monitor the commitments, turns the proposed mitigating commitments into a mere statement of intention with no binding force. Likewise, in the other end of the spectrum, the feasibility of a remedy will be inversely proportional to the intensity of the required monitoring. Therefore, the parties that wish to pursue the concentration transaction are responsible for offering a monitoring system sufficient and simple enough to ensure the effects sought by the remedies.

13. Finally, in addition to eliminating the transaction’s ability of substantially lessening competition, the mitigating commitments must be proportional to the detected competition concern. Thus, when facing two or more alternative commitments considered equally

[1] Similarly: Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/) par. No. 9; Antitrust Division Policy Guide to Merger Remedies, U. S. Department of Justice, Antitrust Division (2011), p. 3; Bundeskartellamt, Guidance on Remedies in Merger Control. Version Public Consultation (2016), par. No. 17; UK Competition Commission, Merger Remedies: Competition Commission Guidelines (2008), par. No. 1.8.

effective to eliminate the competitive concerns by the FNE, it will prefer the less onerous remedy.

B. PROCEDURE FOR THE ASSESSMENT OF THE REMEDIES OFFERED

14. The regulation on control of concentrations relies on the parties' duty to act coordinated, in good faith, promptly and to collaborate with the FNE. Indeed, only the parties are authorized to propose mitigating commitments, while the FNE, has to establish after reaching its decision, whether such commitments are appropriate to prevent the transaction's ability to substantially lessen competition.

15. Considering that only the parties have all the relevant information necessary regarding the effectiveness, feasibility and proportionality of the commitments proposed, it is the parties' responsibility to provide, in due time and form, all such information available, necessary for the FNE's assessment.

16. The parties may offer the mitigating commitments at any time during the procedure befoe to the expiration of the deadlines established for Phase II.[2] The FNE will be available to discuss with the parties the extent of the required information.

17. The proposal must be presented as a written document signed by whom assumes the commitments, in it the commitments proposed must be specified following a template that the FNE will establish for that purpose. In addition, the document will clearly explain how the remedies will be implemented and its projected deadline and set forth the elements that allow the FNE to assess the effectiveness, feasibility and proportionality, as referred above. Finally, if appropriate, it will identify the monitoring and the divestiture trustees, and the duties assigned to each of them.[3]

18. Along with the submission of the mentioned document, the parties may request confidential treatment of the proposal, in which case they shall submit a non-confidential version that meets the requirements set in Article 10 of the Regulation.[4] The FNE may request the opinion of interested third parties regarding the effectiveness and feasibility of the proposed remedies, pursuant to the final paragraph of Article 53 of DL 211.[5]

19. The remedies' proposal submission in the terms mentioned above will automatically suspend the deadlines established in paragraph one of Articles 54 and 57 of the DL 211, up to 10 and 15 days, respectively, pursuant to Article 60 of the same legal body. Yet, in order to facilitate the FNE's assessment regarding the suitability of the

[2] Phase II means the extension period of the proceedings, pursuant to Article 54 (c) of the DL 211.
[3] See Section IV, Literal D of these Guidelines for more specific directions with respect to the contents of commitments that involve structural commitments.
[4] Supreme Decree No. 33 issued by the Ministry of the Economy, Promotion and Tourism on March 1, 2017.
[5] Interested third parties means those parties mentioned in Article 55, paragraph 2 of the DL 211, as economic agents with an interest in the transaction, suppliers, competitors, clients or consumers.

proposed remedies, it is recommended that if the parties file the initial proposal in Phase II, they do it in the 10 following days from the communication of the risks that the notified transaction could raise, as set in Article 53, paragraph one, of the DL 211.

20. Any amendment made by the parties to the remedies proposal document will be considered as a new submission for the purposes of Article 60 of the DL 211, and it will be deemed the most recent filing for the purposes of Articles 31 bis, 54 and 57 of the DL 211.

21. Although the commitments may be offered during any stage of the investigation, those offered during Phase I[6] can only be accepted when the risks are easily identifiable and the remedies are sufficiently comprehensive and clear to ensure they adequately rule out all the possible competition concerns raised by the concentration. The foregoing is justified by the fact that the in-depth market investigation and, consequently the assessment of the effects of the concentration are only carried on during Phase II.

22. The parties may also offer preliminary proposals before of or along with the filing of the merger notification. This submission will not be considered as "commitments offered by the parties" in the terms described in Article 53, paragraph 3, 54 (b) and 57 (b), nor will they suspend the investigation deadlines.

23. The formal submission of commitments or preliminary proposals will start a dialogue in which the FNE will offer guidance to the parties in searching the best available remedy to address any existing concern.[7] However, this assistance will under no circumstances guarantee that the FNE will consider the remedy finally submitted as sufficient to prevent the transaction's ability to substantially lessen competition.

24. Additionally, the FNE may use the mechanism established in the final subsection of Article 53 of the DL 211, consulting third parties' opinion regarding the proposed remedies' ability to eliminate the competition concerns raised by the transaction and on potential problems that could arise in the implementation of those remedies.

25. Particularly, when dealing with divestiture remedies, the FNE may obtain third parties' views regarding the sufficiency of the package of assets offered by the parties to ensure the purchaser its viability; the requirements that the potential purchaser should met to achieve said objective, and; the existence of interested third parties in acquiring these assets. In a further stage, the FNE may consult third parties' opinion on whether the proposed purchaser meets the requirements established in the final submission.

[6] Phase I means the maximum period of thirty days from the beggining the investigation, which is regulated under Article 54 of the DL 211.

[7] This assumes that the FNE has previously determined, in the context of the investigation, the nature and scope of existing competition problems.

26. Furthermore, regarding concentrations notified in multiple jurisdictions, the FNE will be interested in knowing the commitments offered by the parties in such countries, as well as the respective authorities' opinion with respect to the concentration.[8] At the same time, when the investigation's deadlines and the entity of the risks enable it, the FNE will seek for harmonious solutions.

27. Once finalised the remedies' assessment, the FNE will take a decision that will be communicated to the parties within the period of the investigation. If the FNE believes that the mitigating commitments submitted by the parties are not sufficient to remove the transaction's ability of substantially lessening competition, it will forbid the notified concentration.

28. Finally, the FNE may reach the conclusion that the offered mitigating commitments are sufficient to remove the transaction's ability of substantially lessen competition. In this situation, the FNE will issue an approbatory resolution authorizing the concentration ("**Approbatory Resolution**") conditioned to the commitments' execution.

29. Once the Approbatory Resolution has been issued, the formal submission of commitments will become binding for the parties. Therefore, as Article 3 bis of the DL 211 set, any breach of those commitments will lead to the application of the measures established in Article 26 of the same legal text.

III. TYPES OF REMEDIES THAT CAN BE OFFERED

30. The commitments usually accepted to eliminate the competitive concerns raised by concentrations can be classified into those that involve **divestitures** by the merging parties, and **other remedies.**

31. There are two types of divestiture commitments: those that involve the sale of assets to a suitable purchaser (hereinafter, "**divestiture of assets to a suitable purchaser**"), and those that seek to remove links between the parties and competitors.

32. Divestitures of assets to a suitable purchaser seek to create a new competitive entity or strengthening existing competitors. Thereby, the assignment of tangible and intangible assets that belong to the merging parties, pursue the reestablishment of the competitive pressure lost as a consequence of the merger.

[8] Supreme Decree No. 33, issued by the Ministry of the Economy, Promotion and Tourism on March 1, 2017, establishes that the parties will state if they "*authorize the FNE to share the information on the transaction with other competition authorities*".

33. Divestitures to remove links with competitors usually exhibit an accessory nature and seek to remove the coordinated concerns raised by the merger by forcing the divestiture of a minority shareholding held by the merging parties in third parties.

34. By "other remedies" will be understood all the spectrum of remedies regarding limitations or modifications in the future behaviour of the merged entity. With systematisation purposes, these remedies can be separated into five large groups: (i) First, quasi-structural remedies that attempt to influence the structure of the market affected by the merger, for example, granting access and licensing obligations. (ii) Second, behavioural commitments *per se*, as a prohibition to celebrate agreements containing exclusivities, conditional rebates, tying or bundling practices or arbitrary discrimination. (iii) Third, commitments of erecting informational barriers to prevent exchanges of information between the merging parties and their affiliates (also known as "*Chinese wall*"). (iv) Fourth, remedies that promote market power regulation. Finally (v) the fifth group refers to other supplementary behavioural conditions regarding the divested package's purchaser.

35. Although each concentration will be assessed on its own merits and circumstances, generally, in cases of horizontal concentrations, the FNE will require the divestiture of assets to a suitable purchaser. This does not impede the adoption of other remedies as a complement to the divestiture.[9]

36. This preference for commitments that imply the divestiture to a suitable purchaser is based in the fact that they tackle the source of the competition concerns, reestablishing the competitive pressure that was lost because of the horizontal concentration. Moreover, these commitments have lower risks of distorting competition in the affected and/or connected markets and are easier to monitor (as they are implemented at once they do not require subsequent obligations).

37. Exceptionally, the FNE will consider remedies that do not involve the divestiture of assets to a suitable purchaser. This will occur when any of the following criteria are met:[10] (a) the parties demonstrate to the FNE that the commitments proposed are equivalent to the divestiture in terms of preventing the operation from substantially lessening competition; (b) the risks appear to be temporary given the characteristics of the market (for example, dynamic innovative markets); (c) there are proven considerable efficiencies, which may be lost by a divestiture; (d) the divestiture is not possible and prohibition is not suitable to prevent the materialization of the competitive concerns.

[10] With respect to the exceptional nature of approving remedies other than divestitures, see: Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/), par. No. 15, 17, 61, 69; Antitrust Division Policy Guide to Merger Remedies, U. S. Department of Justice, Antitrust Division (2011), p. 3-5; Bundeskartellamt, Guidance on Remedies in Merger Control. (2017), par. N° 22-23, 26 y 85; UK Competition Commission, Merger Remedies: Competition Commission Guidelines (2008), par. N° 2.14-2.21, 4.1-4.2 y 4.30-4.31.

38. On the contrary, in cases of vertical and conglomerate effects, the FNE will be willing to take into consideration mitigating commitments other than divestitures of assets to a suitable purchaser. However, even in these cases, the FNE may opt for the divestiture when proportional.

IV. DIVESTITURE OF ASSETS TO A SUITABLE PURCHASER

39. In general, the sale of all the assets (tangible or intangible) needed by the purchaser to effectively compete with the merging entity, is the best remedy to prevent the competition concerns raised by a horizontal concentration.

40. The exact scope of the divestiture will be determined by the information provided by the notifying parties to the FNE in the remedies proposal. The FNE, once accepted this scope, will reproduce it in the Approbatory Resolution.

41. Three types of risks can affect the divestiture's effectiveness: (i) the package's lack of ability to restore competition, or to attract the potential purchasers; (ii) the purchaser's incapacity of meeting the requirements needed to become an effective competitor; and, (iii) the deterioration of the assets to be transferred, prior the transfer.

42. These risks will determine the characteristics that the proposed divestiture should meet in order to ensure the remedy's effectiveness in preventing the transaction ability of substantially lessening competition, to get the FNE's approval. For this reason, the following sections in this document are structured on the basis of those risks and the conditions that the proposal of remedies must meet to minimize them.

A. CONTENTS OF THE DIVESTITURE PACKAGE

43. The divestiture package shall be suitable to eliminate the competition concerns raised by the concentration. Its content will be defined on a case-by-case basis, considering the particular characteristics of the market in which it will be executed and the magnitude of the identified concerns. Notwithstanding the foregoing, the parties may include in the package assets from markets where the FNE did not identify competition concerns when necessary to attract a suitable purchaser’s interest, or to ensure its effectiveness in restoring the competition in the market.

Divestiture of an existing and stand-alone business[11]

44. The divestiture will preferably include one or more existing and stand-alone businesses, including all the resources that contribute to its current operations. This is because the sale of an existing and stand-alone business, as opposed to the sale of an array of assets that represents a fraction of one of the parties' business, increases the degree of certainty on the remedy's effectiveness, because the business has already demonstrated its ability to compete in the market and survive independently.

Divestiture of tangible or intangible assets defined ad-hoc

45. Exceptionally, if there is no stand-alone business susceptible of being transferred, or if, existing such a business the transfer of the same is not proportional to the identified concerns, the parties may offer to the FNE a divestiture package including all the assets necessary for the purchaser to effectively and permanently compete with the merging entity.[12][13]

46. To be considered by the FNE, the parties will have to demonstrate that the package of assets: can be operated independently; is attractive enough for the potential purchaser and; has the ability to enable the acquirer to restore the competitive pressure.

47. Furthermore, the FNE will prefer a package integrated by assets that have operated jointly in the past, that is to say, assets that belong to one of the parties. On the contrary, remedies that involve a combination of the merging parties' assets (*mix-and-match*) will only be acceptable on exceptional cases.[14]

48. Finally, the parties may grant greater certainty to the FNE regarding the existence of potentially interested parties in the divestiture package, by offering what in comparative

[11] It is preferable for the divestiture package to include an operative and independent business unit, as has been broadly recognized in comparative jurisdictions, see: Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/),, par. No. 33, 36 and 37; Antitrust Division Policy Guide to Merger Remedies, U. S. Department of Justice, Antitrust Division (2011), p. 8-9; Bundeskartellamt, Guidance on Remedies in Merger Control. Version Public Consultation (2016), par. N° 38, 45-48 y 50; UK Competition Commission, Merger Remedies: Competition Commission Guidelines (2008), par. N° 3.7 y 3.9.

[12] In addition, the FNE shall be able to accept that the remedy proposal considers the sale of a set of assets, even when the sale of the business unit results feasible and proportional, as long as the purchaser has no intention in the acquisition of the complete business unit and within the proposal, his identity is revealed.

[13] This may include not just physical assets (production plants, distribution centers, etc.) but also the current personnel employed by the company, intangible assets (industrial property, trademarks, know how, commercial secrets, etc.), software, investigation and development facilities, clients' data bases, contracts that guarantee access to input and clients, permits and authorizations, documents and business registries, and all relevant assets which are necessary to ensure its viability and competitiveness in the relevant market.

[14] The risks of accepting mix and match solutions were recognized in various comparative guidelines on remedies, such as: Bundeskartellamt, Guidance on Remedies in Merger Control. (2017), par. N° 49; UK Competition Commission, Merger Remedies: Competition Commission Guidelines (2008), par. N° 3.1.2.

literature has referred as the *crown jewels*. This implies the existence of an alternative divestiture package, more attractive for potential purchasers than the initial package,[15] which will be transferred if there are no interested parties in the initial package within the timeframe for that divestiture. If required by the parties to ensure the primary divestiture success, the alternative divestiture package will receive confidential treatment until the last day of the term to sell the initial package.

B. CHARACTERISTICS OF THE PURCHASER OF THE DIVESTITURE PACKAGE

49. A divestiture can fail not only when the divested assets lack the ability to restore competition, or attract interested parties, but also when the purchaser is not able to become in a relevant competitive force.[16]

50. Therefore, both the purchaser's identity and the contracts or agreements subscribed concerning the transfer of the divestiture package, will require always the explicit authorization of the FNE.

51. In general terms, the purchaser must be capable of restore the competitive rivalry lost as result of the concentration. Therefore, the FNE will evaluate whether the purchaser proposed by the parties has the expertise, experience, assets and financial resources needed to operate in the affected market in the long-term.

52. In addition, and notwithstanding other case-specific requirements, the FNE will verify that the purchaser meets the following general requirements:

(i) The purchaser must be independent from the parties, and therefore the existence of interlocking and minority shareholdings among them are generally not tolerable. It is also forbidden financing the sale with the parties' resources or maintaining relevant contractual relationships between the parties and the purchaser, except for some special and necessary provisional circumstances;[17]
(ii) The acquisition of the assets by the purchaser cannot raise new competition problems;
(iii) It is expectable for the purchaser to obtain, in due time, all the necessary regulatory approvals to operate in the relevant market.

[15] The *crown jewels* involve the addition to the preferred divestiture package of other assets that are not directly used in the manufacture or commercialization of the relevant product, but which increase the interest for the divestiture package. For example, facilities located in geographic markets without any identified effects, or assets needed to produce products that are not affected by the transaction, but in respect of which there are synergies obtained from the joint commercialization of the products affected by the risk.
[16] The risk magnitude is intrinsically linked to the contents of the divestiture package. If the package includes an operative and independent business unit which competitive viability is empirically proved the purchaser's attributes are less decisive in terms of assessing the effectiveness of the proposed commitment.
[17] These exceptional circumstances occur when to ensure the purchaser's viability, the provision of certain inputs or services is fundamental.

53. Likewise, before the approval of the purchaser's identity, the FNE can request the purchaser the elaboration of a business plan to evaluate his commitment of operating the acquired assets as a unit in the relevant market affected, without transferring such assets to third parties within a fixed a specific timeframe.

54. The FNE will decide the suitability of the proposed purchaser considering different evidence, such as the information provided by the parties, and when applicable, the information and business plan submitted by the prospective candidate. It also will consider the assessment of the monitor trustee and interested third parties' opinions.

55. The FNE will express its conformity regarding the purchaser's identity in a resolution when the remedies proposal contains a binding commitment in respect of the purchaser's identity, or in a subsequent administrative act when it does not. The FNE's approval of agreements and contracts connected with the divestiture package will always be contained in a subsequent administrative act.

56. There is a link between the moment in which the purchaser's identity is communicated and approved by the FNE and how the divestiture package is implemented, which is in turn directly related to the moment on which the notified concentration may be consummated. As general rule, there are three scenarios in the divestiture's implementation:

i. **Scenario I (Prior or *fix-it-first* Solution)**: The parties identify the purchaser in the remedy proposal and enter into a binding agreement with him during the merger control procedure, before consummating the notified concentration. In this case, the FNE can include the purchaser's identity in the Approbatory Resolution.

ii. **Scenario II (Up-front buyer solution):** The parties identify the purchaser and enter into a binding agreement with him after the Approbatory Resolution and before the consummation of the notified concentration. In this case, the purchaser's approval will be contained in an administrative act after the Approbatory Resolution. Only after the FNE approves the purchaser, the parties will be able to consummate the notified concentration.

iii. **Scenario III (After-closing solution)**: In this case, the FNE will issue the Approbatory Resolution postponing the approval of the purchaser's identity until after the consummation of the notified concentration. As in scenario II, the purchaser's approval will be contained in an administrative act after the Approbatory Resolution.

57. When the remedies proposal document does not include the purchaser's identity (Scenarios I and III), it must specify the characteristics that the suitable purchaser should meet. These requirements will be a referential parameter for the FNE to reach a decision as to whether or not to approve the latter. The document ought to contain also a list of potential purchasers of the divestiture package that meet such characteristics.

58. The parties that choose these modalities of divestiture (scenarios II and III) shall be compelled to present a proposal of suitable purchaser after the Approbatory Resolution, which will be responded by the FNE within a 15 days' timeframe. Moreover, the parties may request from the FNE the pre-approval of up to two buyers, in which case the above term will be extended to a maximum of 30 days. If the parties do not provide the FNE with sufficient information to assess the proposed buyer or buyers' suitability under paragraphs 51 to 53 of this Guidelines, it will be entitled to reject the proposed candidate or candidates, notwithstanding the parties' right to request a new statement over the additional information presented.

59. The fix-it-first and up-front buyer solutions (Scenarios I and II) will better guarantee the buyer's suitability attending the divestiture package, and, with it, the suitability of the commitments proposed to solve the identified competition concerns. Consequently, the FNE will consider after-closing solutions (Scenario III) when it does not seem foreseeable for problems compromising the commitments' viability to arise during its implementation (for instance, when the existence of potential suitable purchasers interested on the divestiture package is clear).

C. CHARACTERISTICS OF THE SALE PROCESS TO AVOID DETERIORATION OF THE DIVESTITURE PACKAGE PRIOR ITS SALE

60. It may be the case that the merging parties lacked incentives to properly protect the assets to be employed by their future competitors. Therefore, the mitigating commitments proposed must cover all the necessary safeguards to avoid the inefficacy of the remedy due to the deterioration of the divestiture package prior its sale.

61. The first cause of deterioration of the transferred assets or business is, indeed, the excessive prolongation of the divestiture process. This prolongation is capable of distorting the customers' preferences and the stability of staff thereof.

62. In view of the above-mentioned, the FNE deems adequate that the divestiture process is fully completed within a maximum timeframe of nine months as from the Approbatory Resolution.[18]

[18] The foregoing is notwithstanding that the FNE may exceptionally give an extension for the purchaser's approval based on concrete information justifying so.

63. Nevertheless, the parties will always be able to grant greater efficacy to their remedies by agreeing upon shorter timeframes than those set out in these Guidelines. This proposal may be kept confidential at the parties' request. The shorter the offered time-limits, the lower the deterioration risks affecting the transferred assets or business.

64. In addition, to prevent the divestiture package's deterioration, the parties must commit to continuing conducting the business or preserving the assets subject to transfer in a manner consistent with their ordinary course of business and applying good commercial practices.[19]

D. ADDITIONAL SAFEGUARDS FOR SCENARIO III

65. The FNE may approve the purchaser's identity after the consummation of the notified concentration (Scenario III), when the parties offer certain additional safeguards.

Divestiture procedure

66. Within a time-limit of months the parties must: (i) propose a suitable purchaser to the FNE; (ii) obtain a resolution ascertaining conformity with the identity of the proposed purchaser of the divestiture package (**"Conformity Resolution"**); and (iii) consummate the divestiture with the purchaser approved by the FNE.

67. The parties will set a maximum timeframe up to six months from the Approbatory Resolution, to get the FNE's Conformity Resolution.

68. If the FNE does not issue the Conformity Resolution upon expiration of the six-month timeframe set in these Guidelines for the approval thereof,[20] the divestiture trustee appointed to the effect in the remedies proposal, will proceed to the forced disposal of the assets or business subject to transfer.

[19] Generally, it will be necessary that the parties ensure the maintenance of the assets or pursuant with the regular course of business and good business practice, refraining from carrying out actions that may bring about significant adverse consequences for the respective commercial activity.
The above-mentioned refers, among others: to carrying out the maintenance and preservation activities in respect of the goods comprising the respective entity's fixed assets; technical knowledge and confidential or proprietary commercial information; trade secrets, intellectual property rights, goodwill, and the technical and/or commercial skills of the entity's employees.
In addition, the parties ought to continue conducting the respective business activity under the same conditions as those existing before the consummation of the concentration, and in particular, to allocate sufficient resources thereto, such as capital and/or credit facility, continuing the execution of existing plans and pursuing the implementation of those which have not been commenced yet, preserving the entity's existing administrative and management functions and any other corporate governance measure that may be necessary in view of the line of business of the respective entity.
Commitments must also include the parties' obligation to adopt all such commitments that may be reasonable in the industry, including proper incentive systems for inducing key personnel to remain in the entity and keeping the regular course of the business activities, avoiding the attraction and removal of other staff to and from business activities other than those of the respective entity.

[20] Lack of Conformity Resolution may occur when the parties do not propose purchaser candidates that are suitable according to the FNE, or when those proposed were rejected.

69. If upon expiration of the above-mentioned six-month timeframe, the decision of the FNE regarding the conformity of the proposed candidate remains pending, the parties ought to wait for the FNE's formal communication in this regard to determine whether or not the divestiture package will be subject to forced sale.

70. The forced sale by the divestiture trustee will be made to a suitable purchaser at no minimum price[21] within the time remaining to complete the nine months' deadline, or within the timeframe agreed upon between the FNE and the trustee.

Separate administration of the divestiture package

71. In addition, the parties may offer to ensure the separate administration of the divestiture package. In that regard, they can commit the independence of the divestiture package's administration from any executive of the merging parties or their parent companies.

Appointment of monitoring trustees

72. Additionally, the FNE may estimate necessary that the parties appoint a monitoring trustee to oversee the sale process. The trustee will be bound to:

(i) assess the characteristics of all the interested parties that have bidden for the divestiture package, informing the FNE regarding the competitive suitability of each of them;
(ii) oversee the parties' efforts to find a suitable purchaser;
(iii) timely identify potential obstacles to the successful completion of the divestiture, as well as possible solutions to such problems;
(iv) ensure that the persons and entities interested in the divestiture package receive from the parties all such documents that are necessary to carry out a proper due diligence;
(v) report to the FNE of all aspects relating to the conduction of the sale process whenever it requires; and,
(vi) corroborate the legal and effective transfer of the relevant assets or business unit, upon termination of the sale process.

73. In addition, it may be necessary that the parties appoint a monitoring trustee to keep the FNE informed on the compliance of measures of holding separate business and maintaining all the assets and business to be divested, pursuant the ordinary course of business and good business practice applicable.

[21] In this regard, following the remedy guidelines of the main foreign jurisdictions, the price received by the parties for the divested package is irrelevant for the FNE for the assessment of suitability of the purchaser. The foregoing because the parties may always choose to decline persevering with the concentration in case they estimate that the relevant measures are too burdensome.

E. CONTENT OF THE DIVESTITURE COMMITMENT PROPOSAL

74. In connection with the provisions of this Section, a divestiture commitment proposal must contain at the very least:

(1) a description of the scope of the business or of the combination of assets to divest, indicating with precision and in detail, all the elements that are part of it, including tangible and intangible assets necessary for its operation and are used in its current course of business;[22]

(2) the assets whose alienation is subject to limitations, as when the consent of third parties is necessary[23];

(3) the assets which, despite being part of the business unit, are expressly excluded from the divestiture package, and the reasons for such exclusion (when applicable);

(4) the commitment to conduct the business or administer the combination of assets to be divested pursuant the ordinary course of business and good business practice applicable;

(5) the method by which the divestiture will be conducted in accordance with paragraph 57, between: (i) Scenario I (prior solution); (ii) Scenario II (up-front buyer solution); or (iii) Scenario III (after-closing solution);

(6) the characteristics that the acquirer and potential purchasers[24] must meet (except in prior solution cases);

[22] For example of the aspects to be indicated in the proposal, see Commission notice on remedies acceptable under Council Regulation (EC) n°139/2004 and Commission Regulation (EC) n° 802/2004 of the European Commission, 2008/C 267/01, paragraphs 27-31, such as *inter alia* (i) assets relating to innovation and development; (ii) sales and commercialization activities; (iii) licenses (iv) governmental authorizations and permits; (v) contracts and leases (vi) staff to be transferred (distinguishing those who are and who are not essential to viability and competitiveness; and (vii) existing relations.

[23] As a general rule, mitigating commitments in which the implementation depends on the consent of a third party (for example, the owner of a real property being offered) will not be considered as suitable to mitigate the anticompetitive concern raised by the transaction as long as the FNE does not verify that the relevant authorizations have been expressly given.

[24] The FNE will not consider the assets of the potential purchasers at the time of determining the suitability of the offered package, unless the identity of the purchaser is revealed in a binding manner prior to the issuing of the Approbatory Resolution. However, once the FNE approves the identity of the purchaser it may, at the request of the latter, approve the exclusion of specific assets from the divestiture package, if it reaches conviction, based on its characteristics and resources, that the requested exclusion does not affect the effectiveness of the remedy.

(7) the divestiture trustee identification, in case the parties do not succeed in obtaining the purchaser's approval by the FNE within the timeframe set for such purpose, and an overview of the trustee mandate (only in case of Scenario III);

(8) the non-reacquisition and non-solicitation commitments by which the parties commit not to directly or indirectly reacquire the divested assets or re-hire key personnel within a specific timeframe.

In addition, the proposal may also include:

(9) a proposal of an alternative divestiture package (*Crown jewels*), meeting the requirements set out in preceding numbers (1) to (4);

(10) a commitment of holing separate managements, and the means in which such separation will be implemented;

(11) a commitment to complete the divestiture within a shorter timeframe than the fixed time-limit set for in these Guidelines;

(12) the identification of the monitoring trustee(s) who will oversee the sale process and proper administration of the divestiture package, in addition to an overview of the trustee mandate.

V. OTHER MITIGATION COMMITMENTS

75. As explained, besides divestiture obligations, mitigating commitments offered by the parties, as a general rule, entail limitations or modifications in the future behaviour of the merged entity.

76. Regarding their duration, mitigating commitments other than divestitures must be maintained for as long as the risk exists. Accordingly, the FNE will not accept temporal limitations to it, unless it is predictable that the substantial lessening of competition is transitory.[25]

77. In addition, these remedies may request intense and continue monitoring, a reason for which it is advisable the appointment of a monitoring trustee to keep the FNE informed on the compliance of such commitments.

[25] In order to limit the duration of a temporary remedy, the parties may condition its application upon the fulfillment of easily observable requirements (for example that the merged entity's market share be below certain threshold).

78. The most common mitigating commitments other than divestitures are listed below. This list is under no circumstances exhaustive; the FNE will need to further assess the concrete necessities and possibilities on a case-by-case basis.

A. QUASI-STRUCTURAL COMMITMENTS AIMING TO ENSURE THE MARKET STRUCTURE

79. These commitments aim to restore competition by granting the competitors of the merging parties access, under reasonable terms, to key inputs, infrastructure, networks, technology or information of the merged entity.

80. Commitments aiming at remedying competitive concerns arising from horizontal concentrations usually take the form of licensing of trademarks or patents commitments[26]. Those aiming at remedying the effects associated with vertical concentrations, avoiding that vertically integrated undertaking forecloses access to the upstream or downstream inputs or infrastructure, will generally take the form of access commitments.

B. REFRAIN FROM ENTERING INTO CONTRACTS OR AGREEMENTS COMMITMENTS

81. The merged entity may reinforce the gained market power by engaging in certain conducts capable of preventing the entry or expansion of competitors. In this sense, commitments to refrain from entering into exclusive contracts, granting conditional or loyalty-inducing rebates, engaging in tying and bundling, or increasing switching costs, aim at impeding the artificial foreclosure of the market and enable the entry of competitors.

C. INFORMATIONAL BARRIERS COMMITMENTS

82. Broadly speaking, “Chinese walls” aim at preventing a vertically integrated entity from: (A) distorting the competitive process by sharing with its subsidiary (B) confidential information of the subsidiary’s competitors that use its infrastructure or obtain supplies from it (C). In that sense, suitable mechanisms must be implemented to prevent the exchange of such sensitive information within the vertically integrated undertaking (between A and B).

D. COMMITMENTS AIMING TO REGULATE MARKET POWER DIRECTLY

83. Price caps setting constitutes the clearest example of a commitment aiming at regulating market power. Other type may be a commitment to keep the products’ portfolio or level of services as they were before the concentration.

[26] Depending on the cases’ particularities, the FNE may consider different modalities regarding this type of comitments, for example, the exclusive and temporal use of a trademark or patent or the shared use of these (joint licensing).

84. Although the feasibility and efficacy assessment must be done on a case-by-case basis, generally, the FNE will not approve commitments based on remedies of this nature, unless they are proposed as a transitory commitment prior to the effective implementation of the main remedy.

85. The above-mentioned is due to the fact that this type of remedies increases the inherent risks of behavioral commitments. Indeed, instead of restoring competition, they regulate market power. Worse still, they may even impede the recovery of the market competitiveness by inhibiting the new entry into a market distorted by regulation. Lastly, this type of measures entails significant evasion risks, which increases costs and difficult monitoring.

E. OBLIGATIONS OF THE PARTIES FOR THE BENEFIT OF THE DIVESTITURE PACKAGE PURCHASER

86. To ensure the efficacy of the divestiture, additional ancillary commitments may be necessary. For example, the FNE will deem indispensable the subscription non-reacquisition and non-solicitation commitments. In addition, it may be necessary that the parties offer other transitory mitigating commitments aiming to ensure the viability of the assigned assets or business, such as for example obligations no to compete or obligations to supply determined inputs or trademark licenses or other industrial property rights.

VI. MONITORING AND DIVESTITURE TRUSTEES

87. There are situations in which it may be necessary that the parties appoint trustees to obtain the FNE's approval of the proposed commitments:[27-28]

(1) to oversee the process of sale of the divestiture package (monitoring trustee);

(2) to ensure that during the divestiture process the parties hold the assets or business to be divested separate from the retained business and are maintained pursuant good business practice and in the ordinary course of business (monitoring trustee);

[27] The use of monitoring and divestiture trustees is a widely used practice in foreign jurisdictions; see Commission notice on remedies acceptable under Council Regulation (EC) n°139/2004 and Commission Regulation (EC) n° 802/2004 of the European Commission (2008), paras. 117, 119 and 121; Antitrust Division Policy Guide to Merger Remedies, U. S. Department of Justice, Antitrust Division (2011), p. 26; Bundeskartellamt, Guidance on Remedies in Merger Control. (2017), paras. 127-132; UK Competition Commission, Merger Remedies: Competition Commission Guidelines (2008), paras. 3.23 and 4.5.
[28] The referred functions do not have to be necessary performed by a sole monitoring trustee.

(3) to oversee compliance with the behavioral remedies which are included in the proposal (*ex post* trustee); and

(4) to carry out the forced disposal of the divestiture package (divestiture trustee).

88. When the parties chose Scenario III for the divestment, they must always appoint a divestiture trustee to carry out the sale of the divestiture package in case the FNE does not grant the approval of the purchaser before the expiration of the maximum term to obtain it.

89. Monitoring and divestiture trustees are proposed by the parties in the commitments proposal and will require the FNE's approval (that generally will take place upon the issuing of the Approbatory Resolution). The FNE will approve the trustee identity insofar is convinced that the proposed candidate has the necessary qualification to carry out the task, is directly or indirectly independent from the parties and lacks any conflict of interest for the performance of his duties.[29]

90. Although monitoring and divestiture trustees are remunerated by the parties, they report to the FNE, in such a way that they may only receive instructions from the latter.[30] For these purposes, the trustees must send periodical confidential reports to the FNE regarding the conduction of their tasks, and they shall have access to all types of relevant documentation of the parties[31-32].

91. The trustees' specific tasks must be included in the work-plan they submit to the FNE within the time between the submission of the proposal and the Approbatory Resolution. These tasks will also be detailed in the contract between the trustee and the parties, which must also be approved by the FNE.[33]

92. The trustee mandate will terminate upon completion of their tasks. Early termination may only take place under a grounded decision of the FNE or at the (also grounded) request of the parties, after the FNE's approval.

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[29] In order for the FNE to be able to carry out this assessment it is necessary that the commitments proposal lists all of the historical links between the supervisor (or the natural persons who will carry out the task when the supervisor is a legal entity) and the parties and their subsidiaries.

[30] Nor may the parties request access to the product of his work before said product is sent to the FNE, nor demand access to the communications with the latter.

[31] See: Commission notice on remedies acceptable under Council Regulation (EC) n°139/2004 and Commission Regulation (EC) n° 802/2004 of the European Commission (2008), para. 118; Bundeskartellamt, Guidance on Remedies in Merger Control. (2017), para. 128; UK Competition Commission, Merger Remedies: Competition Commission Guidelines (2008), paras. N° 5.1 and 5.2.

[32] In this regard, the Commission notice on remedies acceptable under Council Regulation (EC) n°139/2004 and Commission Regulation (EC) n° 802/2004 of the European Commission, (2008) provides for the following: *The monitoring trustee will carry out its tasks under the supervision of the Commission and is to be considered the Commission's 'eyes and ears'*.

[33] Said contract must use as reference the template of the contract for the appointment of monitoring and divestiture trustee to be drafted by the FNE.